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

By John Allen Williams and Matthew Foley

On December 1-2, 2000 the Standing Committee on Law and National Security of the American Bar Association, the Center for National Security Law of the University of Virginia School of Law, and the Center on Law, Ethics, and National Security of the Duke University School of Law co-sponsored the tenth annual conference devoted to the review of developments in the field of national security law.

Welcoming Remarks – Elizabeth Rindskopf Parker

Elizabeth Rindskopf Parker, Chair, ABA Standing Committee on Law and National Security, opened the conference with thanks to the conference organizers. She discussed the important contributions of the Standing Committee in furthering the understanding of national security law and noted the crucial role of the Scaife Foundation in supporting its activities. Before introducing the members of the first panel, she paid special tribute to the late Morris I. Leibman, the visionary founder of the Committee.

The topic “National Security Law in a Changing World” is especially appropriate in view of the changes in the strategic landscape since the breakup of the Soviet Union. The conference was intended to help understand these changes as they relate to national security law.

Panel I: Round Table Discussion: Executive Branch Perspectives

James Thessin, Acting Legal Adviser, Department of State, discussed international legal bodies. The International Court of Justice (ICJ) in the Hague, the principal judicial organ of international law, has an increasing number of international security cases on its docket. A review of its past cases shows the breadth of issues it considers. Cases include:

- The 1949 Corfu Channel case, in which the Court first addressed questions dealing with the use of force;
- The 1979 Iranian hostage case, in which the Court forcefully condemned Iran’s behavior during and involvement in the hostage crisis;
- The 1986 Nicaragua case, in which the Court addressed itself to allegations of unlawful use of force against Nicaragua;
- The 1996 Nuclear Weapons Case, in which the Court feared no general rule against the use or threat of use of nuclear weapons.
- Several pending cases are of interest:
  - The Oil Platforms Case brought against the United States by Iran;
  - The Lockerbie Case brought against the United States and United Kingdom by Libya;
  - A case by the Federal Republic of Yugoslavia against NATO Members concerning Kosovo;
  - Congo cases against Burundi, Rwanda, and Uganda alleging acts of armed aggression;
  - Application of the 1948 Genocide Convention to the former Yugoslavia.

United Nations Security Council actions also have important effects on international security law. The Security Council has set up tribunals, provided for civil administration of territories, and – very importantly – authorized the use of force and the application of sanctions.

Continued on page 2
Executive Branch Perspectives . . .
Continued from page 1

We should continue monitoring international legal institutions, the role for the U.N. Security Council, and increased recourse to the International Court of Justice in response to the use of force.

Larry Parkinson, General Counsel of the Federal Bureau of Investigation, said that FBI priorities are affected by a shrinking world. Terrorism is an unfortunate fact of life in that world. It can happen at any time or place, and the U.S. must be able to respond anywhere in the world. Consequently, there is a dramatically increased FBI presence overseas. This includes 44 legal attaches (LEGATs) and increased cooperation with foreign police.

Parkinson noted that this international presence permits a rapid response, which FBI LEGATs in Cairo and Riyadh provided after the USS Cole bombing in Yemen. In addition, Parkinson said, there are five rapid deployment teams on standby in the United States. With personnel from these teams and from LEGATs in Pretoria and Cairo, the FBI had over 500 personnel working in Kenya and Tanzania in the wake of the Embassy bombings there. Terrorists need to understand that they will be tracked "to the ends of the earth," a point underscored by the return of some 15 international fugitives to the United States.

Foreign training is also an important part of FBI activities. Over the years the FBI training center in Quantico, Virginia, has trained over 25,000 foreign police officers. These are people the FBI may need to work with in responding to future incidents. Some of the training is so thorough it replicates that given to new FBI agents.

Parkinson reported there is enhanced information sharing with foreign agencies. Such sharing lies on the intersection between intelligence and law enforcement, making it difficult to put information into one category or the other. This changes the way information is viewed and poses a set of questions: What walls should exist between intelligence and law enforcement? How high should they be? It is important not to compromise sources and methods, and the appropriate degree of separation is a continuing issue. In Parkinson’s opinion, intelligence and law enforcement need to work together, and the key is strong and coordinated intelligence.

Parkinson closed his remarks with two observations. First, he believes that cyber threats will multiply, complicated by the difficulty of determining their source. Second, society needs to develop a consensus about the balance between privacy and civil liberties on the one hand and security on the other. Even legal activities are sometimes questioned by members of the public, such as the FBI’s "Carnivore" computer technique – which is deployed only in response to specific court orders.

Robert McNamara, Jr., General Counsel of the Central Intelligence Agency, said that international support for war crimes tribunals is a continuing issue, but the rule of law remains. He outlined three issues of concern in his remarks.

First, unauthorized disclosure. Leaks of classified information can have serious consequences, including endangering the life of a covert source, the loss of an asset, and damage to relationships with our foreign partners. Not all unauthorized disclosures are covered by existing laws, and McNamara does not view some of the criticisms of efforts to strengthen relevant legislation as valid. It should not be necessary to prove actual harm. Also, intent to harm should not be an issue, since these disclosures, even if unintentional, harm intelligence activities and endanger agents.

Second, international law enforcement issues. There has been an increase in the extraterritorial reach of U.S. law, and the CIA has a counterterrorism center. The millennium celebration defense relied on cooperation between law enforcement and the intelligence community, and included arrests by Jordan and an arrest by the U.S. Customs Service in the Pacific Northwest.

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Third, intelligence collection in the Internet age. It is not always apparent whether a cyber attack against U.S. computers is coming from inside or outside the United States. This is important, since there are restrictions against the CIA collecting information in the U.S. Sometimes attacks from abroad are made to seem as if they originated in the U.S., and sometimes the reverse occurs. For example, an attack on Defense Department sites which appeared to originate from a server in the Middle East was actually mounted by Northern California teenagers.

Richard Shiffren, Deputy General Counsel for Intelligence, Department of Defense, highlighted four issues for discussion. The first was military support to the U.S. Government's counter-drug effort. It was anticipated that this support would continue and, at least in the case of Colombia, likely expand in the foreseeable future. The support includes training and logistics for both foreign military and law enforcement units and necessarily raises novel, difficult legal and policy concerns. For example, to the extent that DoD is authorized to support counter-drug efforts only, does a discernible line exist between counter-drug and counter-insurgency? Additionally, compliance with human rights requirements has become more complicated. In Colombia, nevertheless, progress is being made. The institutionalization of a military justice system has been undertaken and shows great promise.

The second subject identified was computer network operations. DoD has made great strides in addressing the cyber threat to its networks posed by terrorists and criminal actors. At the same time the Department, under the leadership of United States Space Command, is moving ahead with the development of computer network attack capabilities. Application of the Law of Armed Conflict to the emerging technology will continue to be an important assignment for DoD lawyers.

The third subject was the existing international tribunals' scrutiny of the use of armed force in the NATO conducted Operation Allied Force. A commission was appointed to advise the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia as to whether NATO had violated the law of armed conflict regarding ten alleged incidents. A detailed report declined to refer any of the ten for prosecution, but some of them were determined to be close calls and might have been otherwise decided if the facts were only slightly different. On a similar track, the European Court of Human Rights has before it a claim for damages by the representatives of victims killed during the NATO strike on a broadcast studio in Belgrade.

Fourth, the Cooperative Threat Reduction Program, dealing with the dismantling of nuclear facilities in the former Soviet Union and security upgrades for nuclear and chemical storage facilities, was cited as a noteworthy success. Achieving that success required resolving several legal issues involving liability, immunity, program audits and contracts.

Robert Deitz, General Counsel of the National Security Agency, addressed the negative publicity received by NSA for its activities. He said that there is a legitimate concern for the privacy rights of U.S. citizens, but the press' appetite for this issue is insatiable. How does one determine that activities are fair? Legitimate scope of oversight ideally focuses on NSA's legal regime and the checks and balances that have been established to ensure that the proper balance between national security and privacy have been struck. These include multiple reviews by Congress, the Attorney General, DoD, the FISA court, and other agencies and the internal agency organizations such as the IG and the OGC. (Interestingly, if Osam Bin Laden were to cross the border from Canada to the United States, the law would provide him with protection as a "U.S. person").

Deitz said the NSA does not feel new legislation is necessary to protect privacy. The NSA would not be permitted to do what it does without law to set out its boundaries. As a result, Elizabeth Rindskopf Parker added, NSA is very fastidious about the rights of U.S. citizens.

Captain Jane G. Dalton, Judge Advocate General's Corps, U.S. Navy, Legal Counsel to the Chairman of the Joint Chiefs of Staff, noted that the Chairman and the Joint Staff continue to be involved in all ongoing operations overseas, monitoring and reviewing U.S. forces action in SFOR, KFOR, ONW/OSW, counter-drug operations and human rights vetting requirements for training foreign military forces. In addition, she discussed several recent issues that illustrate some of the challenges involved in international operations.

First, in the aftermath of the attack on USS COLE (DDG-67), the Chairman, Combatant Commanders and Service Chiefs began an immediate review of all force protection measures overseas, identifying a number of improvements that could be implemented in the near, medium, and long term. Of interest to the National Security Law Conference is the extent to which the implementation of new measures will require coordination with and cooperation by host nations. There must be a balance of authorities and obligations consistent with political independence and territorial integrity of sovereign nations as contrasted with the inherent right of self-defense of U.S. forces, personnel and assets.

Second, the February 1998 incident in which a USMCEA-6B Prowler aircraft severed the cables of an Italian ski lift, with the severe loss of life. Subsequent actions (including the investigation of the accident, the payment of claims, and the exercise of court-martial jurisdiction over the pilots involved) were governed by the NATO Status of Forces Agreement. Nevertheless, an Italian Parliamentary
Commission was appointed to inquire further into the incident, and recently visited the United States to meet with senior Department of Defense and Department of the Navy officials. Issues addressed with the Parliamentary Commission included the concept of double jeopardy, the flight safety measures implemented in the wake of the accident to govern U.S. military training flights in Italy, and current NATO SOFA provisions.

Finally, a case before the International Criminal Tribunal for the Former Yugoslavia (ICTY) has raised some issues concerning the authority of the ICTY to obtain testimony and documents from SFOR and former SFOR personnel concerning the apprehension of persons indicted for war crimes.

Panel II: Round Table Discussion: Views from the Hill

Patricia Mc Nerney, General Counsel for the Senate Select Committee on Intelligence, discussed her observations about intelligence and the Committee’s legislation in 2000. She noted that intelligence plays a role in all facets of U.S. national security policy. The Cole bombing and the attacks on the embassies in Dar-es-Salaam, Tanzania, and Nairobi, Kenya, illustrate the importance of intelligence to counterterrorism. The NATO mission in Bosnia demonstrates the importance of human intelligence, particularly to force protection as a general matter. The U.S. must carefully examine its allocation of resources to and within the intelligence community, Mc Nerney noted. Good intelligence is essential to diplomacy in general, as well as counter-proliferation and counterterrorism efforts. Mc Nerney noted that intelligence is a bipartisan issue, and that Senate Intelligence Committee works with a bipartisan staff.

Like many of the panelists, Mc Nerney expressed dismay at President Clinton’s veto of the 2001 Intelligence Authorization Bill in November. The veto followed protest by watchdog groups and media outlets who feared that the anti-leak provision of the bill would decrease their ability to learn of national security matters. Mc Nerney questioned their arrangements since the legislation only criminalized release of properly classified information. She noted that the administration had previously agreed to the legislation in a formal Statement of Administration policy. The Department of Justice, CIA, and FBI had all signaled their formal support for the legislation. Mc Nerney expressed the opinion that the media, fearing restrictions on its sources, was motivated primarily by self-interest in its lobbying efforts. The bill had gone through the proper legislative process, starting in the Intelligence Committees, in cooperation with the Judiciary Committee, and passed with unanimous consent of the Senate. Mc Nerney thought that all of the legitimate concerns were addressed in negotiations with the Justice Department. But, she added, “we can still take another look.”

By way of comparison, Mc Nerney noted that under the Official Secrets Act in the U.K., there is a much broader governmental authority. They can restrain or prosecute regarding leaks of official, not necessarily classified, information. The leaks provision only addressed national security information since it required proper classification of that information.

Reform of the Foreign Intelligence Surveillance Act (FISA) originally passed in 1978. Issues with the Act were raised in the wake of the Wen Ho Lee case. The committee considered a bill by Sen. Arlen Specter and other senators to streamline and clarify laws delineating authority for intelligence and counterintelligence efforts. That law was enacted as part of the Intelligence Authorization Act.

Regarding the attack on the USS Cole, Mc Nerney voiced the opinion, “I don’t think anyone believes we could have stopped the bombing” itself, but the incident does illustrate the need for quality intelligence.

Patrick Murray, Chief Counsel for the House Permanent Select Committee on Intelligence, spoke on the structure and strategy of U.S. policymaking. He first noted that if he were to make recommendations to the new administration, he would call attention to coordination between the Secretary of Defense and the Director of Central Intelligence. Murray noted that there has been effective coordination in the past, but they must make sure they share appropriate concerns. The next administration may find it necessary to add personnel for downstream processing of intelligence to ensure that intelligence is analyzed, and accounted for in policy.

Under the current budget process, Intelligence competes with the Department of Defense for funding. “I think that’s not the best paradigm,” Murray said. “Intelligence makes new weapon systems more effective,” so the budgeting process should not set the two against each other.

Murray also argued for a more coherent and non-reactive national security policy. Recent foreign policy has appeared to have the aim of being “friends with everybody.” Murray cited the change in term from “rogue state” to “state of concern” and the strategically unclear “strategic partnership” with China.

A reactive bureaucracy combines with a reactive policy to produce confusion in the intelligence community. There is a need for proactive, coherent, forward-thinking policy. Intelligence has been at odds with policy. Murray noted that the recently revealed secret pact between the U.S. and Russia on Russian arms sales to Iran led policymakers to ignore or minimize intelligence reports. It can be appropriate for intelligence to go to the press with information, Murray argued, if a reactive foreign policy refuses to account for unpleasant facts.
Like McNerney, Murray was concerned with the president’s veto of the 2001 Intelligence Authorization Act. The House Judiciary Committee has criticized the House Select Committee on Intelligence for failing to hold open hearings on the 2001 Intelligence Authorization Act. Murray rebutted the criticism, noting that the Judiciary Committee could have held hearings in May, but opted not to. He also argued that the Act’s balance between constitutionality and effectiveness necessitated closed hearings. Murray expressed particular frustration with the administration’s failure to register its concerns earlier in the process.

Given the division in the upcoming 107th session of the House, pundits assume that there will be partisan gridlock. However, Murray pointed out, the Republicans did not lose that many seats in the November election. Additionally, the Chair and Ranking Democrat on the Intelligence Committee created a bipartisan atmosphere, which is likely to endure. [Note: Ranking Democrat Julian Dixon of California died on December 8.] Intelligence bills routinely passed the often partisan House by voice vote.

Stephen Rademaker, Chief Counsel of the House Committee on International Relations, detailed the foreign policy achievements of the 106th Congress. The State Department authorization bill included provisions aimed at paying arrears to the U.N., while including benchmark reform requirements. In this bill Congress finally managed to achieve a compromise on funding for international family planning. The North Korea Threat Reduction Act imposed requirements on nuclear transfers to North Korea to ensure that country fulfills its international obligations.

The second area of achievement was in foreign assistance. This year, foreign aid was authorized in a series of separate bills. Previous efforts at an omnibus bill had failed. As a result, the Security Assistance Act, Export Enhancement Act, Peace Corps Authorization Act, and Micro-Enterprise Self-Reliance Act were enacted. Development assistance was the only major component of foreign aid that was not authorized. The House reauthorized the Export Administration Act until August of 2001. Congress also passed the Iran Nonproliferation Act, which was directed primarily against Russia, but also applies to others who proliferate nuclear or missiles to Iran.

Other legislative accomplishments included the Trafficking Victims Protection Act, the Inter-Country Adoption Act, and the African Growth and Opportunity Act. Rademaker predicted that the Taiwan Security Enhancement Act, which passed in the House, but not the Senate, in 2000, will be considered again in 2001.

Regarding the Middle East peace process, The House of Representatives passed a bill to impose sanctions on the Palestinians if they unilaterally declare a state.

The American Service Members’ Protection Act is a bill that was introduced in both houses of Congress to insulate the U.S. from the International Criminal Court. Rademaker noted that, among other things, this bill is intended to dissuade other countries from joining that court. A range of American experts and politicians, ranging from Henry Kissinger to Caspar Weinberger to Zbigniew Brzezinski, have all endorsed this legislation.

There is a continuing debate on the utility of sanctions. The Nethercutt Amendment would end most prohibitions on food and medicine exports to Iran and Cuba.

In closing, Rademaker noted that the House Committee on International Relations will have a different chairman and different membership in the 107th Congress. [Note: Henry Hyde of Illinois was named chairman on January 4.]

Scott Stucky surveyed the previous year’s events from his perspective as General Counsel for the Senate Committee on Armed Services. He first noted that we should be wary of trying to cure the evils of the world through legislation.

Armed services funding was achieved through an annual authorization bill - the largest annually recurring bill in Congress. While the House, under its rules, can limit amendments and debate, there are no such restrictions, absent cloture (which takes sixty votes) in the Senate. For example, the Senate version of the defense bill contained two amendments about hate crimes, another to help firefighters, and various other amendments not germane to national defense.


The Senate bill stayed within the budget caps on medical care for retired military personnel. The House leadership insisted on making that a permanent entitlement - a popular move, but one with budgetary consequences.

Much of the committee’s time was devoted to oversight hearings on the Department of Defense and the national security programs of the Department of Energy. It also conducted numerous hearings on civilian and senior military nominations; the committee handles more nominations than any other Senate committee.

The Defense Authorization Act contains a provision authorizing the withholding of nonclassified material obtained from a foreign government or an international organization if the foreign source of the material so desired. This is a long-overdue recognition of a middle ground between classified and nonclassified material. Under the
present system, there is no way to withhold something from disclosure without the cumbersome process of classification.

The Smith Amendment to the Defense Authorization Act would deny security clearances to people convicted of crimes and sentenced to more than one year in prison, drug abusers, and incompetent persons. There is a continuing debate over the Export Administration Act. Some want to overhaul the law and loosen controls over technology; others favor keeping it tight.

Stucky noted that the number one priority for the Senate Armed Services Committee in 2001 will be confirmation of the new administration’s nominations for civilian and military posts. The committee will also have to deal with the controversy over anthrax inoculations, an update of the GI Bill, and streamlining the process of military absentee voting.

Stucky expressed hope that the committee’s reputation for bipartisanship will continue. The divisions within the Armed Services Committee have rarely been along partisan lines. The Base Realignment and Closure Act in 1996, for example, saw opinions divided depending on where people lived.

There are renewed debates about the military’s current force structure. Stucky asked, do we have the people to implement our strategy - even if our strategy is “amorphous niceness?” Has our current force structure been determined by careful consideration or by sheer inertia?

In conclusion, Stucky remarked that the armed forces must not be seen as just another pressure group. The unique respect the military has commanded for decades in the U.S. is partially due to its neutrality in political matters.

**Luncheon Address – James L. Pavitt**

James L. Pavitt, Deputy Director for Operations, Central Intelligence Agency, gave the luncheon address. He noted that persons in his position have not frequently spoken publicly, and that he felt Americans should be proud of the important work that U.S. intelligence does. His remarks centered on the role of the clandestine service in the context of current issues.

The most important attribute of an intelligence officer is integrity. This continues to be true in the new strategic environment. It is important to remember that the CIA was not the product of the Cold War. What President Truman wanted is still necessary: an insurance policy against surprise, and objective analyses.

Dangers have increased since the CIA was formed in 1947, and the potential for unwelcome surprise is higher than since the end of World War II. The end of the Cold War had a destabilizing effect, made more problematic by a technological revolution. Hostile states and non-state actors have greater destructive potential than before, and U.S. territory is vulnerable to attacks of numerous types. Pavitt noted that U.S. interests will again be attacked, and U.S. lives will be lost.

Intelligence gives U.S. leaders the foresight they need to defend U.S. interests, either to avert crises or to minimize adverse consequences from them. Unfortunately, intelligence successes are unheralded, but failures tend to be trumpeted. The CIA is a continuing center of controversy for both conservatives and liberals. It is important to realize that the CIA does not operate in a vacuum, but rather consistent with presidential directives and American values.

The agency is operating better than at any time in his career, Pavitt noted, despite a depletion in the ranks early in the 1990s at the end of the Cold War. Despite technological advances, the CIA must retain personnel, and even increase their number. CIA recruiting efforts continue to be extensive, with a huge increase after 1995. There is a very talented pool of recruits. Their average age is 30 and they are paid about $45,000 per year.

Pavitt closed with two thoughts: the United States is a force for good in the world, and there is no perfection in the intelligence business. Perfect security is not possible.

In response to questions, Pavitt noted that both human intelligence (HUMINT) and signals intelligence (SIGINT) are crucial. We must invest properly in each or there will be gaps in the future. Access to universities for recruiting has not been a problem. Pavitt is quite direct when recruiting: “I run America’s spy service. Our mission is to steal secrets.” Retention remains an issue, however, and there is a need to increase pay.

**Panel III: Legal Issues Raised by Responses to Catastrophic Terrorism**

Panel moderator Suzanne Spaulding, committee member and former Director of the Commission on Terrorism, suggested the need to consider how to respond to a biological attack. Some difficult situations can easily be imagined, including rationing scarce antibiotics, hoarding of antibiotics by unaffected states, and riots at hospitals. Legal issues pile up quickly. What if there were to be an outbreak of a highly contagious disease such as smallpox? There would be public pressure for action, some of which would be unwise. Are existing legal frameworks adequate? She referred to the June 2000 conference at Cantigny sponsored by the McCormick Tribune Foundation. (Rapporteurs’ note: Readers of the National Security Law Report may request a copy of the Cantigny conference report by email at rmidf@tribune.com. A mid-2001 publication date is anticipated.)
Stephen Dycus, Professor of Law, Vermont Law School, reviewed authorities for intelligence activities during a terrorist crisis. Barring some claim of inherent emergency power, the President will be guided primarily by the Foreign Intelligence Surveillance Act or Executive Order 12,333. Both provide for warrantless wiretaps or searches in some cases, but neither applies to homegrown terrorists like Timothy McVeigh. Surveillance is limited by an evolving 4th Amendment jurisprudence that may make a target’s rights depend on his citizenship, associations, or location, or on whether the purpose of the surveillance is foreign intelligence collection or law enforcement. The military will probably play a major role in both crisis and consequence management, acting under various statutory authorities.

The more carefully we plan for a terrorist threat or attack, the more likely it is that in a great crisis the President will see adherence to the plan as a reasonable option, and the more nearly the President’s response will reflect deliberate choices we make now about how to strike the proper balance.

Juliette Kayyem, of the John F. Kennedy School of Government at Harvard University, pointed out there is no law of counter terrorism per se. There are, however, three doctrines of law that relate to what can be done in the counter terrorism area. These are the rules of war, the rules of personal liberties (i.e., The Bill of Rights), and the laws of disasters. The biological terrorism scenario does not fit any one area of law perfectly.

A biological attack is an example of a low probability, high cost event. These questions among many would arise if it were to occur:

- What legal authorities are needed?
- How should a quarantine be declared and conducted?
- What is the State authority over remains?
- How should one handle the public, which will not want to cooperate in every respect?

She concluded there is often not a need for new legislation to deal with catastrophic terrorism. Given that any such new legislation might endure, it may even be unwise. Debates about the law are often debates about policy questions.

Tara O’Toole, M.D., Deputy Director of the Johns Hopkins Center for Civilian Biodefense Studies directed her remarks to the capacity of the medical and public health systems to respond to catastrophic terrorism. In general, medical response capacity is limited by the efficiency-driven “just in time” method for supplies, equipment and (especially) staffing. Hospitals operate at near-capacity efficiency, leaving little flexibility for expansion in the event of a catastrophic terrorist event.

Some legal issues arise, such as the following:

- Is it legal to close hospital doors in a crisis?
- What are the liability issues when using drugs not pre-approved for a certain purpose?
- What liability is there for substandard care given by an under-equipped and overcommitted hospital during a crisis?
- Can one designate a “plague hospital?”
- Can the public be restricted in their travel?

There is also a problem with information flow from the bottom up. A covert biological attack will be difficult to distinguish from a natural outbreak. Indeed, new diseases arise all the time - some thirty in the last decade alone, according to the World Health Organization. It may be difficult to determine the scope and seriousness of an outbreak right away.

Another complication in responding to catastrophic terrorism is that the public health system has been underfunded for decades. Even the New York City Department of Health, one of the nation’s best, used a map with pushpins to track the recent outbreak of the West Nile virus. The June 1999 “Top Off” exercise, which simulated a biological attack in Denver and a chemical attack in Portsmouth, New Hampshire, did not reveal a lack of legal authorities. The problems were how to implement and coordinate such authorities and how to ration scarce antibiotics.

Finally, O’Toole noted the need for a major medical research and development program. The 21st century will be an era of “big biology,” just as the 20th century was one of “big physics.” The great potential benefits of biological research contrast with the great potential for weapons (the dark side of biology). Biologists need to work with governments to minimize the potential for damage.

Michael Wermuth, Senior Policy Analyst, RAND Corporation, said that the constitutional and legal authority for the use of the military in a biological terrorism scenario is clear. The posse comitatus statute does not absolutely forbid the use of the military domestically, even in a law enforcement role. The restrictions of posse comitatus are often used as a smoke screen by the military, which generally does not wish to be used in a domestic role. There are broad exceptions to posse comitatus under the Stafford Act (42 USC, Chap. 68) and the Insurrection Statutes (10 USC, Chap. 15), and specific provisions for combating terrorism (10 USC 382, and 18 USC 831). Some statutes are only applicable if necessary for the immediate protection of human life or when local law enforcement officials cannot handle the situation, and all require a request to the Secretary of Defense from the
Attorney General. The military can even be used for arrests, for direct participation in searches and seizures, and for the collection of intelligence.

The president has the legal authority to make DoD the lead federal agency in response to terrorism, but this may not be the wisest thing to do. DoD has established the Joint Task Force for Civil Support as part of the Joint Forces Command in Norfolk, but its role will be consequence management support to civil authorities. It is unclear the extent to which DoD has a significant mission in crisis management domestically, the extent to which DoD has developed plans to do that, or how well those plans may have been coordinated with State and local governments.

Several items of interest arose in the discussion period following the formal presentations:

- Censorship in a crisis would be difficult, given the number of media outlets. There needs to be a dialogue with the press ahead of time about what would be useful to disseminate. Trying to restrain the press could prove disastrous. There needs to be credible communication, and openness is essential.

- Better pre-planning of various contingency responses would make the declaration of martial law unnecessary, and would convince the press, public, and terrorists that there is an alternative to martial law.

- Highly classified plans still exist for continuity of government (COG) in the event of a crisis.

- The role of local and state governments as “first responders” will remain crucial. The federal government should not supplant local efforts. There must, instead, be mutually supporting plans among Federal, State, and Local governments.

**Dinner Address—Hans Corell**

Hans Corell, United Nations Under-Secretary-General for Legal Affairs gave the dinner keynote address. He discussed the recent changes in UN peacekeeping procedures and UN efforts to bolster the rule of law. He noted that the opinions he expressed were his own, not necessarily those of the UN.

In the past, UN peacekeepers would arrive after a peace agreement had been reached. The former combatants were happy to have the UN there. Recently, however, peacekeeping situations have become more complex. UN peacekeepers have been involved in intrastate conflicts without a peace agreement - meaning that the UN is seen by some as partial. Civilian UN workers have been targeted in many places.

Tangled legal issues have challenged the UN in Kosovo, as the UN has moved to develop institutions, hold elections, and transfer authority to a Kosovo local government. The UN has set up institutions to preserve human rights and promote economic development, and has established twenty departments to administer justice, exercise fiscal authority, provide education, and perform other duties. There has been a balance between creating self-administration in Kosovo while the UN governs in the interim. The UN has created legal authorities for the residents of Kosovo to resort to.

Budgetary matters, too, have been complex. The UN has financed its operations from the General Assembly budget, while local administration has been performed with local funds. Authorities for taxation have been created and reformed. The constitutional implications of regional departments have been reviewed. It has been difficult to find police and judges, so the UN has brought in international personnel.

East Timor, Corell noted, is similar to Kosovo with some important differences. Kosovo’s constitutional situation was less clear - Kosovo remains a part of Yugoslavia, and had an existing judicial system, while East Timor’s legal framework was constructed from the ground up. East Timor even lacked buildings and lawyers.

Corell spoke on the lessons to be learned from the UN’s experiences in these cases, drawing on the review undertaken for the Secretary General in the so called Brahimi report. The Secretary-General must provide the information to the Security Council that it needs to know - not what it wants to hear. The peacekeepers must be allowed to defend themselves. Their doctrine must be updated, stressing the importance of the rule of law. Member states should contribute a team of well-trained personnel, such as police, judges and experts on human rights, who would be ready to deploy on short notice.

Corell spoke of the importance of an interim international criminal code to be applied in these situations. We also need easily applicable procedures, embodying and furthering the principle of legality. Corell also feared a “more reserved attitude” from the General Assembly towards these proposals, since they feared a decline in funding for developmental aid. However, the fact remains that the UN must have the ability to defend itself in peacekeeping operations.

The root causes of violence must be addressed. Democracy, the rule of law, and civilian institutions must be created, and economic development must be encouraged. There is a need to spell out more clearly what the UN can do. The Secretary-General should be able to introduce interim rules of criminal procedure in peacekeeping operations where the UN is also governing the territory.
The rule of law is a distinct element of UN peacekeeping.

The UN aims to bring the justice and predictability of the rule of law to international relations. UN Secretary-General Kofi Annan has called the rule of law the "foundation of much of the social progress of the last millennium." In the Millennium Declaration, in September 2000, the General Assembly declared its intention to "strengthen respect for the rule of law in international and national affairs." With the rule of law comes respect for human rights. Corell noted that he had been in Moscow in November 2000 addressing a conference on the importance of the rule of law in international relations as well as in Russian reforms.

(see http://www.un.org/law/counsel/info.htm)

Mr. Corell observed that states at long last seem to agree that conflicts are caused by a lack of respect for human rights and the rule of law.

Corell then addressed developments regarding the International Criminal Court (ICC). In Rwanda, throughout the former Yugoslavia, and possibly in Cambodia, the UN has to address crimes against humanity with ad hoc international justice systems. Crimes against humanity can be committed with little danger of legal retribution. One hundred and twenty states have signed the statute of the International Criminal Court (ICC) a new step forward for the rule of law. Corell closed by appealing to his American hosts to support the ICC, which he called a gift of hope which aims to address the impunity that has caused so much suffering and sorrow among human beings. Parts of the world that often look to the U.S. as a model will react with concern and disbelief that the U.S. could walk away.

Panel IV: Crisis in Colombia: Drugs, Guerillas, and the Threat to Democracy

John Norton Moore of the University of Virginia School of Law chaired the panel. He noted that Colombia faces a variety of problems - rebellion, human rights abuses, and lack of economic development. Most cocaine that ends up in U.S. originates in Colombia. Colombians live in fear of murder, kidnapping, and violence.

Despite the end of the cold war more than a decade ago, development and the rule of law have not progressed in Colombia. The Organization of American States preceded and served as a model for NATO. Moore argued that the relationship of the OAS to Colombia and to the UN should be re-examined.

The answer to Colombia's problems in the long term will be democracy, the rule of law, economic development, a decline in terrorism, and improved health, Moore said. He deferred to the panel as to how to achieve these goals.

David Jordan, professor of Government and Foreign Affairs at the University of Virginia and former Ambassador to Peru, believes that the U.S. has failed to appreciate the complexity and depth of Colombia's problems. The US uses a limited economic model that pushes the benefits of open economic borders but fails to account fully for the damage that unregulated mobile capital can do. Jordan believes that the US focuses on insurgency and gang hostilities as the root causes of violence, when pursuit of power and profit are more important motivations. The U.S. sees the Colombian government as a victim, Jordan argued, when in fact elements of the government have been complicit in the drug trade. Finally, the US believes that social forces are predominantly on the side of those seeking to check drug corruption but in many cases some of the most potent societal forces support drug consumption.

In 1999, the Colombian government announced its $7.5 million plan to eradicate the drug trade, restore order, and promote growth. Plan Colombia, as it is called, includes a $1.3 billion U.S. aid component.

Jordan argued that Plan Colombia, while developed and supported with good intentions, must be designed to strengthen the state. Jordan proposed a series of moves some of which the Plan includes as necessary to stabilize Colombia: redressing state weakness with greater local self government; controlling borders; reforming and modernizing the military to bolster the rule of law; developing the judiciary to better protect human rights; and encouraging economic development so that those displaced by the fighting can support themselves.

Colombia is a weak state, its legitimate economy is in decline, requires agrarian reform and its public security is grossly inadequate, Jordan said. The government ceded control of the cocaine-producing southwest region of the country to the Fuerzas Armadas Revolucionarias Colombianas (FARC), the main guerrilla group. A separate guerrilla group, the Ejercito de Liberacion Nacional (ELN), which is in a position to disrupt internal Colombian trade will likely be given control of some territory in the North.

The government negotiates with the FARC because elements of Colombia's elite accept the group's legitimacy. From 1958 until 1974, rich landowners held sway in Colombia's nominal democracy. Since the 1970s, the FARC has protected peasants and cocaine growers. Jordan termed the FARC-held territory a "state within a state." FARC representatives meet with the Colombian government to discuss matters of human rights, agrarian reform, and economic policy.
Jordan believes that if the U.S. fails to address the Colombian government's declining legitimacy, the plan cannot succeed. The US component of Plan Colombia is a drug policy without a state-building policy, Jordan argued. This cannot ultimately cure the problem of the internal war, the drug supply, money laundering, or the paramilitaries.

The weakness of the Colombian economy further boosts the importance of the drug trade. While Colombia never had to renegotiate its debt in Latin America's "lost decade" of the 1980s, it now suffers from unemployment levels of twenty percent. Financial institutions, unable to get money from legitimate activity, welcome narcodollars. Plan Colombia does not fully address this economic dependency.

The right-wing paramilitaries are a grave threat to law and order. The paramilitaries have become as well dependent on the drug trade to maintain themselves. Many of these paramilitaries are located in the north, but Plan Colombia begins with a two-year focus on the south. As a result, Europeans have come to see US involvement in the south as a counterinsurgency movement disguised as an antidrug policy. Jordan argued that the US should complement a Colombian state building strategy, not give the appearance of supplanting or co-opting it.

Jordan also argued that the foreign policy aspects of Plan Colombia are underdeveloped. Colombia's neighbors are not included in the plan. European contributions geared toward human rights, judicial reform, and economic development have declined greatly since Plan Colombia was unveiled. The Europeans believe that Plan Colombia will exacerbate the conflict and that it provides cover for a US military intervention in Latin America.

Europeans are more likely to view the problems in Colombia as a humanitarian crisis. Europeans, more tolerant of drug use than Americans, are less concerned with the drug issues in Colombia. Meanwhile, European elite exploiting offshore tax havens, have resisted efforts to tighten banking regulations globally. Money laundering havens, which provides liquidity for off shore speculative funds, is a major part of the drug problem.

Border control is another Colombian problem. Ecuador fears guerrillas and coca growers in its territory. Former President Alberto Fujimori feared FARC involvement in Peru. Brazil does not have the same level of commitment as the US in fighting Colombia's problems. Venezuela is a wildcard; new President Hugo Chavez has demonstrated considerable sympathy for the left, and has met with Saddam Hussein, Carlos the Jackal, Fidel Castro, and representatives of Colombia's rebels. These meetings with guerrillas have complicated Venezuela's relations with Colombia. Panama, which claims neutrality in Colombia's internal dis-

putes, has asked the U.S. for $30 million to help staff their border with Colombia.

Meanwhile, the arms trade continues unabated with Colombia's insurgents. Narcodollars buy arms. International capital flows help corrupt the Colombian state. Plan Colombia addresses this fact with customs reforms, but not yet through any tax reforms. There is no agreement to support Colombia's capital reserves with any international arrangements.

A more comprehensive plan, Jordan argued, would subordinate the drug problem to Colombia's state security needs, would link the drug problem to the state's credit problem, and would force a neighborhood alliance system.

Plan Colombia's objective should be to turn Colombia into a strong state. The US must remember the Colombian state's permanent interest- a secure population and territorial integrity - lest the state's legitimacy continue to ebb. Efforts in this vein could include joint border patrols through bilateral agreements, although border countries have preferred to remain uninvolved.

The US should also move toward a regional capital regulatory regime to deal with and prevent short-term speculative capital movement. There will be a need for lenders of last resort as narcodollars dry up for Colombia's central bank.

Gabriel Marcella of the Army War College said that Colombia faces profound and complex problems. It has a proud history of achievements, but its current democracy has been corrupted. Colombia has 40 million people in an area three times the size of Montana. Its geography is a challenge to central control. Where the government is weak, narco-trafficking is strong. The assistance and aid that have come to Colombia are not yet enough satisfactory. There is a need to build confidence over time.

Two hundred fifty thousand acres in Colombia are currently devoted to coca production. This is a higher number than in 1990, partially because of the success of Bolivia and Peru in banishing production from their own territory. Bolivia has decreased production by 55 percent and Peru by 67 percent in recent years. This illustrates the importance of a multilateral strategy- if Colombia and the US manage to decrease production in Colombia, it could surge elsewhere.

Rebels use narcodollars to fund their operations, along with money from kidnapping and extortion. Plan Colombia reflects the belief that a strengthened Colombia will automatically decrease cocaine production. Marcella believes that this is the best the U.S. can do given the current political process. The US is reluctant to commit to counter-
insurgency actions, which cannot be separated from the drug trade. The task at hand is to reconstitute state authority.

Columbia must increase the size of its’ military which is too small, has too few resources, and lacks the necessary organization. The army, with police support, can take control of an area, but cannot hold onto it or develop its infrastructure unless it is significantly enlarged.

Marcella called U.S. support essential to finding a solution. There must also be coordination with border states. While Ecuador is currently the weakest of these states, shifting cocaine production could also affect Bolivia and Peru. The U.S. learned in El Salvador in the 1980s that providing advice and support without manpower is the preferred path.

Marcella closed by quoting Clausewitz. He wrote that war is the continuation of politics through other means. But that was in nineteenth century Europe, a landscape of strong states. Right now, the U.S. is asking a weak Colombia to operate strategically. But Colombia lacks that capability. The military is decoupled from the rest of the solution.

Stetson University College of Law professor and former Colombian judge, Luz Nagle said that a democratically elected state cannot negotiate its own existence, and that if there is going to be a peace process, it must include every group involved in the bloodshed. No peace can be achieved when some of the players in the crisis are missing from the negotiation table, pointing out that “to play chess you need all the pieces on the board.” Moreover, the government’s authority is weak because Pastrana already made too many concessions to one player, the FARC. His actions have crippled his credibility among Colombians who are tired of so much bloodshed.

Professor Nagle talked about the horrendous conditions and desperate situation in Colombia. She described physicians in contested rural areas being killed by either paramilitaries or guerrillas for aiding sick and injured peasants and banana plantation workers. She told about children being kidnapped from school buses by FARC forces, and described how professionals have to pay extortion “taxes” to guerrillas on a pro-rated scale depending on the profession they hold, or face being killed.

According to Professor Nagle, the war has caused mass displacements of rural people to Colombia’s main cities and into neighboring countries. While FARC carries out its own activities of kidnapping and harassing the society, the ELN cripples the nation’s infrastructure, blowing up oil pipelines, sabotaging power lines, and attacking hydroelectric stations. It is said that the damage caused to the environ-}

ment by the oil spills equals eight times the damage caused by the Exxon Valdez in Alaska.

Professor Nagle noted that violent incursions by the FARC into poor neighborhoods prompted citizens to form self-defense groups called militias because there is no state presence capable of protecting them from common criminality or from guerrilla attacks. This situation reinforces, she believes, the notion that the lack of presence of a strong government causes the victimization of citizens and forces them to take the law into their own hands.

As it stands now, Plan Colombia is perceived as a unilateral intervention by the United States. The Europeans are hesitant to commit to it, nations in the region, while supporting the peace process, are scared of the repercussions Plan Colombia brings to their own countries, and Colombia’s ability to fund its share of the Plan is not forthcoming. Given these circumstances, Plan Colombia is a mistake. Professor Nagle advocated a regional peacekeeping operation, headed by the Organization of American States, to bring objective outsiders into the Colombian crisis. She believes the forces can best be led by the United States because the United States has the experience, training, and capability to lead other regional participants.

Professor Nagle closed by stressing that Colombia is nearly out of time, and that something, anything, must be done to save Colombia.

Gen. Charles Wilhelm, USMC (Ret.), is former Commander in Chief of the U.S. Southern Command. He noted that he has a different perspective of Plan Colombia and of President Pastrana.

As the Commander in Chief of the Southern Command, Wilhelm handled military-to-military contacts with 32 countries, and spent a great deal of time in Colombia. Wilhelm argued that the situation in Colombia is not hopeless. Wilhelm stated that Colombia is not a banana republic, is not a den of thieves and murderers, and is not governed by a regime that lacks respect for the rule of law. Rather, Colombia has a nearly unbroken tradition of democracy going back to 1817. It is governed by a hard-working, honest, and sophisticated administration. The problems in Colombia predate the Pastafa administration, which is trying to learn from past mistakes.

Wilhelm defended Plan Colombia, calling it a process, not a solution in its own right. The U.S. assists in the process, while Colombia provides the content.

Plan Colombia focuses on human development; fiscal, judicial, and economic reform; and promoting peace. It includes an anti-drug, military component. Others may
poke holes in the plan, but President Pastrana has only a four-year term and must move rapidly from planning to execution.

Plan Colombia is a social plan with a military component, not the other way around. Eighteen percent of the $7.5 billion is marked for military reform and the anti-drug effort. The rest is aimed at social reform.

Wilhelm praised Colombia's seriousness and discipline regarding Plan Colombia. The military strategy supports reform. The U.S. goal is to produce a thirty-percent decline in cocaine production by 2007; Colombia's goal is to halve production by 2006.

Plan Colombia does not ignore the military needs of the country. The first two years of the plan focus on the South. The next two years focus on the East. Years five and six focus on the North, where poppy production is common.

Plan Colombia can work. It requires U.S. support. Also, Pastrana is ably seeking increased support from Europe and Japan. The plan does require economic development in Colombia, but Wilhelm noted that the best economists forecast consistent three percent growth.

Panel V: A Comparative View of Intelligence: Cooperation in a World of Borderless Threats

Elizabeth Rindskopf Parker presented the views of Hayden Strang, Legal Adviser to the Australian Security Intelligence Organization, who was unable to attend. Australia faces trans-border threats similar to those of larger states, and terrorism is an emerging issue. As in other countries, there is a need to establish a consensus on the nature of the threats and appropriate responses. He feels the official Australian response is well focused and has adequate resources. New issues include money laundering and the smuggling of persons by criminal elements, together with corporate fraud and drug trafficking.

Intelligence support to law enforcement is an issue in Australia. Intelligence agencies may pass information to law enforcement, usually as intelligence rather than evidence. Agents try to stay out of the evidentiary chain, due to disclosure concerns. Sometimes the sensitivity of evidence prevents a prosecution. He felt a statutory scheme is needed with respect to disclosure.

Danielle Cailloux, Counselor, Belgium Police Oversight Committee and former Counselor, Belgium Intelligence Agencies, noted that prior to 1990 the intelligence cycle was controlled by state security services. Now, in the information era, intelligence is in the domain of law enforcement and the business world. A culture of secrecy still prevails in intelligence agencies, which distrust open source intelligence. This is a mistake; there are many reliable open sources, and there needs to be a changed culture in intelligence services.

Intelligence cooperation in Europe with respect to organized crime is well organized, including shared databases. A UN treaty on common legal standards, the UN Convention Against Transnational Organized Crime, is an important initiative.

Michael Duffy, General Counsel, Canadian Security Intelligence Service, said that the activities of his service are governed by a 1984 statute. The mandate includes investigating threats to the security of Canada and advising the government. The Canadian Security Intelligence Service is not a law enforcement agency, which affects how it collects and uses information. The agency conducts its activities primarily within Canada, with a limited international role. Service activities are reviewed by the Solicitor General's office and the Security Intelligence Review Committee, although these are not oversight bodies.

Disclosure issues are crucial, and the requirements are clearly established. There is no broad discretion in this area and methods to release information are described in detail. Leaks are a concern, and there must be consequences.

As a wealthy and open nation of immigrants, with long and open borders, Canada has several security concerns. These include terrorism, criminalization of threats, economic espionage, cyberterrorism, and weapons of mass destruction. In meeting these concerns public trust is essential: not blind trust, but trust based on proper mechanisms being in place.

Robert McNamara, Jr., General Counsel, Central Intelligence Agency, pointed out that spying often violates the laws of the country in which it occurs. He wryly noted that collection against the U.S. is called "espionage" and collection by the U.S. is called "intelligence." He addressed three issues: international law enforcement, "Echelon" activities, and emerging legal standards.

Intelligence agencies need to work closely with international law enforcement agencies, with various modalities of cooperation being possible. The CIA sometimes works directly with foreign law enforcement agencies, such as in the Pan Am 103 bombing investigation. A great deal of information was declassified and released, and CIA officers were made available for testimony. Information is also released to war crimes tribunals, subject to restrictions on revealing sources and methods. The proposed International Criminal Court raises concerns about its jurisdiction and
whether the U.S. would be expected to allow its intelligence sources to testify in open court, without US approval or the use of protective measures.

The NSA “Echelon” communications interception activities have become a concern in the European Union, as well as in the U.S. The Europeans fear that NSA is collecting information for business purposes, but this is “nonsense,” he said. The intelligence community does not conduct industrial espionage. It is hard to prove a negative, however, so the concerns endure. Also, the community does not target U.S. persons inside the U.S. without a FISA warrant, or outside the U.S. without approval of the Attorney General.

The European Union has undergone some changes including an increased interest in privacy protection for its citizens. EU public opinion is focusing on previously secret matters, and intelligence agencies must be sensitive to new EU standards. A sound relationship with our EU partners is increasingly important.

The challenge faced is to continue to apply traditional standards in the face of new threats and evolving international legal standards.

David Bickford, CB, Chairman, Bickford Associates and former Under Secretary of State and Legal Advisor to the Security and Intelligence Service in Britain (M15/M16), said that the United Kingdom has made great strides in dealing with new threats. (The terrorism prevention rate, he noted, is 78 percent.) These strides include cooperation between law enforcement and intelligence agencies, dealing with organized crime, effective administration and judicial regimes for information disclosure, the protection of human sources, and communications interceptions based on executive warrants. With respect to the latter, keyholders must provide the decryption key if they receive a proper warrant.

Future issues include the confiscation of assets, the Official Secrets Act, and meeting the European Court of Human Rights’ standards. The latter concern affects peacekeeping operations, as well. Bickford noted that the UK now has a freedom of information act, which, unfortunately in his view, excepts the intelligence agencies.

Future challenges include vague, anarchic threats. These may be related to economic imbalances, ecology and animal rights extremism, or cyber threats unleashed “just for the hell of it.” These potential targets of intelligence agencies are, however, less likely to have the same public support as do terrorists and international criminals.

Issues arising in the discussion period included the following:

- The UK’s position on offshore banking transparency is evolving toward full compliance with appropriate standards.

- The British have a tradition of harboring political refugees. Even known terrorists are protected if their home countries do not respect human rights.

- The Freedom of Information Act (FOIA) poses problems for intelligence agencies, who find compliance a diversion in terms of effort and assets. In addition, there is a fear that sources and methods will be disclosed and the foreign services will limit cooperation in view of a possible FOIA disclosure.

Luncheon Address—Paul E. Kennedy

Paul E. Kennedy, Senior Assistant Deputy Solicitor General, Department of the Solicitor General of Canada, discussed the long history of security cooperation between the United States and Canada.

It’s long border with the U.S. leaves Canada inherently vulnerable to terrorism and transnational organized crime. As a result, Canada has entered into a number of international agreements. There is a terrorist presence in Canada linked to terrorist support activities such as fundraising, intimidating immigrant communities, and illegal actions such as theft, bank fraud, and the smuggling of both persons and things.

Technology poses a particular challenge. It can work for the government, but can also be used by those who wish to undermine security. Rapidly evolving technologies including the Internet have created new avenues for crime and terrorism. Facilities, networks, and assets must be protected as part of a country’s critical infrastructure. Laws and policies need to be updated and harmonized to deal with that issue.

With respect to the special relationship between the U.S. and Canada, he noted that 85 percent of Canada’s population is within a ninety minute drive from the United States. There is a billion dollars a day in trade between the two countries. Like the United States, Canada is a wealthy country with multiple points of access, respect for civil liberties, an independent judiciary, and the rule of law. Canadian courts often cite U.S. cases in their decisions. This does indeed reflect a special relationship.

Problems have a way of crossing the border and policy and legal arrangements must be in place. Balances must be struck between security and privacy and between
facilitation of movement and law enforcement. It is in Canada's interest to work with the U.S. to maintain our common foreign security. Any disagreements on particular issues such as export controls and the International Criminal Court should not bring into question this shared objective.

Panel VI: Deterrence in a World of Strategic Multipolarity

Professor George Quester of the University of Maryland discussed the theory of deterrence and its imperatives. He started by covering a series of problems with the concept of deterrence. First, deterrence is immoral, or at least distasteful. Deterrence keeps the guilty (governments) in check by threatening the innocent (civilians). Second, it requires national command authority to function very smoothly. Third, it must allow for a retaliatory strike. Deterrence breaks down if one side has a clear advantage over the other. Finally, there is the problem of drawing borders. Should Soviet nuclear weapons have been allowed to protect Cuba? Should American nuclear weapons have been stationed in West Germany?

During the Cold War, American Catholic bishops called deterrence immoral. The bishops reasoned that the Soviet people lived in a nondemocratic nation, were not to blame for the sins of their government, and thus should not have been threatened by nuclear weapons. Quester asked, is mutually assured destruction any more or less immoral today, between the U.S. and Russia, or the U.S. and China? Is the U.S.-Chinese conflict one of ideology or nationalism?

Quester noted that there are political, legal, and moral problems in the process of arms reduction. The actions and intentions of the U.S., France, China, and the U.K. are all uncertain.

One argument for a national missile defense (NMD) system is that the U.S. needs protection from the missiles of malevolent and unstable rogue states. Quester argued that NMD could actually destabilize the situation vis-à-vis these countries. In World War I, he argued, combatants went to a war that none of them wanted. Each side feared being caught off guard by a first attack from the other side. If NMD makes rogue states nervous, it could actually destabilize the situation.

Quester went on to argue that disarmament would not be prudent either. He cited the threat of a chemical or biological attack on the U.S. as a situation that requires a counterthreat of nuclear use.

John Harvey, Deputy Assistant Secretary of Defense for Nuclear Forces and Missile Defense Policy, presented the conceptual framework for U.S. policies on deterrence and ballistic missile defenses in a multipolar world, including in responding to the threat of the proliferation of weapons of mass destruction (WMD) and systems for their delivery.

The U.S. has a threefold policy for responding to the threat of WMD. First, is to prevent acquisition: the U.S., in cooperation with the international community, can inhibit the introduction of WMD into a region and has had success via such mechanisms as the nuclear nonproliferation regime, MTCR, export controls, bilateral engagement with North Korea, etc. But despite its best efforts, the U.S. cannot expect prevention measures to be successful in all cases. The North Korean development of an IRBM-the No Dong-is a case in point. If and when prevention fails, the second line of defense is to deter the use of these weapons by maintaining strong conventional and nuclear forces, and the willingness to retaliate against aggression. Because the threat from ballistic missiles, in particular, already exists and is increasing, there must be a third line of defense in addition to prevention and deterrence, and that is a vigorous program to develop and deploy BMD to defeat the threat by being able to shoot it down.

Harvey explained how nuclear forces strengthened our security during the Cold War and concluded that they will remain an important element of U.S. national security strategy for the foreseeable future. Although nuclear forces will be smaller than in the past, Harvey said, it is critical that the U.S. maintain a safe and reliable nuclear deterrent. This remains important because the changes that came with the end of the Cold War are far from irreversible. Harvey noted that while Russia is not a threat to the U.S. today, Russia has increased the importance of nuclear weapons in its national security strategy and moved away from reliance on conventional forces. China and rogue states pose different problems. The U.S. must retain nuclear weapons to hedge against the possibility of a resurgent Russia and to minimize other countries' incentives to acquire and use weapons of mass destruction.

Ballistic missile defense will strengthen deterrence, Harvey argued. Iran, Iraq, and North Korea are all working to build long-range missiles. They could use these missiles to threaten the U.S. and its allies. An American NMD system would lessen the incentives of these states to develop WMD and associated missile delivery systems. The U.S. does not presume that other countries are irrational, Harvey argued. A leader of a rogue state might hope to coerce the U.S. into inaction by the threat of direct attack, without actually firing long-range missiles. Harvey called attention to the 1990-91 Congressional debate regarding U.S. intervention in the Persian Gulf and wondered how the debate might have gone differently if Iraq had possessed long range missiles capable of threatening the United States.
Captain Lynn Wessman, USN, the Washington Liaison Officer for the U.S. Strategic Command, spoke about the structure of the U.S. strategic nuclear forces and the changes that have taken place over the last decade. During the Cold War, the U.S. and its allies faced a focused threat from the USSR, defense budgets gradually increased between 1960 and 1985, and the Services dominated the military requirements and budgeting process. After the Berlin Wall fell, more diverse threats and a fundamental change with our relationship with Russia and the former Warsaw Pact states replaced the bipolar world. Defense budgets declined by 19% between 1990 and 2000 while funding for strategic nuclear forces declined by 72% over the same period. Funding for the strategic nuclear forces now amounts to about 2.2% of the fiscal year 2000 DoD budget. The Goldwater/Nichols Act enhanced the role of the Unified Commanders in Chief and established more of a balance with the Services in determining requirements for defense systems.

The U.S. Strategic Command was established on 1 June 1992 with strategic nuclear forces consolidated into a single joint command. The Air Force reorganized and the Strategic Air Command (SAC) was disestablished. Where SAC and the bomber forces were once dominant within the Air Force, today the fighter aircraft community plays a much more central role. USSTRATCOM is one of four "functional" CINCs that are globally oriented - the other three being U.S. Space Command, U.S. Special Operations Command, and the U.S. Transportation Command. There are five "theater" commands that are regionally oriented - European Command, Pacific Command, Central Command, Southern Command, and the Joint Forces Command.

The mission of STRATCOM is to deter major military attack on the United States and its allies; and if deterrence fails, to employ forces. The word "nuclear" does not appear in their mission statement. The STRATCOM staff in Omaha is primarily a planning staff that integrates strategic deterrence policies and requirements. It also serves as an advocate for nuclear force structure, modernization and arms control implications.

The strategic nuclear forces are composed of a "triad" of land-based intercontinental ballistic missiles (ICBMs), long-range bombers, and strategic ballistic missile submarines. ICBMs provide responsiveness, bombers provide flexibility, and submarines provide a survivable assured response. Connecting those forces is a survivable network of communications, command and control and intelligence. Wessman disparaged a claim made by some antinuclear critics that the strategic nuclear forces are on "hair trigger alert." Our nuclear forces operate under strict procedures with extremely elaborate safeguards so that only the President or his successor can only authorize nuclear weapons use. The bomber forces are no longer on alert on a day-to-day basis. The ICBMs and the strategic submarines have training targets, consisting of broad ocean areas, loaded into their systems such that even if an accidental launch did occur (and that's essentially impossible to happen), the missile would be directed away from land.

The U.S. and Russia are reducing their strategic nuclear weapons from about 10,000 for each country in 1990 to below 6,000 each under the START I treaty not later than December 2001. Further reductions may be possible depending on the fate of the START II treaty, or possible unilateral actions by each country. Whether the U.S. and Russia will continue with these bilateral arms control treaties is very much up in the air.

Wessman described a nuclear "pyramid" with strategic nuclear weapons located at the top. Below that are tactical nuclear weapons, inactive nuclear stockpiles, nuclear warhead components, fissile material, nuclear infrastructure and scientific and technical expertise. Only the top of this pyramid is addressed by the START I treaty indirectly via launcher accounting rules. A more comprehensive framework is needed to address the rest of the pyramid.

USSTRATCOM had an extensive military-to-military contact program with the Russian nuclear forces to promote better understanding and transparency. However, not much has happened over the last two years because of the Russian leadership's displeasure with the West over Kosovo and NATO expansion. Wessman said STRATCOM and the U.S. government hope these valuable visits would resume in the near future.

Another major challenge facing the U.S. is maintaining our nuclear stockpile without underground nuclear testing. It is a significant scientific challenge to maintain our nuclear weapons safe, secure and reliable through a science-based stockpile stewardship program. Although we are making good progress, only time will tell if we will be able to maintain the stockpile in the future without resuming underground testing.

Wessman said we find ourselves in a confluence of events and a new reality - with more diverse and less predictable threats and the need to shape our strategic forces for the 21st Century. We must evolve strategic thinking beyond deterrence alone. During the cold war we relied almost exclusively on the threat of deterrence and retaliation. We are moving toward three different thrusts with more of a balance between them - first, dissuasion and reassurance (such as arms control agreements, confidence building measures, and threat reduction initiatives); secondly, denial and defense (such as ballistic missile defenses); and, thirdly deterrence and retaliation.
In closing, Wessman noted that worldwide wartime fatalities were pretty constant at about 2% of the world population between 1600 and 1945. Since then worldwide wartime fatalities have dropped to a small fraction of that amount. Nuclear weapons have made the world’s major powers behave more responsibly and avoid major conflicts. As Sir Michael Quinlan said, “better a world with nuclear weapons but no major war, than one with major war but no nuclear weapons.” Thus nuclear weapons have helped make us more safe and secure and will continue to play a significant role in our national security for the foreseeable future.

National Defense University Professor Elaine Bunn noted that the next administration will face two strategic controversies: how to manage the nuclear arsenal, and whether or not to pursue ballistic missile defense.

There will be a need for a new framework on deterrence and stability. Bunn asked, “Whom will we deter, and from what?” As a new policy is forged, U.S. deals with one country will affect the expectations and actions of other countries. The U.S. will also make decisions on what kind of deterrence to work toward balancing the offensive and defensive components. These decisions will in turn have requirements on numbers and posture of nuclear weapons. Finally, a new nuclear strategy will determine how to address the nuclear posture of other countries. Bunn called for an overall strategic review, along with a review of nuclear policy.

To determine a nuclear policy, the U.S. must determine who its adversaries are and what kinds of threats they present. Bunn saw the main threats to the U.S. as Russia, China, and rogue states. Concern about rogue states will drive progress on missile defense. Continued Russian-American deterrence will drive the posture of American nuclear forces. There is no consensus in Washington on how to deal with China. Current U.S. nuclear missiles are sufficient to deter China, but Chinese capabilities and actions do not drive American forces or posture.

Bunn noted that American actions toward one area will have an effect on other areas. She compared the effects to the uncertain effects of erratic interlocking gears. Russia and China will react to an American move on missile defense, although the U.S. intends to direct that defense only against rogue states. Wary of this imprecise but dangerous interconnectedness, Bunn called for a comprehensive review of American strategy. The U.S. must determine what its biggest threats are and how to address them, being as mindful as possible of unintended consequences. Bunn closed by noting that no course of action will be entirely free of risks.

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ABA Leibman Award in Law and National Security Presented to Mark M. Richard and Judge Robinson O. Everett

A very special part of the tenth annual review conference was the presentation of the ABA Morris I. Leibman award in law and national security. This Award established by the Standing Committee on Law and National Security in 1997 and approved by the ABA Board of Governors, honors the memory of Morris I. Leibman, a distinguished lawyer, co-founder of the Standing Committee, and recipient of the Presidential Medal of Freedom. The Award recognizes the example of Mr. Leibman’s lifelong dedication to the rule of law, leadership in the field of law and national security affairs, and continuing support for those engaged in this field.

This is the second time the Leibman award has been presented. This year the Standing Committee was proud to present the Leibman Award to two highly deserving individuals—Mark M. Richard and Robinson O. Everett.

Robinson O. Everett

Nominated by Scott Silliman, Center on Law, Ethics and National Security at Duke, Judge Robinson O. Everett received the Leibman award for his numerous contributions and achievements towards the field of national security law. Professor John Norton Moore, Judge Everett’s “student” and now Director of the Center for National Security Law at the University of Virginia School of Law presented the award to Judge Everett. Elizabeth Rindskopf Parker read the following citation:

For over four decades, Judge Robinson Everett’s impact on law and national security affairs has been unparalleled. A longtime professor of law at Duke University, he pioneered courses in military and national security law, providing models for dozens of courses now widely taught at the nation’s law schools. Together, his authoritative textbook and groundbreaking work in helping to craft the Military Justice Act of 1968 have created an invaluable legal foundation to support and ensure military justice for the armed forces. For ten years, as Chief Judge, later senior judge, U.S. Court of Military Appeals, Judge Robinson’s judicial opinions have expanded this base to create a body of law widely credited for restoring the essential respect and cooperation between the Court and the uniformed services. Consolidating his achievements, in 1993 Judge Everett founded the highly regarded Center on Law, Ethics, and National Security at Duke University. Deservedly, whether as a law professor, judge, author or congressional consultant, Robinson Everett’s many contributions have received a continuous round of richly deserved accolades. Yet in all this, Judge Everett remains humble and unassuming, someone whose only comment would be that he “tried to do his best”—for students, for colleagues, for profession, for country, but most of all, for his family— a loving wife and three sons. It is an honor for the Standing Committee that Judge Everett has agreed to accept the Morris I. Leibman Award in Law and National Security in further acknowledgement of his life’s work.

Mark M. Richard

Nominated by John Bellinger of the Department of Justice, Mark M. Richard received the award for numerous services to the field of law and national security. Attorney General Janet Reno presented the award to Mark Richard and on behalf of the Committee, Elizabeth Rindskopf Parker read the following citation:

Counselor to seven Attorneys General on international crime and national security matters, Mark Richard has been a tireless public servant, a crusader for justice and government integrity, and a wise mentor and caring colleague. He has been a pillar for national security law in the U.S. Government for over three decades. As Deputy Assistant Attorney General, Criminal Division, Department of Justice, his vision inspired most of the Department’s international criminal justice initiatives, with a focus on international terrorism and espionage prosecutions. His dedication to international cooperation in crime fighting and justice have guided countless extradition and mutual legal assistance treaties to successful conclusion. His keen intellect, long experience as a federal prosecutor, sophisticated understanding of international and intelligence law, and remarkable negotiating skills have been pivotal to resolving complex issues and conflicting interests, in conditions of extraordinary political sensitivities, both in the United States and abroad. Moreover, his stature and respect among the agencies of the U.S. government concerned with international security have produced unprecedented and effective cooperation. This award allows the remarkable, yet too little known accomplishments of this modest public servant at last to receive the wider public recognition they deserve. Little can be said to further embellish the contribution and quality of Mark Richard’s lifetime contribution. It speaks eloquently for itself.
Highlights of the Leibman Award Dinner

Elizabeth Rindskopf Parker, Chair of the Standing Committee, presents the Leibman Award in Law and National Security to Judge Everett.

Family members Lynn Everett, Robinson Everett, and son Greg Everett pose with Attorney General Reno during the award ceremony.

Former Chair and now Counselor to the ABA Standing Committee on Law and National Security, Professor John Norton Moore introduces Leibman award recipient Robinson O. Everett.

Professor Robinson Everett's achievements and dedication to national security law are highlighted by former student, John Norton Moore.

In his acceptance remarks, Judge Everett reiterated the importance of national security law and of military law and expressed his appreciation to those present - "a group of individuals that I respect, love and admire."

During the dinner celebration, Chair Parker announced that Judge Everett had been named Counselor to the Standing Committee on Law and National Security. From left to right are Elizabeth Rindskopf Parker, Greg Everett, Professor John Norton Moore, Judge Everett, Lynn Everett and Linda Steckley, Associate Dean for External Relations at Duke Law School.
Highlights of the Leibman Award Dinner

Attorney General Janet Reno in introducing Mark Richard stated that "he is the epitome of people within the government who I have come to admire so much."

The Attorney General commented that "it is people like Mark Richard who approach this work day in and day out with such gallantry, such foresight and with such enthusiasm, that it makes me so very proud to be an American."

Left: Mark Richard as he looks back on his career of 33 years of service in the intelligence field, comments on the dynamic arenas that law enforcement has had to face over the years.

Below: Elizabeth Rindskopf Parker, Sheila Richard, and Attorney General Reno join in congratulating Mark Richard.
Save the date.....November 29-30, 2001

Eleventh Annual Review Conference

The 11th Annual Review of the Field of National Security Law will be held on Thursday and Friday, November 29 and 30, 2001 at the Capital Hilton, 16th and K Street, NW in Washington, DC.

This very popular conference will again be cosponsored by the ABA Standing Committee on Law and National Security, the Center for National Security Law, University of Virginia School of Law and the Center on Law, Ethics and National Security at Duke University School of Law.

The review conference began at the suggestion of former Chairman Morris I. Leibman to promote a better understanding of the role of law in the defense and advancement of our national security interests. Now in its 11th year, the Conference will continue to bring together senior attorneys in government most prominently involved in national security affairs with members of the private bar and the scholarly community.

Our popular Executive Branch and Legislative Branch panels will be repeated along with four other cutting edge panel topics and a conference dinner on Thursday, November 29. MCLE Credit will be available.

Please hold the date, watch for registration and conference information in your mailbox in early Fall and visit our website at www.abanet.org/natsecurity/ for conference updates.

Should you need hotel accommodations, telephone the Capital Hilton at 202-393-1000.

CNSL Plans Eleventh
National Security Law Institute for June 2-14, 2002

The Center for National Security Law (CNSL) has announced it will hold an eleventh National Security Law Institute during June of next year. This highly-acclaimed, two-week program provides an excellent overview of the field of national security law for professors who wish to teach in this area as well as for practicing government attorneys with responsibilities in the national security area.

Applications are also accepted from foreign government attorneys, and during the past decade lawyers from six continents have taken part in the program.

Most of the training takes place at the University of Virginia School of Law, where CNSL has been in operation now for more than twenty years. In the middle of the first week, the roughly two-dozen participants travel to Washington, DC, where they meet with senior national security lawyers in the government, visit the White House, Pentagon, and CIA, and then return to Charlottesville for a second week of intensive work. For further information, contact the Center at:

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