



# National Security Law Report

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*June 2002 - Chairman's note: In light of recent events, we thought you might be interested in reading what the Standing Committee was discussing a year ago. This report was prepared last Spring but its publication was overtaken by the events of the Fall. Nevertheless, the discussion of proposals from the key commissions that had looked at how the federal government is organized to handle acts of terrorism, including the recommendation for a Department of Homeland Security, and of the importance of finding ways to make bipartisan progress in protecting our national security, seem timely even a year later.*

## Conference Report: "Moving from Polarization to Progress on National Security Issues"

May 18, 2001 • Washington, D.C.

By Matthew Foley

### Introduction

This symposium was presented by the American Bar Association Standing Committee on Law and National Security in cooperation with the Woodrow Wilson International Center for Scholars on Friday, May 18, 2001 at the Woodrow Wilson Center in Washington, D.C.

A prominent group of attorneys, former congressmen, representatives of commissions studying terrorism and foreign policy, senior Republican and Democratic congressional advisers of House and Senate national security committees, and other policymakers met at a May 18, 2001, conference in Washington, D.C., to discuss the topic of "Moving from Polarization to Progress on National Security Issues." The American Bar Association Standing Committee on Law and National Security and the Woodrow Wilson International Center for Scholars sponsored the not-for-attribution conference, which was underwritten by the Robert R. McCormick Tribune Foundation. No official conference recommendations were made, and many issues remain in debate. However, there was broad consensus among participants on the following:

- The U.S. lacks an articulated strategic vision in foreign policy;
- Even when consensus is improbable, consultation can reduce polarization;
- The U.S. must prepare at the state and local levels to prevent and mitigate the effects of terrorist attack;
- The single issue most in need of consensus is that of preserving homeland security.

### Foreign Policy in 2001

In foreign policy, as in most matters, an obvious and compelling threat encourages focus. In the absence of an apparent threat, actions may lack coherence and resolve. Today's American foreign policy is the product of a variety of strands of thought rather than any single organizing principle.

Some conference participants stressed that it is the responsibility of the executive branch to articulate a strategic vision for foreign policy. While legislators may be receptive to leadership from the president, they expect to be consulted about executive decisions. Congressional committees can be "ground zero" for the polarization and politicization of foreign policy, so it is particularly important for the president to include them in his consultations. In trying to prevent gridlock, communication is essential between branches, between executive agencies, among committees, and across party lines. Some conference attendees noted-before the defection of formerly Republican Senator James Jeffords-that the Hill perceives the Bush administration as reluctant to consult with Congress.

The declining number of representatives and citizens with military service also was discussed. The implications of this trend are unclear; studies of American history have indicated that when the proportion of representatives with military service declines, the country is more likely to engage in war. Some fear that the military's declining proportion of the population will dampen support for the institution over time. The public at large is inattentive to foreign affairs, with troubling implications for foreign policy.

A variety of issues and threats were discussed as the basis for a more cohesive strategy. While much discus-

## Conference Report . . .

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sion focused on dangers to U.S. security, some participants also remarked that national strategy is not limited to responding to threats. Strategy also involves building institutions, including alliances and multilateral systems to advance political and economic interests.

Congressional committees will take up a number of issues in the coming session, including arms proliferation, the spread of AIDS/HIV, child trafficking, UN arrears, the ejection of the U.S. from the UN Human Rights Council, Permanent Normal Trade Relations for China, and the proper U.S. role in the International Criminal Court.

### Specific Issues

Politics is always beset with controversy, some conference participants noted, just as it was in the days of Alexander Hamilton and Aaron Burr. Principled political debate reflecting different ideologies is essential. The problem arises when disagreements materialize for purely political purposes. However, many conference participants reported a general feeling of amiability between the parties on several national security-related congressional committees. It was noted that recent disagreements on foreign policy did not extend to near the level of the Vietnam War era. Recently, there was a great deal of unity in support for Plan Colombia.

Foreign policy after the Cold War has become a difficult, amorphous series of issues. Public disinterest leaves leaders reluctant to act boldly. Various participants repeatedly stressed that the U.S. must clearly express its policies on the Middle East, China, Europe, and elsewhere. Without clarity, other countries and American policymakers do not know what to expect.

In foreign policy, the Bush administration has placed Secretary of Defense Donald Rumsfeld's review of national strategy and military organization and national missile defense (NMD) at the top of the list of national security priorities. Some participants argued that preventing and responding to terrorism should be a higher profile issue.

Perhaps the central theme in the evolution of foreign policy during the Clinton years was the growing importance of economics. This included U.S. export promotion important in the Clinton administration's early trade negotiations with Japan and extending global free trade. The emphasis on free trade continued into the current administration, with President Bush negotiating a Free Trade Area of the Americas and seeking fast-track negotiating authority from Congress.

There is a broad bipartisan consensus behind the efforts to increase free trade. Disagreements on trade issues

have not been argued along party lines. Two of the most vocal opponents of Permanent Normal Trade Relations with China are liberal Senator Paul Wellstone and conservative Senator Jesse Helms, suggesting that political alliances in foreign policy issues will be based on economics and ideology as well as partisanship.

Some conference attendees cited problems resulting from the increased importance of trade in foreign affairs. The U.S. has yet to determine the most effective export control regime to ensure that high-tech items not be sold to foreign countries at the expense of national security. Some participants argued for a multilateral approach, arguing that unilateral export controls gain little in national security and serve only to put American companies at a competitive disadvantage. Some attendees with congressional experience noted that financially oriented committees have gained influence in foreign policy. As a result, committees dealing with different aspects of foreign policy sometimes work at cross-purposes.

The proper role of economic sanctions has come under scrutiny in recent years. A coalition of business and human rights groups has united against sanctions. The appointment of Richard Haass, who has expressed reservations about the efficacy and overuse of sanctions, to a key State Department role indicates that the Bush administration may seek to work with Congress to roll back economic sanctions, and to reduce their prominence as a tool of U.S. diplomacy.

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Despite the generally cordial relationship on important congressional committees, there is a risk of partisan rancor over some foreign policy issues on the horizon. Representatives' positions on national missile defense (NMD) and the American military presence in Kosovo tend to break along party lines. Another debate yet to gain public attention centers on the role of arms control negotiations in the post-Cold War world. There has been a general move toward mitigating the effects of proliferation with an NMD system, and away from trying to prevent proliferation through arms control agreements. U.S. policymakers have yet to determine if these two approaches are complementary or opposite.

### **Combating Terrorism**

Many conference participants agreed that combating terrorism is a matter of paramount importance, and that it offers an opportunity for finding common ground across party lines. There were calls for an overall foreign policy vision containing a strategy for resisting terrorism, combined with an organizational overhaul. A bioterrorist attack could quickly spread across state lines and cause catastrophic loss of life. There has been insufficient legal, intelligence, logistical, and medical preparation for such an attack. Organizational issues can be a first step toward greater effectiveness and agreement on national security issues. They provide tools and build trust for more contentious issues.

The new threats blur the lines between peace and war, and between national security and law enforcement. A series of studies and reports has revealed that the government remains ill-equipped to prevent and react to acts of terrorism. If a terrorist event occurs, all levels of government must be able to function effectively, with leadership from the president.

### **Organizational Issues**

Experts familiar with a series of studies on terrorism presented their findings. The Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction (the "Deutch Commission") reviewed the work and organization of the 55 federal agencies that have a role in preventing the proliferation of weapons of mass destruction. It found that the current interagency system is inadequate to fight against new threats to national security, such as terrorism with a weapon of mass destruction (WMD) and threats to information infrastructure. Terrorists may gain access to WMD.

Also, new security threats to American informational infrastructure, economic threats to oil in the Caspian Sea, and the proliferation of Soviet nuclear weapons must be addressed.

The commission stressed the need to change policy and programs in order to increase cooperation and effectiveness. The newer threats tend to blur the distinction between foreign threats and domestic response, and between national security issues and domestic law enforcement. These complex issues will not be resolved without a coordinated, multi-year plan.

Specifically, regarding the threat from chemical and biological weapons, the commission recommended a plan be developed and tested over five years to coordinate the actions of agencies and bolster detection of such an attack.

Some conference participants stressed the need for a manager with responsibility to coordinate a new counterterrorism plan. It was recommended that the manager should be a new deputy director from a strengthened National Security Council. In the Bush administration, Vice President Dick Cheney has overseen counterterrorism efforts.

A new agency may not be the correct approach, some participants said, because many existing agencies' terrorism resources and capabilities are multipurpose, serving other missions in addition to terrorism. Thus, the newly created agency is likely either to duplicate existing capabilities or deprive agencies of capabilities they need for other missions. Participants debated the proper role of the National Security Council (NSC) in responding to terrorism. A number of participants argued for a higher profile for the NSC. Others argued that the NSC is too close to the president and does not always enjoy bipartisan support.

Some participants argued that the role of the vice president should be restricted to heading a temporary task force. Otherwise, the president will delegate to the vice president tasks for which he himself should take responsibility. It was argued that a temporary task force may be all that is necessary, provided that it elicits the necessary focus and planning.

It was argued that there can be little progress on the matter of counterterrorism efforts until the public is effectively educated on the matter. By and large, there is little attention given to the issue of terrorism. Attention comes in short bursts, and tends to have an unproductive "sky is falling" spin.

The National Commission on Terrorism (the “Bremer Commission”) looked at the role of intelligence in the administration. It recommended that analysts and law enforcement should increase intelligence sharing. In addition, it argued that the Department of Justice has been too restrictive of the FBI’s authority.

The commission also called for tougher action to fight fundraising activities of terrorist groups. With the rise in the proportion of private, non-state sponsored terrorism, front organizations and nongovernmental organizations are becoming more common sources of terrorist funding. There is insufficient communication among different executive agencies to fight this source of funds.

More research and development programs were called for to determine what kinds of chemical and biological threats may exist in the future and how to combat them. It was also recommended that the president keep an inventory of legal authorities that can be invoked in a time of crisis, and that the Department of Defense be prepared to respond to catastrophic terrorist attacks.

Intelligence has an important role to play in preventing a terrorist attack. The Bremer Commission recommended easing restrictions on use of informants by the CIA. Currently, the CIA imposes heavy restrictions on efforts to recruit as informants persons connected with terrorist organizations. In addition, the growing importance of the FBI in collecting information on international terrorists means that the FBI must make effective and timely dissemination of that information, as allowed by law, a primary mission.

Currently, the State Department tends to categorize countries as all-or-none in terms of whether or not they support international terrorism. Greater use of a middleground category would help reward reform in once-terrorist states, and warn backsliders.

The Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction (the “Gilmore Commission”) examined local, state, and regional response to terrorism, particularly the emergency services that would be called upon in the face of a terrorist event. The Commission’s mandate was to examine how the federal government assists state and local governments. The group found that state, local, and federal governments must have plans for cooperation in place in advance of a terrorist attack. The commission called for a comprehensive national strategy to fight terrorism, with a concrete plan allowing for measurable progress.

The commission did not agree with other findings that the National Security Council should assume the lead


role in fighting terrorism. Instead, it argued for a manager with an even higher profile and level of authority, calling for a presidential appointment and a Senate confirmation for a lead officer in charge of counterterrorism efforts. Many conference participants stressed that the manager must have budgetary authority to elicit cooperation and compliance.

The US Commission on National Security/21st Century (the “Hart-Rudman Commission”) found that there is no comprehensive strategy to fight terrorism. It argued that the National Security Council should take the lead. It, too, found that responsibility was too diffuse and that agencies fail to communicate with each other, and recommended the creation of a National Homeland Security Agency. The Hart-Rudman Commission determined that federal assistance should be streamlined, and that federal leadership should be divided into departments of prevention, critical information protection, and emergency response.

A bioterrorist event could cause great havoc. The U.S. should step up its research in fighting pathogens. Some participants also noted the need for better coordination in the collection, analysis, and distribution of intelligence across executive agencies, particularly to combat terrorist fundraising.

In dealing with terrorism, it is essential to protect civil rights and retain the public’s trust. Some recommendations are controversial—for example, an increased role for the Department of Defense and stepped-up intelligence efforts. The government has to take steps to understand how the public will react to an incident of terrorism, who will be trusted, and which actions will be effective.

The conference occurred at a watershed period for U.S. national security. This is not due to the change in administration; rather, there is growing agreement that the main challenge to the U.S. is increasing homeland security. Three issues emerged as crucial as national security policy is developed:

- What is the proper organizational structure to deal with the threat of terrorism?
- What resources should be devoted to the effort?
- What oversight mechanisms should be developed to ensure that civil liberties are protected when the role of intelligence agencies is enhanced? 

*Matthew Foley is Communications Director for the National Strategy Forum*

## Book Review

### The White House Staff: Inside the West Wing and Beyond

By Bradley H. Patterson Jr.

Reviewed By Douglas M. Brattebo

*Brookings Institution Press, Washington, D.C., 2000*  
(469 pages; price: \$30.00).

Presidential power today is molded and directed primarily by the men and women of the president's personal staff. Bradley H. Patterson reminds us that these staff members "have no legal authority in their own right, yet 100 percent of presidential authority passes through their hands." The American people, however, know very little about who these staffers are or what they do. Weighty memoirs, lighthearted movies, and even a primetime television drama have not meaningfully filled this void. *The White House Staff: Inside the West Wing and Beyond* is well-constructed to educate future presidents, presidential servants, and citizens on the daily challenges that confront the many specialists who work for the president and act on his behest.

It is no secret that modern presidents no longer govern primarily through the cabinet departments, but through the White House staff, which has come to consist of no fewer than 125 distinct offices from its humble genesis in the Executive Reorganization Act of 1939. Presidential candidates often promise to cut back the White House staff and reinstitute cabinet government, but after taking the oath of office they soon find that there are powerful advantages to governing from the West Wing. Reducing the White House staff would necessitate carrying out the same core functions with fewer employees, and so presidents end up adding employees despite prior pledges to do just the opposite.

The crucial fact of contemporary presidential governance is that policy development, leadership, coordination, and salesmanship have become firmly centralized in the White House, and the departments and agencies of the executive branch have begrudgingly acknowledged this. In this age of hyperpluralistic politics and eroding distinctions between foreign and domestic policy, only the president is accountable to a national electorate, and only he possesses the "overarching vision of goals and priorities, the acute political sensitivity to opportunities and limits." Departments are not kept in the dark, but the idea of cabinet government, in which decisions were made in the departments themselves, with presidents overseeing the process, has been dead and buried since the Eisenhower administration. Make no mistake: governance occurs in the West Wing, and the departments have become what Lloyd Cutler has called "outer-moons."


Overseeing this White House system is the chief of staff, whose reason for existence is to bring coherence to the daily functioning of the White House. The position was created by Eisenhower, and subsequent presidents who have resisted centralizing the management of the White House in the chief's hands have learned a quick and painful lesson. The chief of staff must be a strong presence, and the president must make it clear that the chief of staff acts with his blessing. The president simply cannot govern if he cannot assert effective control over the machinery of the White House. Indeed, his ability to organize and manage personnel through the chief of staff will determine the upper numerical limits of the White House staff.

A new president is bedeviled by the recognition that his policy priorities cut across the traditional jurisdictions of cabinet departments and other executive branch structures. The initial temptation may be to adjust existing bureaus, or to add new ones uniquely fitted to the tasks at hand, but the realization soon sets in that such a course would simply add to the constellation of bodies the president must deal with from a distance. Without fail, modern presidents have quickly determined that the only practical course is to draw the reigns of policy leadership more tightly into the White House. Patterson rightly concludes that this path is the one "most fitting and most likely to be chosen by the presidents of today and tomorrow."

Each president thus contributes to the institutional structure of the White House in a manner that reflects his policy priorities. Over time, however, presidents realize that the top policy concerns of their predecessors are enduring in nature, and so the institutional presidency slowly settles into a kind of stasis. Presidential priorities may shift and change, but the White House has come to possess the tools indispensable to asserting policy primacy on virtually any matter. Although presidents shave the freedom to redraw the organizational scheme of the White House, combining and even eliminating whole offices, they rarely do so because the existing arrangement is effective. Over more than six decades of painstaking practice by strikingly different chief executives, the White House has evolved into an entity uniquely equipped to serve the winner of the next election.

Emblematic of the ascendance of the White House as the nation's policy engine is the president's reliance on his national security adviser and the National Security

Council staff of nearly two hundred. Indeed, the Situation Room is in many respects the nerve center of the modern presidency. Although the NSC rarely convenes as a formal body, its centrality to all the president does is evident in the roles its staffers play in a host of diverse and sometimes surprising capacities: summitry, legislative liaison, speechwriting, press relations, and even the provision of legal advice. The tensions that arise between the national security adviser and the Departments of State and Defense are well chronicled, but such rivalry was effectively contained during the George H. W. Bush and Clinton administrations. Both presidents' national security advisers communicated frequently with the secretaries of State and Defense, building strong personal connections and leaving few opportunities for policy fissures to form. Patterson quotes President George H.W. Bush on the importance of giving the lead role to the national security adviser: "The President should make clear that in all but title the NSC adviser is like the Chief of Staff for foreign affairs."

Patterson concludes that policy centralization in the presidency is an irreversible fact, but he notes that the ability of the White House staff to work effectively with the executive branch departments depends in large measure on the personalities of the principals. Presidential governance undoubtedly has become a permanent campaign of sorts, but that does not mean that a new president should simply move his campaign staff into the White House with him. Instead, he should choose sagacious staffers, and then appoint cabinet secretaries with whom he is certain those old hands can work. The presidency is an institution, but it consists of individuals who must collaborate gladly to forge policy as they willingly endure both pressure and sacrifice. This excellent book should become a standard primer not only for presidential scholars and members of the new Bush administration but for all who aspire to key roles in future administrations. Inquiring students and members of the general public also would be well served by a thorough reading of this encyclopedic work. Careful study of how the White House staff is structured and operates can facilitate smoother presidential transitions and more coherent public policy. 

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## *Save the date.....*

# *Twelfth Annual Review Conference*

November 21-22, 2002

The 12th Annual Review of the Field of National Security will be held on Thursday and Friday, November 21 and 22, 2002 in Washington, D.C.

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 12th year, the Conference will continue to bring together the 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 21. 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/](http://www.abanet.org/natsecurity/) for conference updates.

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