American Bar Association

Standing Committee on Law and National Security

1962 – 2002

A Brief History

2002 – 2003

Standing Committee Members

Chair Suzanne Spaulding, Former Director, National Commission on Terrorism and former General Counsel, Senate Select Committee on Intelligence.

David Anderson, Colonel, U.S. Marine Corps and former Judge, Navy-Marine Corps Court of Criminal Appeals; currently with US Court of Appeals for the Armed Forces.

Rodney Bullard, United States Air Force JAG Department, Gulfport, MS.

Susan Cahoon, private practice, Atlanta, GA

Angeline Chen, Associate General Counsel, International Launch Services and former Deputy Associate General Counsel for Information Security at the National Security Agency.

Mary Elizabeth Hoinkes, former General Counsel, U.S. Arms Control and Disarmament Agency

Jeh Johnson, private practice and former General Counsel, Air Force.

Lewis Libby, Chief of Staff to the Vice President and former Deputy Under Secretary of Defense for Policy.

Judith Miller, currently in private practice, Washington, DC and former General Counsel, Department of Defense

Richard Shiffrin, Deputy General Counsel for Intelligence, Department of Defense and former Deputy Assistant Attorney General with the Office of Legal Counsel at the Department of Justice.

Scott L. Silliman, USAF (ret.), Director, Center on Law, Ethics and National Security, Duke University School of Law and former Air Force Judge Advocate.

Counselors

Judge Robinson O. Everett, Founder, Center on Law, Ethics and National Security, Duke University School of Law

Ambassador Max Kampelman, former Delegation Head to the Nuclear and Space Arms Negotiations in Geneva.

John Marsh, former Secretary of the Army.

John Norton Moore, Walter L. Brown Professor, University of Virginia School of Law and Director, Center for National Security Law.

Eugene Rostow, former Yale Law School Dean and Under Secretary of State for Political Affairs.

William Webster, former Federal Judge and FBI Director and Director of Central Intelligence.

James Woolsey, former Director of Central Intelligence.

A Message From the Chair

The following brief history of the Standing Committee on Law and National Security reveals an evolving subject matter focus but an unwavering commitment to educating the Bar and the public on the importance of the rule of law in preserving the freedoms of democracy and our national security. Lewis Powell's 1961 pamphlet "Instruction on Communism and its Contrast With Liberty Under Law," which presented an education blueprint for involvement of the organized Bar in public education about totalitarian communist regimes, provided the original impetus for the establishment of the Standing Committee the following year. As the Committee concludes its 40th year, the threats we face are different but the importance of the informed discussion and debate on issues arising at the intersection of law and national security that this Committee was established to foster has never been more evident.

- Suzanne E. Spaulding, Chair, Standing Committee on Law and National Security Committee

Introduction

The American Bar Association's Standing Committee on Law and National Security plays a unique role in the formulation of American national strategy. Drawing on the expertise of its members and guests, the Committee engages audiences ranging from the highest levels of government to high school students in informed discussion and debate on topics from grand strategy to the nuts-and-bolts of institutional reform for the US, foreign countries, and multilateral institutions. Standing Committee members include current and former legal advisors to Congressional committees and executive agencies. Through their daily work, person-to-person diplomacy, articles, and testimony before Congress, Committee members help shape the debate on international affairs.

Presenters and speakers at Committee events have included Lewis Powell, Dick Cheney, Antonin Scalia, Les Aspin, Edward Levi, Arlen Specter, Robert Bork, George Shultz, Daniel Patrick Moynihan, Henry Hyde, James Woolsey, Edwin Meese, William Webster, Benjamin Netanyahu, Jane Harman, Alberto Gonzales, Orrin Hatch, and a number of foreign Ambassadors. Guests, readers, and attendees include officials of all three branches, judges, foreign and international organization representatives, think tank researchers, professors, and all who have an interest in national security. The Committee facilitates the exchange of ideas between current government officials. Through its events and publications, the Committee tracks legislation affecting the world of national security law.

The Committee was founded in 1962 by a distinguished group that included ABA President (and later Supreme Court Justice) Lewis F. Powell, Chicago attorney Morris I. Leibman, Rear Admiral William C. Mott (USN-JAG, Ret.), Professor Frank Barnett, and R. Daniel McMichael of US Steel Corporation (and later Secretary of the Scaife Foundation). Originally, the Committee focused on bolstering understanding within the Bar and the public of the need to oppose totalitarian communist governments. Lewis Powell's 1961 pamphlet "Instruction on Communism and its Contrast With Liberty Under Law" which presented an education blueprint for involvement of the organized Bar in public education about communism provided the original impetus for the ABA's efforts. Over time, its scope broadened to include all aspects of the intersection between lawmaking and national and international security.

The Committee long ago recognized the threat that terrorism poses to modern societies. It first held a conference on the topic in 1979, and has continued to address it in conferences, panel discussions, and publications. In June 1999, then Chair of the Committee, Elizabeth Rindskopf Parker, in describing the goal of certain Committee activities, told Suzanne Spaulding, the Committee's current Chair, that "[o]ur plan is to explore and develop thinking about the topic of 'homeland defense law' (for lack of a better name)."

From its inception, the Standing Committee has been in the forefront of national security law issues and has pursued its objective through a wide-ranging program of scholarship, conferences, workshops, and publications.

The Cold War – Addressing the Soviet Threat

Throughout the 1960s and 1970s, the Committee organized workshops for professors of law featuring presentations by leading specialists on contemporary international and national security problems.

The Committee was instrumental in focusing world opinion on Czechoslovakia's attempt in 1971 to extort "defense fees" from the families of refugees who had fled the 1968 Soviet-led Warsaw Pact occupation. Public focus caused Czechoslovakia to cancel the fee collection program. The Committee also brought public pressure on signatories of the Helsinki Final Act on Security and Cooperation in Europe to implement fully the Final Act, particularly its provisions on human rights.

In 1979, the Committee began publishing the *Intelligence Reports,* a monthly newsletter keeping members informed about Congressional committees and executive agencies, pending legislation, legislative reports, and relevant court decisions. Today, the newsletter has a circulation of over 3,500. Among the issues discussed in the early *Intelligence Reports* were Senate committee hearings and the debate over the FBI charter legislation.

> ***"One of the Standing Committee's most important contributions has been to identify a new body of law called national security. It began with the recognition that there is a real external threat to our free society. The challenge was to take steps to protect our society without destroying the essential nature of our institutions. This was particularly within the competence and responsibility of the American legal community."***
> ***- Morris I. Leibman – (Morrie served five presidents as a behind-the-scenes advisor and received the Presidential Medal of Freedom from President Ronald Reagan.)***

The 1979 Committee conference dealt with a range of topics, including the role of intelligence in national security, the traditional political and military roles of intelligence, and its new role in modern transnational terrorism and economic warfare. The conference discussed modern transnational terrorism, the capability of the intelligence community, the impact of terrorism on our liberties in a free society, the FISA Act: its limitations, vague minimization procedures; and economic intelligence.

Former Attorney General Edward Levi addressed the ABA conference on intelligence legislation discussing the government's role in intelligence, the conflicts over separation of powers in intelligence activities and the Church Committee's report, and the conflict between the courts,

the legislative branch and the executive in foreign surveillance. He stated that "if we wish to protect both the public rights and the intelligence agencies, we must proceed recognizing this drive by the courts to take charge, to indicate the limits to that involvement and to indicate the kinds of steps that can be taken."

Leo Cherne, former Chairman of the President's Foreign Intelligence Board discussed the intelligence needs of a modern free society. He warned that the intelligence capability of the US is vital "to the maintenance of peace, to any possibility for future arms limitation, the monitoring of international agreements, to the existence of an adequate program to protect the national security, [and] to avert terrorism."

ACLU Director John Shattuck and Professor Robert Bork debated the limits on national security intelligence in a free society. Antonin Scalia, then a professor at University Chicago Law School, wrote a case text on the subject and led a panel discussion on balancing secrecy and disclosure.

Past Chairs of the Standing Committee
Morris I. Leibman (1962 – 1967)
Charles S. Maddock (1967 – 69)
William C. Mott (1969 – 73)
James M. Spiro (1973 – 1975)
Morris I. Leibman (1975 – 1982)
John Norton Moore (1982 – 1986)
Richard E. Friedman (1986 – 1989)
Robert F. Turner (1989 – 1992)
John H. Shenefield (1992 – 1995)
Paul Schott Stevens (1995 – 1998)
Elizabeth Rindskopf Parker (1998 – 2001)
Suzanne E. Spaulding (2001 – Current)

In 1980 the Committee established the advisory group to keep the committee abreast of pending legislation in the intelligence and related fields. In October, the "Intelligence Report" newsletter published the first interview granted by Ambassador Arkady N. Shevchenko. He had recently resigned his position as Undersecretary General of the UN, repudiated his Soviet citizenship, and took up residence in the US. He discussed Soviet intelligence and disinformation and the relationship between the Politburo, the International Department of the Central Committee, and the Communist Party. He also warned that the Soviets sought to take advantage of restrictions placed on US intelligence agencies beginning in the mid-1970s.

The ABA House of Delegates adopted Standing Committee recommendations on charter and greymail legislation. Committee representatives testified before the Senate Judiciary Subcommittee on Criminal Justice.

Later in 1980, Congress enacted the Intelligence Identities Protection Act following three years of debate and extensive ABA input. The Committee continued to work with the Departments of Justice, State, and Defense, the CIA, and other governmental organizations on national security issues and legislation.

A statement of tribute to Morris I. Leibman was read in the House of Representatives on March 25, 1980 by Congressman Robert McClory of the Permanent Select Committee on Intelligence. The statement said, "the strength of the American system arises out of the citizen statesman. No one exemplifies this more than Morris I. Leibman... Morris Leibman's service results from a remarkable combination of outstanding professional accomplishments within the legal profession, deep concern about the national security of the US and above all, an unshakeable dedication to the fundamental precepts of human freedom."

In December 1981, the Committee sponsored a workshop for professors of law on "US and Latin America: Continuity and Change in the Relationship." The workshop covered historical, political, economic and institutional aspects of the relationship, through specific problems and key relationships in the 1980s.

At the Committee conference in 1981 on the First Amendment and National Security, John Shenefield, former Assistant Attorney General for the Anti-Terrorism Department, discussed the Reagan administration's handling of intelligence matters during its first year. Richard Willard, Office of Intelligence Policy, Department of Justice, and Daniel Silver, former CIA General Counsel, discussed problems of national security and censorship in a democracy.

Judge Thomas Buergenthal of the Inter-American Court of Human Rights argued that the Helsinki Accords effectively focused political attention on human rights at a Committee breakfast on the Helsinki Accords. In August, the Committee presented a workshop entitled "Litigating National Security Issues" at the ABA Annual meeting. It addressed the difficulties in attempts to obtain classified information in discovery or to introduce such information into evidence in civil or criminal litigation.

In 1981 the *Intelligence Report* received an award for outstanding journalistic contributions on the subject of American Intelligence by the National Intelligence Study Center. The *Intelligence Report* followed the three-year battle and final enactment of the Intelligence Identities Protection Act, which made exposing covert US agents a criminal offense. In June 1981 Antonin Scalia wrote an article for the *Intelligence Report* discussing the first published opinion of the FISA court. The court held that the FISC did not have jurisdiction to authorize FISA physical searches since the act only speaks to electronic surveillance.

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- A statement of tribute to Morris I. Leibman read in the House of Representatives on March 25, 1980

In January of 1982, the Committee, together with the Center for Law and National Security, University of Virginia School of Law, and the ABA International Law Section cosponsored a seminar on "The First Amendment and National Security." Later that year, the Committee cosponsored a workshop with the University of Georgia Law School on "Coping with Internal Conflicts: Dilemmas in International Law" to honor former Secretary of State Dean Rusk for his public service. Workshop participants examined the balance between national sovereignty and international pressures for intervention. In May, the Committee and the University of Mississippi Law Center cosponsored a workshop on "Law and National Security in Outer Space."

Early in 1983, John Shenefield presided over a formal debate on "National Security and the First Amendment." Floyd Abrams, of Cahill Gordon & Reindel, sometimes counsel to the *New York Times,* and Richard Willard, Deputy Assistant General, Civil Division, US Department of Justice debated media access to information on US military actions. Later that year, the Committee

published a study entitled "Oversight and Accountability of the US Intelligence Agencies: An Evaluation."

Throughout the year, the Committee provided information on legislation, including the Freedom of Information Act, and amendment, the Federal Tort Claims Act, and the Anti-Terrorism and Foreign Mercenary Act.

At the strong urging of the ABA, the president concluded in early 1984 that it would be in the nation's best interest to ratify the Genocide Convention. In March, the committee co-sponsored a conference on "The Media and Government Leaks" regarding the use and proper governmental response to leaks. Panelists included representatives from the media, civil liberties organizations, and Capitol Hill.

In January 1985, the Committee sponsored a presentation during the annual meeting of the Association of American Law Schools. Ambassador Max Kampelman, spoke on his experience as lead negotiator for the Helsinki Final Act. "If we can make the Soviets pay a price for transgressing agreements – whether it's a price in public opinion, or whether it's a price in benefits, or whether it's a price in relationships – and if we can maintain our military strength, I think we have a shot at entering into some kind of constructive relationship with them," he argued.

At the ABA annual meeting in London, the committee presented a panel discussion entitled "National Security Leaks: Is There a Legal Solution?" The program presented a panel of US and Canadian experts in matters of national security, the media, and legal controls on the dissemination of information. President Ronald Reagan stated "I want you to accept a challenge to become part of the solution to the problem of terrorism. You have a fundamental concern for the law and it's upon the law that terrorists trample." The Standing Committee continues to respond to his call by sponsoring conferences and law professor workshops as well as participating and analyzing relevant legislation.

"Restoring Bipartisanship in Foreign Affairs" conference was designed to encourage leaders of the Executive Branch and Congress to focus on the problems of partisanship and to consider steps that might be taken to improve the relationship. Secretary of State George P. Shultz, Senators Daniel Patrick Moynihan and Jeremiah Denton, Congressmen Henry J. Hyde, Dante B. Fascell, and Richard Cheney spoke at the conference along with former White House counsel to President Carter Lloyd N. Cutler and William G. Hyland, editor of *Foreign Affairs*.

In May 1985, the Committee co-sponsored a Conference entitled "Congress, the President and Foreign Policy" to focus on congressional and presidential power in foreign affairs and policymaking, including the historical and constitutional basis for foreign policymaking. Senator John Tower, William Goldsmith, Congressman Henry Hyde, Senator Arlen Specter, Eugene Rostow, and Monroe Leigh participated.

During the ABA Annual Meeting that year, the Committee presented a debate on the War Powers Resolution. Professor Michael Glennon and Frederick Tipson, both former counsels of the Senate Foreign Relations Committee, argued that the war powers resolution is not in conflict with the Constitution. Monroe Leigh and John Norton Moore challenged the constitutionality of the resolution.

Congressman Henry J. Hyde addressed the Committee at a breakfast meeting on Congressional oversight of intelligence operations. He concluded, "I don't think we're capable of keeping a secret. I think that the rush to the typewriter to get everything – anything – in the press, all under the rubric of people's right to know, results in giving the information to our adversaries." The Committee co-sponsored a workshop for professors of law with the University of Oklahoma College of Law on "Law and National Security: Strategic Resources." The conference included sessions on agriculture, mineral, and oil issues.

The Committee's 1985 conference "Terrorism: The Issues Confronting a Free Society" drew a standing-only crowd. The distinguished speakers included Attorney General Edwin Meese, FBI Director William Webster, Benjamin Netanyahu, Israeli Ambassador to the United Nations, Ambassador Robert Oakley, head of the State Department's counterterrorism program, and Judge Irving Kaufman, US Court of Appeals for the Second Circuit. In October, the Committee, along with the Center for Law and National Security and University of Virginia School of Law co-sponsored a conference entitled "The Vietnam Debate: A Fresh Look at the Arguments."

Speakers at 1985 breakfast meetings included Supreme Court Justice Lewis Powell, Legal Advisor to the Department of State Judge Abraham Sofaer, Senator Orrin Hatch, Admiral William Crow, Chairman of the Joints Chiefs of Staff, and General William Odom, Director of the National Security Agency.

Later that year, the Committee sponsored a Law Professor Workshop with the Saint Louis University School of Law on "Legal Issues of Foreign Involvement in Central America." This program featured a debate on the merits of the Nicaragua-United States case then pending before the International Court of Justice.

"Those...who follow the Committee's activities are well aware of the continuing impact of its work across the land from high school classrooms and college campuses to boardrooms and the halls of government – and on distant battlefields. The Committee's leadership and composition have been consistently high in integrity and sense of mission."
- R. Daniel McMichael, Scaife Foundation

A Committee conference in January 1987 co-sponsored with the Institute for the Study of the Soviet Union and East Europe at the University of Arizona was entitled "Soviet Objectives and Strategies in the Third World." A second workshop was held at the California Western School of Law on "Mexico and the United States: Strengthening the Relationship" The workshop included speakers and participants from both Mexico and the US. Topics such as hemispheric security, immigration and refugee concerns, drugs and weapons trafficking and trade and final relations were discussed.

In May, the Committee and the Center for Law and National Security, University of Virginia School of Law, and the International Law Institute in DC sponsored a workshop on "Deception and Deterrence in Wars of National Liberation, State Sponsored Terrorism and Other Forms of Secret Warfare." Keynote speakers included Claire Sterling, the noted authority on linkages among terrorist groups, and the Honorable Fred C. Ikle, Under Secretary of Defense for Policy.

In 1988 the Committee sponsored a dinner meeting in Washington, D.C., of the general counsels of the various government agencies that handle national security. The informal gathering aimed

to foster or strengthen personal relationships among the agency general counsels to create a greater efficiency in our national security infrastructure.

A 1988 conference, "Separation of Powers in Foreign Policy: Do we have an 'Imperial Congress'?" examined the relationship between Congress and the President in the formulation and execution of foreign policy. It also examined ways to enhance the effectiveness of such policy based on the time-honored constitutional tradition of the separation of powers. Later that year, "Legal and Policy Issues in the Iran-Contra Affair: Intelligence Oversight in a Democracy" examined the appropriate mechanism for intelligence oversight in a democracy in light of the Iran-Contra affair and looked in depth at the legal issues involved and at the policy lessons to be learned.

"The Back End of the Arms Control Process: Verification, Violation Compliance and Net Assessment" focused on the conclusion of the INF Treaty and the need to provide an overall assessment of arms control decisions in the broader framework of national goals and international trends.

A 1989 conference, "Economic Policy and National Security," addressed the international debt problem, unsecured loans to the Soviet Union and Eastern Bloc by the US and its allies, and the appropriate balance between free trade of information and technology and the requirements of national security. A conference later that year on "Treaty Implementation and Interpretation Under the Constitution" provided a forum for experts and practitioners to exchange views on the theoretical separation of powers between the president and Congress.

In 1989, the Standing Committee cosponsored a conference on "The Strategy of Sanctions." Conference participants discussed the policy reasons for imposing sanctions, the moral and commercial implications of sanctions, and legal and military aspects of their enforcement. Participants included Standing Committee members Paul Schott Stevens, Stewart Baker, Suzanne Spaulding, and Richard E. Friedman; Richard Haass of the Brookings Institution, Joel Rosenthal of the Carnegie Council on Ethics and International Affairs, and Richard Spier of RAND Corporation.

At the suggestion of six-term chairman Morrie Leibman the Committee began its tradition of holding an annual conference designed to provide an overall "review of the field" of national security law.

After the Cold War

By this point, the Committee's impact could be seen in academia. The number of national security law courses offered at accredited law schools catapulted from 1 in 1974 to 7 in 1984 to 83 in 1994. By 1990, there were three separately authored casebooks on national security law.

The Committee's October, 1991 conference on "The Rule of Law in US Foreign Policy and the New World Order," in Washington focused on how the US could best assist the Soviet Union and other Eastern European nations' transition to democracy. The Honorable Steny H. Hoyer, Chairman of the US Commission on Security and Cooperation in Europe, delivered the keynote address, characterizing the Copenhagen Document as the Magna Carta of rule of law engagement.

In January 1992, the Committee held a conference in Miami on "Strengthening Regional Security, Democracy and the Rule of Law in Latin America and the Caribbean." Among the 40 speakers at the event was the former Ambassador to Panama, Ambler Moss, who at the time of the conference was the Director of the University of Miami's North-South center. He recommended that more attention be paid to Latin America following the Cold War.

The Committee sponsored a conference on "Intelligence in a Post-Cold War World," in Washington, on April 30-May 1, 1992. Seth Hurwitz, Counsel to the President's Intelligence Oversight Board, delivered the keynote address describing political intimidation by police as an essential element of totalitarian rule. Elizabeth Rindskopf, CIA General Counsel, discussed the meetings between the intelligence and law enforcement services of the United States and Russia. She emphasized that former Soviet bloc nations were entitled to foreign intelligence capabilities, so long as they support and do not undermine the basic objectives of the democratic structures they serve. Other speakers discussed institutional reform in the former Soviet bloc.

The Committee and the University of Virginia co-sponsored the Second-Annual "Review of the Field" conference on national security law, in Washington in 1992. The conference was dedicated to the memory of Morris I. Leibman, a former six-term chairman of the Committee and recipient of the Presidential Medal of Freedom, Supreme Court Justice Antonin Scalia, arms control negotiator Ambassador Max. M. Kampelman, US Institute of Peace President Ambassador Samuel Lewis, and National Strategy Information Center President Frank Barnett each paid tribute to Morrie Leibman. Also at the conference, John Shenefield, Committee Chair, led a panel discussion about the Alvarez-Machain forceful rendition case. Colonel Raymond C. Ruppert, who served as General Norman Schwarzkopf's lawyer during Operation Desert Storm, discussed "operational law" in the military.

The Committee hosted several 1992 breakfasts featuring speakers, such as Richard C. Holbrooke and former KGB high officials Vadim Bakatin and General Oleg Kalugin. Holbrooke addressed the Committee as chair of the Bipartisan Commission on Government Renewal, sponsored by the Carnegie Endowment for International Peace and the Institute for International Economics, Holbrooke related the Commission's recommendations to the president-elect for a council system for domestic and economic affairs similar to the national security system. While, Kalugin and Bakatin championed the establishment of oversight of the country's security services as a new realm for the rule of law in Russia.

The Committee hosted a retreat in Eastern Maryland for future members of the Clinton administration to exchange ideas with their outgoing predecessors from the Bush administration and national security law experts.

"I consider the creation of the Standing Committee on Law and National Security one of the most important and most productive initiatives the Association has taken during my professional life. And its record of accomplishments, and its influence both in the law schools and in the bar at large, constitute an achievement of lasting significance, which is helping to guide the response of the nation to the changing circumstances of its security in a prudent and realistic way."
- Professor Eugene V. Rostow

Also in 1992, the Committee hosted a session at the University of Virginia on Vietnam and its aftermath. Later that year, the committee studied "Critical Infrastructure Protection" at a single-day session at the Supreme Court.

On the heels of the signing of the Chemical Weapons Convention in January 1993, the Committee established the "Task Force on Nonproliferation of Weapons of Mass Destruction" under the chairmanship of Richard Schifter, who later that year became the Special Assistant to the President and Counselor, the National Security Council ("NSC"). John H. Shenefield, Chair of the Committee, and John B. Rhinelander, former SALT II negotiator, then assumed a co-chairmanship of the Task Force. Its members draw from the NSC, State Department, Defense Department, Commerce Department, Central Intelligence Agency, US Arms Control and Disarmament Agency ("ACDA"), Congressional staffs, private firms, law schools, and other private institutions.

In its 1993 Annual Report, the Task Force called for a new multilateral nonproliferation regime. In August of that year, John Shenefield posed a series of hypothetical challenges to an esteemed panel of experts at an ABA Presidential Showcase entitled, "Law or Mass Destruction? The Role of Law in Preventing Proliferation of Weapons of Mass Destruction." Among the panelists were William E. Colby, Counselor to the Standing Committee and a Director of the Lawyers Alliance for World Security and former Director of Central Intelligence; David A. Kay, who directed United Nations nuclear inspections in Iraq; James A. Lilley, former US Ambassador to China and South Korea; Elizabeth Rindskopf, General Counsel of the CIA.

The Task Force also undertook an analysis of the "catch-all" regulations promulgated by the White House under the 1990 Enhanced Proliferation Control Initiative. That work resulted in another Rudney publication entitled, "Combating Proliferation with 'Catch-All' Statutory Provisions," published in the National Security Law Report. In addition, the Task Force compiled preliminary surveys of the current US and foreign export control regimes. The importance of the Task Force's work was evident in September 1993, when President Clinton told the United Nations, "One of our most urgent priorities must be attacking the proliferation of weapons of mass destruction, whether they are nuclear, chemical, or biological; and the ballistic missiles that can rain them down on populations hundreds of miles away."

In June 1993, the Committee held a conference entitled, "Anarchy in the Third World," which received high praise from the ABA President, Michael McWilliams: "This is an *excellent* conference. The American Bar Association is proud of the Standing Committee on Law and National Security for putting on these types of conferences, the most successful one of which, I believe, is this one here today and tomorrow."

At the third annual "review of the field" conference Professor John Norton Moore moderated a panel discussion on "The Scope and Significance of National Security Law." John Shenefield, chair of the Committee, moderated a panel examining "New Developments in National Security Law." Deputy US Attorney General Philip B. Heymann delivered the keynote address on the changing interface of the law enforcement and intelligence communities. Director of Central Intelligence R. James Woolsey also addressed the conference. Former Defense Department General Counsel and Standing Committee Advisory Chair Kathleen Buck moderated a panel on "Women in the Military." Former CIA Deputy Director for Intelligence Dr. Ray Cline moderated a panel on "Strengthening Legal Constraints in the Control of Terrorism." Participants included

Professor Jonah Alexander, Professor Alan Gerson, FBI counter-terrorism expert Ronald Klein, and Professor and former Standing Committee member John F. Murphy.

With WMD a priority for the administration, the Task Force on Nonproliferation of Weapons of Mass Destruction and the Committee co-sponsored a conference entitled "Nonproliferation of Weapons of Mass Destruction," in June 1994, just as the tense arms negotiations with North Korea were underway. The Task Force also took a lead role in a chemical weapons convention workshop during the spring of that year.

> ***"Conceived in the bygone era of the cold War, the Committee has been instrumental not only in the development, but in the very creation of a wholly new field of law – national security law, a field that continues to grow in significance and complexity."***
> ***- Paul Schott Stevens, former Chair***

In December 1994, the Standing Committee and the University of Virginia co-sponsored a conference on "Non-Governmental Security Threats: The 'Gray Area' Challenge," in Washington. Stanley Morris, Director of FinCEN, explained that organized criminal groups are moving back and forth between legal and illegal activities and are exploiting political instability and new communications technologies.

The Committee's annual conference in 1995 addressed the "sometimes messy relationship" between the media and the national security establishment; ongoing efforts to "reinvent" the US Intelligence Community; special problems in the counterintelligence area; and threats posed by domestic and international terrorism.

Former Secretary of Defense and House Armed Services Committee Chairman Les Aspin addressed the Standing Committee on the new structure of US intelligence in 1995. Later that year, Senator Arlen Specter recommended to the Committee that the United States intelligence community be "actively engaged" in assisting US business interests to counter growing, industrial espionage efforts by foreign countries.

White House Counsel and former US Court of Appeals Judge Abner Mikva spoke on the importance of maintaining the separation of powers in 1995. Judge Mikva argued that the Independent Counsel Statute merited a revision to guarantee that such investigations would be politically neutral.

Professor Philip B. Heymann, former Deputy US Attorney General and Standing Committee member, published an article in the *National Security Law Report* on the blurring of the jurisdictions between law enforcement and intelligence. The Standing Committee held a two-day conference on "Law Enforcement and Intelligence," in September 1996 where Standing Committee members Elizabeth Rindskopf and Zoe Baird, along with Heymann, participated in a panel discussion entitled "An Overview of a Changing World;" Peter W. Rodman, Jessica E. Stern, Zoe Baird, and David Bickford discussed the challenges posed by the fall of the Soviet Union and the emergence of sub-national military threats on a panel entitled "Political Changes in the World Environment;" and Richard E. Friedman, Chair of the Advisory Committee to the Standing Committee, moderated a panel discussion on "Protection Against the Erosion of Civil Liberties." Participants included Anthony Lewis of the New York Times, Kate Martin of the Center for National Security Studies, and Howard Shapiro of the FBI.

The Committee hosted several breakfasts featuring speakers such as Walter Dellinger and Kunihiko Saito, the Ambassador of Japan to the United States. Walter Dellinger, Acting Solicitor General, spoke about "Executive Branch Lawmaking." Dellinger argued that the executive branch has gained independence by developing a principled and consistent approach to the major legal issues confronting it. The sense of legality in executive branch operations, Dellinger maintained, has allowed the public to entrust greater power in the executive branch than ever before. While Ambassador Kunihiko Saito spoke about the US-Japan security relationship on December 19, 1996. He said that in many ways, the Cold War is not yet over in Asia, citing the relationships between North and South Korea and China and Taiwan as examples. In light of these tensions, the US-Japan security relationship is as vital as ever, Saito argued.

At the Sixth Annual Review of the Field Conference Paul Schott Stevens, Chairman of the Standing Committee, moderated a roundtable discussion of new developments in national security law from a Congressional perspective. Colonel Guy B. Roberts moderated a panel discussion on weapons of mass destruction. Col. Roberts argued that the fear of "loose nukes," especially in the hands of states such as Iraq, had become a prominent national security concern. A discussion of terrorism included Frank F. Cilluffo of CSIS, who argued that intelligence agencies must be willing to recruit those with blood on their hands in order to infiltrate terrorist organizations. John P. O'Neill of the FBI's Counterterrorism Operations Section said that the US devotes most of its counterterrorism resources to state-sponsored terrorism, despite the greater threat posed by radical non-state actors. Representative Porter Goss addressed potential threats such as weapons of mass destruction in the hands of rogue states, fundamentalism, and the rise of new powers such as China, arguing that they demonstrate the necessity of a strong and well-funded intelligence community.

NSA Director Kenneth A. Minihan spoke about the "National Security Implications of the Information Age" at a Committee event in 1997. Minihan said that novel information security threats defy geographic barriers and blur the distinction between military attacks and ordinary crimes. The Standing Committee hosted a number of breakfast meetings throughout the year, with speakers including Judge Royce C. Lamberth, Walter B. Slocomb, and Caspar Weinberger.

> ***"This committee is one of American law's and one of the country's truly fine institutions and has done a remarkable service over the years in helping all of us understand during the Cold War how to balance these very difficult interests, important interests, of respect for the Constitution and the rule of law on the one hand, and of the need for the country to be strong against its serious adversaries on the other."***
> - ***R. James Woolsey, former DCI***

In the first time a sitting FISA Court judge had addressed the public about the court, Judge Royce C. Lamberth, US District Judge for the District of Columbia and Chief Judge of the Foreign Intelligence Surveillance Court, argued that the FISA Court was not a "rubber stamp" for the executive branch. Judge Lambert said that while no FISA applications had been formally denied by the court, many had been revised, withdrawn, or resubmitted with additional information. Walter B. Slocomb, Under Secretary of Defense for Policy, argued that nuclear deterrence is still an important policy in the post-Cold War era, despite the diminished role of nuclear weapons in our defense posture.

Masabide Ota, governor of Okinawa, argued that Washington and Tokyo should do more to recognize the legitimate interests and needs of the Okinawan people. Hong Kong Solicitor General Daniel R. Fung spoke to a Standing Committee breakfast meeting on May 1, 1997. Fung argued that Hong Kong had already begun to serve as an "interpreter and a mentor" on legal issues for China. Former Secretary of Defense Caspar Weinberger argued for continued US engagement. He offered support for fast-track trade authority and NATO expansion, but criticized the Clinton administration for failing to pursue a missile defense system. General Marsh, chairman of the President's Commission on Critical Infrastructure Protection, explained the Commission's mission and some of its recommendations.

During this time, several Standing Committee members contributed articles and studies to the national security law debate. Suzanne Spaulding published an article in the *National Security Law Report* about legislative developments in the area of intelligence. Spaulding discussed the availability of subpoena authority for the CIA Inspector General, legislation on encryption technology, and improving oversight of the intelligence community's clandestine activities. Edwin D. Williamson proposed an international treaty on property rights in a June 11 op-ed published by the *Washington Times*. Such a treaty would prohibit expropriation of property unless done for a public purpose, without discrimination, and with compensation. L. Britt Snider published a monograph on intelligence-sharing entitled "Sharing Secrets With Lawmakers: Congress as a User of Intelligence." Mr. Snider prepared the study as a Visiting Fellow at the CIA's Center for the Study of Intelligence.

Standing Committee member Edwin Williamson moderated a debate entitled "Is International Law Really *Law*" between Professor Robert F. Turner of the University of Virginia and John R. Bolton of the American Enterprise Institute in 1997.

A the seventh annual Review of the Field Conference in November 1997, State Department Legal Adviser David R. Andrews discussed the year's developments in national security law from the State Department perspective. Andrews spoke about designation of thirty organizations, including Hamas, Hizbullah, and the Tupac Amaru movement, as "foreign terrorist organizations" under the Anti-Terrorism and Effective Death Penalty Act of 1996. John Shattuck, Assistant Secretary of State for Democracy, Human Rights, and Labor, described his experiences with issues arising from war crimes and genocide.

"The American Bar Association Standing Committee on Law and National Security has been one of the most important contributors in the global struggle for democracy and the rule of law. Founded by Lewis Powell and run in the grand manner by Morrie Leibman, it has earned the congratulations of all freedom loving peoples."
- Professor John Norton Moore, Director, Center for National Security Law

In 1998 the Committee hosted several speakers, including: L. Britt Snider, Special Counsel to the Director of Intelligence at the CIA and Advisory Committee member, spoke to the Standing Committee about intelligence sharing with Congress on January 15, 1998. Snider described intelligence sharing as one of the most important aspects of relations between the executive and legislative branches, and noted that such sharing has increased dramatically over the past 20 years. General Barry R. McCaffrey, of the Office of National Drug Control Policy, spoke on April 28 about the role of his office in combating the drug problem, the nature of drug use in the United States, and efforts to secure international cooperation in the anti-drug effort.

General Henry H. Sheldon, Chairman of the Joint Chiefs of Staff, spoke at the June 5, 1998 breakfast meeting about nontraditional military interventions and theater ballistic missile defense systems. Representative Bill McCollum spoke to the Committee's September 15th breakfast meeting about challenges to the intelligence community. Rep. McCollum said he believed that terrorism was the single greatest threat to US and western interests in the new century, and argued that a good intelligence capability was the most effective means of combating the terrorist threat.

At the eighth annual Review of the Field Conference a panel discussion on Executive Branch Perspectives heard from Judith A. Miller, Standing Committee Member and General Counsel to the Department of Defense. Miller spoke on the executive branch panel regarding the ABM Treaty and the Law of the Sea Convention. Miller argued that the Senate's failure to consider ratification of the Law of the Sea Convention compromised national security by calling into question the United States' commitment to oceans law and policy. Richard A. Clarke, National Coordinator for Security, Infrastructure Protection, and Counter-Terrorism at the National Security Counsel, spoke at the conference's luncheon about the threat of terrorism, particularly cyber-terrorism, to US national infrastructure. US Supreme Court Justice Sandra Day O'Connor spoke to the Conference's dinner about the career of Justice Lewis Powell and the changes in the national security environment from his appointment to his departure from the Supreme Court.

During 1999, John J. Hamre, Deputy Secretary of Defense, spoke to the Committee about homeland defense and preparedness, arguing that the issue does not get as much attention as it should. Hamre warned that a serious terrorist attack with no prior warning was a possibility that would test the government's response capability to the limit. Hamre said that while the Defense Department must maintain the role of second responder, extreme circumstances could compel its involvement. In addition, James L. Pavitt, CIA Deputy Director for Operations, addressed the Committee off the record at its October business meeting.

> *"In the post Cold War World, it has become common place to note that law and international security are inexorably related. The brilliant thinking required to identify this relationship can easily be missed because this idea today seems both so obvious and simple. Let us remember, then, that it was the ABA's Standing Committee on Law and National Security that first recognized this critical relationship forty years ago and which has worked tirelessly since then to expound upon it for the benefit of all."*
> *- Dean Elizabeth Rindskopf Parker, former Committee Chair*

Standing Committee members published a number of contributions to the national security law discourse over the course of 1999. Standing Committee member Philip B. Heymann published a book entitled *Terrorism and America: A Commonsense Strategy for a Democratic Society*, reviewed in the May 1999 edition of National Security Law Report. Additionally, Richard E. Friedman published an article entitled "Sovereignty and Independence: The Mainland China-Taiwan-United States Triangle" in the November issue of National Security Law Report.

In 2000, the Committee held a conference on the legal implications of catastrophic terrorism, which was an important step toward addressing a soon-to-be pivotal issue. The conference analyzed the United States' legal preparedness for a catastrophic attack. Suzanne Spaulding, the conference convener, argued that in the event of a catastrophic attack, it is likely the public

would be willing to shift authority to the government and compromise civil liberties. Thorough, realistic planning ahead of time would maximize the prospects for protecting civil liberties while taking the steps necessary to protect lives.

Dr. Tara O'Toole of the Johns Hopkins Center for Civilian Biodefense Studies, said that the country's public health system does not have the "surge capacity" – the ability to extend medical care to a greater number of patients than usual – to deal with a catastrophic attack. Dr. O'Toole argued that biology will become the focus of 21st century scientific advancement just as physics was the center of 20th century developments.

Former DCI James Woolsey spoke to a Standing Committee breakfast in 2000 about the security challenges of the 21st century. Woolsey saw a new threat from fanaticism armed with power. He also argued that the administration was doing too little to prevent Iraq from developing weapons of mass destruction.

Elizabeth Rindskopf Parker, Chair of the Standing Committee, delivered comments to the Judicial Review Commission on Foreign Asset Control on the judicial review features of the Foreign Narcotics Kingpin Designation Act of 1999. She argued that designation of narcotics traffickers under the Act should be subject to judicial review. The comments were made in her personal capacity.

At the Committee's 2000 Review of the Field Conference, James L. Pavitt, Deputy Director for Operations at the CIA, spoke at the Conference's luncheon about the role of the clandestine service and Suzanne Spaulding moderated a panel discussion on the Legal Issues Raised by Catastrophic Terrorism. Stephen Dycus, Juliette Kayyem, Tara O'Toole, MD, and Michael Wermuth participated in the discussion, which addressed civil liberties, public health, and use of the military issues that could arise in the wake of a terrorist attack. Additionally, Hans Corell of the United Nations Legal Affairs office spoke about developments in the UN's peacekeeping and rule of law efforts to the Conference's dinner program.

The following year the Committee held a conference entitled "Moving from Polarization to Progress on National Security Issues." Conference participants were remarkably prescient in recommending that the US prepare at the state and local level to prevent terrorist attacks and mitigate their effects, and that the administration focus on the realistic goal of achieving consensus on homeland security issues. Other recommendations included the articulation of a strategic vision in foreign policy and increased consultation between the White House and Capitol Hill.

Post-September 11

With over twenty years of work exploring legal responses to terrorism, the Committee's expertise is tragically in great demand. Members have worked tirelessly to make their expertise available to all parts of the government, media and the public at large in an effort to assist our nation in understanding and reacting effectively and responsibly to terrorism. In response, the Committee established task forces to clarify the legal issues, suggest

"The threats we face are different but the importance of the informed discussion and debate on issues arising at the intersection of law and national security that this Committee was established to foster has never been more evident."
- Suzanne E. Spaulding, Chair, Standing Committee on Law and National Security

responses, and address implementation concerns.

Mike Smith and Stewart Baker are coordinating the Law Enforcement and Intelligence task force; Pam Parizek is coordinating the Terrorist Asset task force; David Anderson is coordinating the Immigration and Border Patrol task force; Dale Bosley and Gene Matthews are coordinating the Public Health/Domestic Response task force; and Lee Zeichner is coordinating the Critical Infrastructure Protection task force.

The Standing Committee held a breakfast meeting to discuss legal and policy responses to the September 11 attacks. Former DCI James Woolsey suggested that Iraq may have been involved in the 1993 World Trade Center bombing, and addressed the burden of proof necessary for the US to take military action. Then he explored how the United States might respond to state versus non-state actors. M.E. "Spike" Bowman, Deputy General Counsel for Intelligence, FBI, argued that that FBI needed more analysts and translators to combat terrorism. Gary Milhollin of the Wisconsin Project on Nuclear Arms Control agreed that governmental institutions must be "bigger" as well as better. Gene Matthews, Legal Advisor to the Centers for Disease Control, provided a primer on public health law in light of biological and chemical terrorist threats. Judith A. Miller recommended that the government increase the number of multi-agency "red teams" devoted to the fight on terrorism. She suggested the formation of a team dedicated full-time to examining how and where terrorists might strike.

In April, the ABA conducted a joint forum with the CDC entitled "State Emergency Public Health Powers and the Bioterrorism Threat." Gene Matthews, Center for Disease Control and Prevention, discussed what public health powers are needed; Larry Gostin and John Chapin, commented on the current state of emergency health powers. The event ended with an open discussion to develop action plans to improve state and local bioterrorism laws and procedures. This forum lead to the creation of a draft "Model State Emergency Health Powers Act" which is currently under consideration by several state legislatures.

In May 2002, in conjunction with the Federalist Society, the Committee presented a program on "The U.S. Response to the International Criminal Court: What Next?" This timely program addressed whether the ICC would provide adequate procedural and structural safeguards and whether the ICC could be effective on the world stage.

At the ABA Annual Conference, the Committee sponsored a mock argument before the court addressing the President's authority under Article II of the U.S. Constitution to convene military tribunals, and whether promulgated Department of Defense military tribunal regulations for detainees at Guantanamo Naval Base, Cuba meet due process requirements from a US and international perspective. Judge Walter T. Cox, III, former chief Judge of the United States Court of Appeals for the Armed Forces, Elizabeth Rindskopf Parker, Dean, McGeorge School of Law, and John Podesta, former Chief of State to President Clinton sat as judges. Major General (ret) John D. Altenburg, Former Deputy JAG, US Army and Ruth Wedgwood, Director, International Law and Organization, SAIS argued for the government's position and Timothy Edgar, Legislative Counsel to American Civil Liberties Union and Terence F. MacCarthy, Executive Director, Federal Defender Program, Inc., presented the detainees' arguments.

In October, the Standing Committee and McGeorge School of Law co-hosted a Supreme Court Conference entitled "The Role of International Law in Protecting United States National

Security. This seminar brought together knowledgeable former and current legal advisors in the national security arena to identify and explore the roles of international law in a post-September 11 world. Participants recognized that the current template of rules of war do not cover all of the facts we face today. The war on terrorism is a war between a sovereign states and a group of transnational, non-state actors/terrorists who do not distinguish themselves from civilians, target civilians, and do not follow other established laws of war. The United States' actions in this conflict will contribute to the development of customary international law applicable to this scenario, and the Committee's continued commitment to enhancing understanding of the importance of the rule of law will once again help shape our nation's response to a grave national security threat.

2002 – 2003
Advisory Committee Members

Chair Richard Friedman, Chair, National Strategy Forum.

James E. Baker, Judge, U.S. Court of Appeals for the Armed Forces and former Legal Advisor, National Security Council.

Stewart Baker, private practice and former General Counsel, National Security Agency.

Richard Blau, private practice in Tampa, Florida.

Eugene Bowman, Deputy General Counsel, Federal Bureau of Investigation.

Willie Curtis, Professor, U.S. Naval Academy.

Lori Damrosch, Professor, Columbia University School of Law.

Albert Harvey, private practice, Memphis, TN and former Board of Governors' liaison to Standing Committee.

Josh Levy, private practice, Washington, DC and former Clerk to U.S. District Courts, Southern District of Florida.

Hamilton Loeb, private practice, Washington, DC

James McDaniel, private practice, St. Louis, Missouri and former member, ABA Board of Governors.

Elizabeth Rindskopf Parker, Dean of the UOP McGeorge School of Law and former Standing Committee Chair; former General Counsel of the University of Wisconsin; former General Counsel, CIA and NSA.

Pamela Jimenez Parizek, Associate Managing Director, Kroll Worldwide and former Senior Counsel, Securities and Exchange Commission.

Ann Petersen, private practice, former General Counsel, Department of the Air Force.

Steve Preston, private practice and former General Counsel, Navy.

Walter Gary Sharp, Sr., Director, Global & Functional Affairs, Bureau of Legislative Affairs, US Department of State.

Paul Schott Stevens, private practice, and former Chair of Standing Committee, served as first Legal Adviser to the NSC and as NSC Executive Secretary under General Colin Powell.

Richard Thornburgh, private practice, Washington, DC and former United States Attorney General.

Theresa Van Vliet, private practice, Miami, FL.

Ruth Wedgwood, Professor, Yale University School of Law, and Johns Hopkins School of Advanced International Studies.

Michael Wermuth, Senior Policy Analyst, RAND Corporation and former Project Director for the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction.

Lynne Zusman, private practice, Washington, DC.