

**Law and National Security
INTELLIGENCE REPORT**

Volume 13, Number 3

Robert F. Turner, Chairman

March 1991

White House Is Upgrading Council on Environmental Quality

The United States has made substantial improvements in environmental quality during a time when the economy has grown by 75 percent, declared Michael R. Deland, chairman of the White House's Council on Environmental Quality (CEQ). Speaking at the Standing Committee's breakfast in Washington, D.C., on February 21, Deland said that CEQ was established in 1970 and that Russell Train was the first Chairman.

The Council's first annual report recommended creation of what became the Environmental Protection Agency (EPA). As EPA's role increased over the years, that of CEQ diminished. Mr. Deland stressed, however, that President Bush has been reinvigorating CEQ. When Deland arrived at CEQ there were nine on the staff—the number is now 25, moving to 40.

Deland said the primary mission of CEQ is to serve as the President's in-house environmental adviser. He regularly meets with the President and attends Cabinet meetings and all the meetings of the White House's Domestic Policy Council and the Economic Policy Council, and the National Security Council when appropriate.

Secondly, CEQ serves as the arbitrator, conciliator, and honest broker among the various federal departments and agencies. CEQ attempts to resolve differences before they have to be raised to the President for decision. CEQ, added Deland, increasingly serves as a coordinator of interagency matters. Thirdly, CEQ serves as the guardian of the National Environmental Policy Act (NEPA), which was the statute that created the environmental impact statement process as well as CEQ.

CEQ is attempting to play a catalyst role in changing the American mindset about the environment. The idea, underscored Deland, is to move the focus from the "discharge end of the pipe" and spending billions of

dollars to clean up messes after the fact—toward looking at the internal production processes and finding how they might be changed to prevent pollution at the outset. In line with its heavy emphasis on pollution prevention, CEQ promotes energy efficiency, conservation, and recycling.

It is possible to have both a healthy environment and a sound economy, underscored Deland. The Bush environmental agenda is to harness the marketplace in service of the environment. He cited as examples worthy of emulation the "Pollution Pays" program of the 3M corporation, which has saved a half a billion dollars, and Chevron's SMART (Save Money And Reduce Toxics) initiative.

Under an Executive Order promulgated in December 1990, CEQ is establishing a presidential commission on environmental quality. It will include 24 leaders from the environmental community, industry, academia, and other sectors. Among other things, the action-oriented commission will work to take good ideas from the marketplace and ensure they are replicated.

Environmental quality is intimately related to law and national security, noted Deland. In a recent example,

Continued on page 2

**Saddam Hussein's Transgressions:
War Crimes Trial Urged**

"Crisis in the Gulf: Enforcing the Rule of Law" was the theme of a conference held in Washington, D.C., on January 30-31. Drawing some 200 persons, this timely gathering was organized by the ABA's Standing Committee on Law and National Security. In his welcoming remarks, former ABA President David Brink said the key reason why the United States is fighting in the Persian Gulf is to advance the rule of law throughout the world. The United States reveres, and is willing to pay a high price in lives and resources, for what is truly a war

Continued on page 4

Council on Environmental Quality

Continued from page 1

the Department of Defense (DOD) coordinated with CEQ at the outset of Operation Desert Shield about DOD's desire to take two mission-related actions: (1) increase nighttime military flights out of Westover, Massachusetts, and (2) detonate mines from the air in exercises in Nevada. However, noted Deland, DOD has not asked CEQ to grant waivers or exemptions from environmental laws. Deland added that Secretary Dick Cheney and Deputy Secretary Don Atwood are working hard to create an environmental ethic throughout DOD.

Another example of the environment and national security overlap is Saddam Hussein's release of millions of gallons of oil into the Persian Gulf. This intentional act reminds us of the importance of, and the potential virulence of, eco-terrorism.

CEQ, noted Deland, also is increasingly involved in providing the President with advice on energy policy. He emphasized that the just released National Energy Strategy clearly has national and international ramifications. Also having important long-term impacts on national security is the whole issue of global climate change. Global change involves such interrelated matters as climate, energy availability and use, water, and economic development. CEQ is an active member of interagency groups focusing on global change policy and research. Also, CEQ has a lead role in preparing the U.S. report for the 1992 United Nations conference on environment and development set for Brazil.

Other international aspects of CEQ's work include stationing a CEQ staff member in Moscow to help the U.S.S.R. create rational approaches to the environment as it attempts to move away from communism; coordinating with China so that it will minimize environmental damage as it attempts further industrialization; promoting transfer of U.S. environmental and energy technologies to other nations; and, examining what can be done about pollution problems in Eastern Europe (e.g., promoting there the concept of "emissions trading").

In response to a question and suggestion from Frank Barnett, educational consultant to the ABA Standing Committee, Deland commented that he has discussed with Lieutenant General Henry Hatch, chief of the U.S. Army Corps of Engineers, how the Corps and other U.S. entities can collaborate in assisting Eastern Europe to deal with its tremendous pollution problems. Aside from the Corps' capabilities to act abroad, Deland also expressed the belief that the Corps should be given authority to clean up Superfund sites in the United States.

James Arnold Miller

National Energy Strategy

The Bush administration's national energy strategy released on February 21 ran into a cacophony of criticism from many quarters when it was presented to Congress and the public. The strategy, 214 pages plus appendices, covers an immense range of subjects from exploratory drilling in the Arctic National Wildlife Refuge (ANWR) to the deregulation of natural gas pipelines and the repeal of a 50-year-old law that limits who can enter the wholesale electricity generation market. This strategy would promote new nuclear power plants and the promotion of oil drilling on the outer continental shelf—two actions sure to raise the hackles of certain environmental groups.

One early critic of this strategy of Admiral James Watkins, USN (Ret.), the Secretary of Energy, was a former Deputy Secretary of Energy, John Sawhill, who is now President of the Nature Conservancy. Mr. Sawhill called for negotiations between environmentalists and the would-be oil drillers in sensitive areas to develop a package of gasoline taxes and other conservation-enhancing measures such as higher fuel efficiency standards. Absent such negotiations a stalemate in energy policy will result, said Sawhill.

There was a suggestion buried deep in the National Energy Strategy document that would encourage people who own old cars to junk them and buy new ones which are more fuel efficient and cleaner. No federal financing plans were offered!

Senator J. Bennett Johnston (Democrat-Louisiana), the chairman of the Senate Committee on Energy and Natural Resources (before which your editor has testified to urge opening ANWR to exploratory drilling) and his Republican opposite, Senator Malcolm Wallop of Wyoming, have cosponsored a bill to open the ANWR coastal plain to environmentally controlled exploratory drilling. Close observers give it a 50-50 chance of passage.

Our readers should understand that the ANWR coastal plain constitutes only eight percent of the Wildlife Refuge's 19.8 million acres. The fear of environmentalists is that drilling would endanger the lifestyle of the some 160,000 Porcupine Caribou which use portions of the coastal plain for four to six weeks in the summer. The same arguments were made with respect to the projected danger to the Central Arctic Caribou herd during the period of oil development and production at Prudhoe Bay, some 65 miles west of ANWR. That herd has learned to love the pipeline and has actually grown from 3,000 to 18,000 animals. A 65-mile pipeline from ANWR to Prudhoe Bay would probably have the same effect on the Porcupine Caribou!

But development of ANWR and the continental shelf

are just some of the controversies the new energy strategy has spawned. There will be many more.

It is sometimes wise to examine how others, not part of the domestic political fray, see us. After pointing out that Admiral Watkins worked on the National Energy Strategy in the open for 18 months, holding "umpteenth public hearings," the London *Economist* commented:

Until last autumn most energy lobbyists were guardedly positive. Then the Energy Department went quiet, and word slipped out that the White House was gutting most of its proposed conservation measures while strengthening the emphasis on increased domestic production. The lop-sided result is what riles the greens.

Mr. Watkins can say that he sympathizes with green views on the need for conservation but has been overruled by the troika that presides over George Bush's domestic policy: John Sununu, the chief of staff, Richard Darman, the budget director, and Michael Boskin, the chief economic adviser. He will not be the first cabinet secretary to sell this line of being a decent person savaged by a three-headed Cerberus in the White House.

In Greek and Latin mythology, Cerberus is a three-headed dog which stands guard at the entrance to the nether regions. Democrats might try to paint President Bush as the devil and adopter of the alterations to the Watkins plan by the White House Cerberus. It will be an interesting contest to watch and report on.

William C. Mott

Military Law and The Law of War

Events in the Middle East have brought to the forefront numerous international legal issues. These issues range from war crime questions to the very "rule of law" itself. An international organization dedicated to studying such concerns is the International Society for Military Law and the Law of War. The Society, which was founded in 1955 at the University of Strasbourg, has the following objectives: the study of comparative military and disciplinary law; the harmonization of municipal systems with international agreements in the development of a law of war; and research into the use of law for the protection of human life in wartime.

The Society is presently composed of over 1,000 members in 38 countries representing leaders from academia, the bar, the judiciary, and the military. Members actively meet to discuss issues of common interest and work through standing committees on criminology, military history and disciplinary law, and the protection of human rights.

Twice a year the Society publishes *The Military Law and Law of War Review* which serves as a forum for

thought and discussion. Each issue contains articles by leading scholars and practitioners as well as reviews of books and other publications of general interest to the members.

Yearly membership in the Society is \$24.00, and includes a subscription to the aforementioned *Review*. Applications for membership may be sent to the Society's U.S. Correspondent: Major Jeffrey F. Addicott, International Society for Military Law and the Law of War, c/o International Law Division, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781.

War Powers Litigation

There have been several recent challenges to the authority of the President to deploy troops and initiate action in the Persian Gulf crisis. In the U.S. District Court for the District of Columbia on December 13, two cases were decided separately on motions for preliminary injunction. Each court concluded that such efforts were not ripe for judicial decision. They differed, however, on whether the cases should be dismissed as nonjusticiable political questions.

In *Dellums v. Bush* (No. 90-2866), 53 Congressmen and one Senator sought to enjoin the President from initiating an offensive attack against Iraq in the absence of a declaration of war (under Article I, Section 8, Clause 11, of the U.S. Constitution) or other explicit authorization from Congress. Judge Harold Greene concluded that plaintiffs had standing to preserve their right to vote on the issues. He also rejected the Executive Branch's argument that the decisions to determine whether an offensive action constitutes an act of war—and whether to take such action—were nonjusticiable. The court was of the view that use of the U.S. forces deployed would no doubt qualify as "war," and that congressional approval would be required if Congress so desired. However, Judge Greene found the case was not ripe for decision because Congress itself had not, at that time, taken action to assert its constitutional authority; nor had the Executive Branch committed itself to a particular course of action. Accordingly, plaintiffs' motion for a preliminary injunction was denied.

In contrast, Judge Royce Lamberth accepted the Executive's argument that the case before him, *Ange v. Bush* (No. 90-2792), should be dismissed as nonjusticiable. Plaintiff in this case was in a National Guard unit deployed in the Gulf. He claimed that deployment violated the War Powers clause in the Constitution, as well as the War Powers Resolution of 1973, and sought to return to the United States. Judge Lamberth viewed plaintiff's constitutional challenge as an attempt to have the judiciary intrude into political and policy considerations in the area of foreign affairs, matters where the

Continued on page 4

War Powers Litigation

Continued from page 3

court "lacks expertise, resources, and authority to explore." Judge Lamberth noted that his decision was not intended to permit the President unfettered ability to interpret and exercise the power of the Executive in this area, and that the Congress itself was not without recourse and could take action to counter the President's deployment of forces. Moreover, Judge Lamberth also concluded the case was not ripe for decision: The allegation that the President would bypass Congress and involve the United States in a war without congressional participation was too speculative to constitute a real or threatened harm that would permit judicial review.

Subsequently, Congress voted its support of military action in the Gulf and, on January 16, 1991, the conflict in the Persian Gulf was joined.

W. George Jameson

Saddam Hussein's Transgressions

Continued from page 1

of principle.

Eugene Rostow, Jennings Randolph Distinguished Fellow at the United States Institute of Peace, said in a conference luncheon address that U.S. aims in the Gulf War are simple: (1) to make Iraq leave Kuwait, to restore the legitimate Kuwaiti government, and reverse Iraq's annexation of Kuwait, and (2) to establish security arrangements in the Middle East area. In short, the United States seeks to restore Kuwait, end Iraq's aggression, and deter future Iraqi aggression.

Michael Matheson, principal deputy legal adviser to the Department of State, said the Gulf crisis demonstrates the striking disregard of Saddam Hussein for all the norms of international behavior. His Excellency Shaikh Saud Nasir Al Sabah, the Ambassador of Kuwait to the United States, declared in his luncheon address that Saddam has violated every basic law, right, treaty, and convention of international law. Saddam's transgressions against the rule of law include:

- He launched the invasion of Kuwait on August 2, 1990, and then annexed it. He moved to systematically loot treasures and crush freedom and human rights. Police detentions, torture, and murders have been common.
- After invading Kuwait, Saddam used thousands of non-Iraqis in both Iraq and Kuwait as hostages—including as "human shields"—and on many occasions violated the rights, privileges, and immunity of diplomats under the Vienna Convention and customary international law.

- Saddam launched attacks by Scud missiles against non-military populations in Saudi Arabia and Israel (a neutral in the conflict).
- He intentionally released millions of gallons of oil into the Persian Gulf.
- Saddam has mistreated prisoners of war, including subjecting them to humiliating public displays, torturing and drugging them to elicit "confessions," and using them as "human shields."

Matheson said Iraq's justifications for invading Kuwait have been widely rejected by the international community. Iraqi dissatisfaction with Kuwaiti economic behavior (especially concerning oil production), Iraqi territorial claims, and/or attempting to link Kuwait to the Israeli-Palestinian dispute—do not justify the invasion. Concerning the latter matter, University of Virginia School of Law Professor John Norton Moore said nothing in the United Nations Charter entitles a nation to conduct aggression just because there is an unresolved political-military conflict elsewhere in the world. Moore said there is no legal basis for any of Saddam Hussein's arguments in support of the aggression. The invasion, he noted, is a clear and massive violation of the rule of law.

Speakers pointed out that since the invasion of Kuwait the United Nations Security Council has passed 12 resolutions. For example, Resolution 678 of November 28, 1990, which Matheson said was "historic," authorized nations to take all necessary means to obtain the Iraqi withdrawal. That resolution set the deadline of January 15, 1991, allowing some six weeks for Iraq to leave Kuwait.

The Gulf crisis demonstrates how the United Nations was designed to operate, observed Matheson. The Security Council's authorization in the case of this Gulf crisis was the first sustained act of the Security Council to use its power. Eugene Rostow believes the use of force by the United States and its coalition partners represents collective self-defense blessed by the Security Council but is not a full-fledged United Nations operation.

Several speakers said they would like to see the anti-Iraq coalition and/or the United Nations Security Council establish a war crimes tribunal when the Gulf conflict ends. The tribunal could treat "grave breaches" under the Geneva Conventions of 1949 as well as crimes against peace and against humanity as were treated at the Nuremberg and Far East military tribunals after World War II. There is, however, an obvious major problem in convening a war crimes trial for Saddam Hussein. As St. Louis University School of Law Professor Howard S. Levie put it: "**To make rabbit stew, you have to catch the rabbit.**" Allan Gerson, visiting fellow at the Washington Institute for Near East Policy, urged that a trial be conducted **even if Saddam is not**

apprehended—the point would be to brand the Iraqi leader a war criminal.

Charles Brower, previously a judge with the United States-Iran Claims Tribunal, said that Security Council Resolution 674 of October 29, 1990, constituted a judgment against Saddam and his regime for violation of international law. Therefore, reparations are due to the victims. The resolution invites states to collect relevant information on claims against Iraq concerning which restitution will be sought. The victims include Kuwaitis, people from other nations who were held hostage and otherwise victimized in Kuwait and Iraq, and those in Saudi Arabia and Israel hit by Iraqi Scud missiles. Several speakers suggested that if the winners of the war extract excessive reparations, Iraq's ability to recover economically and to rejoin the international community may be impeded. A large challenge would be creating what many feel will be necessary: a **multilateral** claims adjudication mechanism, even though this would be unprecedented.

Professor Moore predicted that after Saddam is militarily defeated, there will be a major "debate." The debate will be over whether Saddam should, after all of his egregious actions both before and during the war, be permitted to pull his forces out of Kuwait with no other significant consequences for him. When this debate inevitably begins, Moore suggested, the nations of the world that are truly committed to the rule of law must remember all of Saddam's transgressions. Moore urged America's leaders to refuse to allow a return to "business as usual."

The conference included discussion on the applicability of the War Powers Resolution of 1973. Robert F. Turner of the Center for National Security Law at the University of Virginia School of Law, and chairman of the ABA's Standing Committee on Law and National Security, said that in his opinion the resolution is unconstitutional. Therefore, it is moot as to whether or not the Bush administration complied with it in the Gulf crisis.

The conference also treated the relationship of the

Vietnam war to the Gulf crisis, and how U.S. "peace" activists have treated each conflict; ideas concerning possible postwar political, military, and economic arrangements for the Middle East region; and, the need to do something about the potential of postwar Iraq to restore its programs to produce weapons of mass destruction.

James Arnold Miller

(Single copies of a summary report on the conference are available from the Standing Committee's office, tel. 703-242-0629.)

Book Review

U.S. Foreign Intelligence: The Secret Side of American History by Charles D. Ameringer. Lexington Books, 1990, 405 pages, \$24.95.

The current military/intelligence complex in this country is a direct descendent of customs and usages dating back at least to the Revolutionary War. The history of the American Revolution is replete with uses of intelligence and espionage, and the United States has strong roots in conspiracy and intrigue. From the famous traitor Benedict Arnold to the renowned hero Nathan Hale, the spies of this period set the stage for what was to be a long history of foreign relations supported by intelligence gathering and dissemination.

The use of intelligence to influence policy slowly evolved after the Revolution of 1776. Teddy Roosevelt's "taking" of Panama could never have been achieved without the premeditated intervention and influencing of events undertaken by his administration.

Continued on back page

Calendar of Events

April 3-4	National Security Conference on "National Security Law: Review of the Emerging Field," Washington, D.C.
April 18	Breakfast Meeting, University Club, Washington, D.C.
May 29-30	National Security Conference on "Preserving the Separation of Powers in Foreign Policy: Checks and Balances and the New Congressional Activism," Washington, D.C.
October	National Security Conference on "Strengthening Regional Security and the Rule of Law in Latin America and the Caribbean"

For further information on any of these events, contact James Arnold Miller, 703-242-0629.

Book Review

Continued from page 5

During the Red Scare of 1919-1920, U.S. Attorney General A. Mitchell Palmer created the General Intelligence Division, with a younger J. Edgar Hoover in charge of "kicking ass and taking names." Despite periods of so-called "high moralism" (as Secretary of State Stimson said, "Gentlemen do not read each other's mail"), sophisticated intelligence techniques assisted this country in winning World War II. With the breaking of RED and PURPLE and with the success of MAGIC and ULTRA, the Allies were able to determine not only what the Japanese and Germans were planning, but also to maintain a check on the effectiveness of Allied deception, usually enabling the Allies to distort reality and mislead the enemy.

This lineage of American foreign intelligence has been traced by professor Charles Ameringer, head of the Department of History at Pennsylvania State University.

Ameringer presents a well-written yet somewhat disappointing book. Drawing largely upon readily available reference materials such as legislative reports and other works of non-fiction, he examines the path of intelligence in this country and the way it has influenced and indeed shaped relationships with friend and foe alike. Beginning with the country's inception, Ameringer attempts to trace his historical perspective through the recent tenure of late Director of Central Intelligence William Casey and, subsequently, through the highly celebrated trial of Marine Corps Lieutenant Colonel Oliver North.

From his extensive research, Ameringer offers new insights into not only the existence of, but also the role and importance of intelligence and covert action in influencing world events and making the world more secure. His command and explanation of events surrounding the Watergate era, and especially his portrayal of the deliberations of the Church Committee, are both interesting and enlightening. However, there are several problematic issues which detract from the overall value of the book as a reference tool for scholars.

To begin with, the author's apparent bias against covert action as a tool of properly coordinated intelligence activity is both distracting and bothersome. It represents, in an otherwise objective writing, almost a personal diatribe against this type of activity. In addition, the author appears to lack thorough knowledge of covert activity, and attempts to make up for this by an inordinate reliance upon the types of "kiss and tell"

bestsellers which were so popular in the earlier post-Watergate era.

Furthermore, although he attempts to present a cogent picture of current intelligence activities, his information is somewhat dated and therefore not as useful as a more current explanation might be. As a result, the work will not provide a great deal of assistance to scholars and historians interested in contemporary intelligence activities. For instance, Ameringer's failure to note reform at CIA and elsewhere within the U.S. intelligence community is somewhat analogous to appearing before a judge and citing authority that has been overruled. More thorough research would undoubtedly have fleshed out these and other changes. Such deficiencies further discredit the book.

Perhaps the greatest oversight in the book is Ameringer's failure to explore the Iran-Contra affair in greater detail. In particular, the in-depth congressional report, released in 1987, explains the role in the affair of intelligence and of "the enterprise," the system through which funds were collected, managed, and covertly passed through "back channels" to the resistance in Nicaragua (in essence creating a "private" American foreign policy). Also, the issue of "plausible deniability," which in the estimation of many is one of the more important aspects of American foreign policy, is not traced effectively through the Poindexter trial and the McFarlane testimony before the select intelligence committees of the House and Senate. Any history of modern U.S. intelligence should not neglect what can only be described as colossal events.

Ameringer concludes by suggesting the need for change in the intelligence community. He then requests that, "in the meantime, don't shoot the piano player." Those students, scholars, and citizens who are deeply interested in this and related topics even if ultimately disappointed by the book, will be pleased that Professor Ameringer agrees that the player should continue even while debate on the exact tune to be played continues.

Finally, Ameringer's suggestion that the President's Foreign Intelligence Oversight Board be given the powers of a federal grand jury appears to present the type of constitutional separation of powers problem that was resolved in favor of the independent counsel in the recent *Morrison v. Olson* decision by the U.S. Supreme Court. However, the call for a more independent board, free from the type of executive influence that has previously existed, is certainly a thought-provoking and possibly useful idea if not taken to extremes.

Mark R. Heilbrun

The Intelligence Report, which is published monthly, reviews court cases and books concerned with (1) national security, and (2) intelligence. It also reports on developments in these two fields in the U.S. and abroad, and, in addition, on national security conferences sponsored by the Standing Committee on Law and National Security. The views expressed in this publication are not necessarily those of the American Bar Association or the Standing Committee on Law and National Security. Questions or comments should be directed to W.C. Mott, Editor, 1501 Trombone Court, Vienna, VA 22182, Tel. 703-242-0629, Fax. 703-938-1727.