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THE U.S. NAVY AND THE MARINE POLLUTION CONVENTION

by James Kraska

In step with society's increasing environmental awareness, navies are striving to become environmentally friendly. The U.S. Navy, for instance, has initiated a program called "Environmentally Sound Ships of the 21st Century," which aims to bring Navy vessels into compliance with tough environmental standards within the next decade. Other maritime powers are following suit. Canada recently launched its newest frigate, the HMCS *Vancouver*, which entirely sterilizes all overboard discharge.¹ Western European navies have also initiated environmental programs.² These programs will attempt to reduce or eliminate shipboard solid waste discharges of trash, garbage, plastics, and medical waste—refuse which traditionally has been dumped overboard into the oceans.

The most comprehensive agreement to control solid waste discharges is MARPOL 73/78.³ Annex V of the Convention aims to prevent the disposal of plastics and garbage from vessels at sea.⁴ The U.S. is at the forefront of working to eliminate solid waste discharges by becoming the first nation to apply Annex V to its warships and submarines. Historically, naval vessels are afforded sovereign immunity from maritime regulations such as MARPOL.⁵ This is the case with MARPOL generally, but the Marine Plastic Pollution Research and Control Act,⁶ which implements Annex V of the Convention under U.S. law, requires unprecedented full compliance by the Navy. Thus, environmental law has opened the first chink in the ancient armor of state immunity for warships.

The current law requires the Navy to be in full compliance by December 31, 1993.⁷ The unique mission and operating characteristics of warships, however, may make compliance with Annex V impractical.

The Navy has two compelling strategic reasons for achieving compliance with MARPOL Annex V: (1) Potential enemy vessels can gather intelligence about U.S. forces, such as locations and numbers of ships, by studying floating waste discharges left in their wake. Reducing or eliminating this discharge minimizes the "waste signature" of U.S. vessels. (2) Compliance would allow warships to operate worldwide without regulatory constraints or inappropriate dependence on shore facilities. The difficulties of compliance are related to the unique nature of warship operations. Unlike commercial vessels, war-

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Standing Committee Helped Draft 1984 Law

First Circuit Applies CIA Information Act

Nine years ago the Standing Committee played a central role in bringing together groups as diverse as the American Civil Liberties Union and the Central Intelligence Agency to draft an important new statute governing access to CIA operational files through the Freedom of Information Act (FOIA). That statute has now been tested in *Sullivan v. Central Intelligence Agency*,¹ with the result that the classified information sought remains protected.

The plaintiff, Sherry Ann Sullivan, submitted FOIA requests to a total of nine government agencies seeking information about her father, Geoffrey Sullivan, who flew from Cozemel, Mexico, with a flight plan destination of Tegucigalpa, Honduras, on September 24, 1963, and was never heard from again. Ms. Sullivan became convinced that her father had been involved in a CIA-sponsored activity over Cuba—perhaps air dropping propaganda materials—and sought to learn the details.

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ships may patrol at sea for extended periods of time rather than simply cruising quickly from port to port. Because warships travel worldwide and in remote locations, they do not always have convenient access to port waste management facilities. All warships, but especially submarines, have severe size, weight, and space constraints. In addition, waste treatment processes aboard submarines cannot be allowed to contaminate the carefully controlled artificial atmosphere. The trend toward building smaller vessels, such as frigates, compounds these difficulties. Shipboard waste treatment equipment must be specially designed to operate reliably in combat conditions and meet appropriate standards for shock, vibration, and acoustic and electromagnetic signatures, all of which could reduce the effectiveness of shipboard electronics or assist enemy sensors in locating or identifying the vessel.

Annex V contains restrictions on the disposal of plastics and garbage from ships. "Garbage" is defined as "all kinds of victual, domestic, and operations waste... generated during the normal operation of the ship and liable to be disposed of continuously and periodically"⁸ Dunnage, lining, and packing materials may not be disposed of within 25 nautical miles from the nearest land; and paper, cloth, glass, and metal may not be disposed of within 12 nautical miles from the nearest land.⁹ The Navy is developing shredding and pulping equipment to meet or exceed these regulations. But two other regulations are creating great difficulty for the Navy: Annex V forbids any release of garbage or trash in "special areas," even if the garbage has been treated, and this Annex also established a total ban on all vessel discharges of plastic.

Special Areas

Annex V bans the release of all garbage and trash (except food wastes beyond 12 nautical miles) into "special areas."¹⁰ "Special areas" are enclosed or semi-enclosed seas that are considered to have especially vulnerable ecosystems. These include the Baltic Sea, the Mediterranean Sea, the Black Sea, the North Sea, the Red Sea, and the Persian Gulf. The number of special areas is likely to increase, and in the future may include the Gulf of Mexico and the greater Caribbean. Ironically, special areas include some of the most strategically critical and closely patrolled seas on Earth.

The ban on discharges in special areas requires that ship wastes generated in the special areas be

stored onboard the vessel until they can be off-loaded in a proper port treatment facility. This restriction poses a potentially insurmountable problem for Navy vessels, because there is not adequate available or foreseeable technology that would enable shipboard treatment and storage of all solid wastes. Storage of wastes onboard for more than a few days is impossible due to sanitary and health considerations, insufficient storage space, and the increased risk of fire. Moreover, warships often are required to loiter on-station in special areas for extended periods of time, compounding these problems.¹¹ In consideration of these factors, Navy vessels operating in special areas for more than 3 days discharge garbage and trash into the ocean.¹² Unless Congress changes the law, this practice will be in violation of the MPPRCA at the end of this year.

Ban on Plastics

The MPPRCA also prohibits the "disposal into the sea of all plastics . . ." ¹³ In an effort to comply with the ban, the Navy is limiting the amount of plastic brought onboard by leaving plastic wrapping and packing ashore, replacing plastic with nonplastic or biodegradable plastic items, and storing nonfood-contaminated plastics onboard for up to 20 days, as space permits. A shipboard plastic waste processor (PWP), solid waste pulper (that pulverizes mulchable materials, such as galley wastes and paper) and a shredder (that shreds metal, glass, and ceramic wastes) should be installed on the surface fleet by 1998. These devices treat the entire stream of shipboard-generated solid wastes. The PWP will sanitize plastic refuse onboard and mold it into easily stored solid "bricks" that may

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Book Review

Making War: The 200-Year-Old Battle Between the President and Congress over How America Goes to War

by John Lehman
Charles Scribner's Sons,
New York, 1992

Former Navy Secretary John Lehman's study of the battle over war powers makes timely reading as Congress and the President once again battle for control of the helm of the ship of state—this time over the deployment of troops to Somalia, Haiti, and perhaps Bosnia-Herzegovina as well.

While the book includes some useful constitutional history (while not a lawyer, Lehman does hold a Ph.D. from Pennsylvania) and some quite interesting anecdotes from earlier periods, he is at his best in discussing some of the "case studies" of the post-Vietnam era—many of them written from a first-hand perspective.

He pulls no punches in expressing his disdain for the modern practice of micromanagement of the military by unelected congressional staff members—a group he calls "nothing less than a fourth branch of the government"—and he provides some powerful statistics to make his case. Noting that the entire staff of the Senate Foreign Relations Committee in 1945 consisted of "one clerk serving on a half-time basis, an assistant clerk, a secretary, and the part-time services of another secretary," he notes that since 1974 congressional staffs have been quintupled and number approximately 39,000—"the equivalent of three full army divisions with an annual budget cost of \$2.5 billion, of \$5 million per member." To illustrate the impact of this growing bureaucracy on the Pentagon, he quotes figures provided by President Bush for fiscal year 1989, during which the Pentagon devoted 500 man-years and over \$50 million just to write the more than 850 reports required by Congress—only a small portion of the 750,000 annual inquiries and requests the Pentagon receives from the 107 congressional committees and subcommittees claiming oversight of Defense and even the occasional Member who does not sit on any of these bodies. According to Lehman, no less than \$10 billion a year is invested in various aspects of "congressional oversight."

Given his own impressive history as an advocate of large carriers and sophisticated, "hi-tech" weaponry—a favorite target of the Military Reform Caucus in the 1980s—it is not surprising that Lehman takes delight in observing the widespread successes of such hardware in achieving a speedy and (at least in terms

of American casualties) relatively low-cost victory in the Gulf War. His discussion of the role of Congress in undermining deterrence during Operation Desert Shield is insightful, as is his general discussion of the background and implementation of the 1973 War Powers Resolution in situations from Vietnam and Mayaguez to Panama and the Gulf. His conclusion that the Desert Storm victory "drove the final nail into the War Powers Resolution," however, may prove to be premature and excessively optimistic.

The book is reasonably well footnoted for a popular study of this type, and some of his most powerful anecdotes are credited to others—such as the account from his former mentor, the late Senator John Tower, who as Chief START negotiator in Geneva reflected that he was:

naturally disturbed when I was told by Ambassador Glitman that a member of a delegation of congressional observers had taken [Soviet negotiator] Karpov aside at a reception in Geneva and told him not to worry about SDI. Glitman had heard this Senator say: "Congress is going to take care of" the program. I could only imagine how much comfort that might have given the Soviets.

Although regarded by many as one of the "hard-liners" of the Reagan Administration, Lehman speaks disdainfully of America's experience with covert action—concluding: "One cannot escape the conclusion, upon reviewing 215 years of American covert operations, that we haven't conducted them very well and that we might have been better off not to have tried." Characterizing them as often "blighted by amateurism, fiasco, and chicanery interrupted by some notable, if rare, successes," Lehman concludes that "when peace returns, such actions are fundamentally at odds with our government principles and institutions . . ."

Some readers may be surprised that, in his final chapter, entitled "The Power of Money," Lehman seems to concede ultimate legislative supremacy in the business of making war. To be sure, control over the nation's purse-strings is by design a formidable power—and it does ultimately give Congress tremendous influence to terminate sustained intensive hostilities. It would be unfair to criticize Lehman for not providing a more sophisticated analysis of this issue—but such a study is very much needed.

While not a great original contribution to the debate over the separation of constitutional war powers, Lehman has provided us with a highly readable, reasoned, and in general very useful contribution to a growing body of literature dealing with both legal and policy issues involving warmaking. It is recommended.

CIA Act . . .

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Prior to the enactment of the CIA Information Act,² the Agency would have been compelled to review all of its operations files and to surrender any that were not protected by one of the standard nine exemptions. In practice, virtually all CIA operational files were protected from release; but the CIA was nevertheless forced to devote valuable manpower resources retrieving and examining files pursuant to such requests. The end result was a major backlog of FOIA requests, and the 1984 statute was largely the product of a compromise in which the ACLU and other organizations agreed to the exemption of most operational CIA files in return for assurances that other FOIA requests would be processed more expeditiously.

The Act exempts CIA operational files from review with three noteworthy exceptions, each of which was relied upon by Ms. Sullivan. The Agency was required to search files in cases involving:

- a request by U.S. citizens for information on themselves;
- a request regarding "any special activity the existence of which is not exempt from disclosure (under FOIA); and
- a request for information about a subject matter of an investigation by the congressional intelligence committees, the PIOB at the White House, the CIA General Counsel or Inspector General, or the Office of the Director of Central Intelligence involving an allegation of impropriety, illegality, or violation of an executive order or presidential directive.

Ms. Sullivan sought to persuade the court that the "information on themselves" exception was intended by Congress to apply to next-of-kin requests. This was rejected not only because contrary to the clear language of the statute, but also because the Senate Report on the bill expressly stated that "This legislation does not give next-of-kin a right to request information about a deceased person."³

She then sought to rely upon the "special activity" language, arguing that the alleged CIA campaign to overthrow Castro was comparable to CIA activities directed against the Arbenz regime in Guatemala in the mid-1950s—which was one of the examples given in the Senate report on the bill of operations which were not automatically protected. The Court of Appeals concluded that "the CIA's role in respect to Castro's Cuba is more properly analogous to CIA operations against Soviet influence in Western Eu-

rope during the 1950s, a course of conduct which the Senate specifically indicated was too sweeping to trigger the special activity exception, than to the coup in Guatemala." Further, the court noted that there was a "second prong" to the special activity exception—it "requires that the requested material not be exempt for disclosure under FOIA. At the very least, this means that the data must be either unclassified or declassified. . . . Declassification occurs only when 'an authorized Executive Branch official has officially and publicly acknowledged the existence . . . of a special activity.'"⁴

Finally, the court rejected Ms. Sullivan's argument that the fact that the Church Committee and House Select Committee on Assassinations (HSCA) had inquired into CIA activities against Cuba exempted her FOIA request from the provisions of the CIA Information Act. The court reasoned:

Appellant is not seeking information on the CIA's role in the Kennedy assassination and has not alleged that . . . her father . . . was directly involved in any such machinations. Hence, because her request does not overlap the "specific subject matter of [the] investigation," . . . she cannot use the HSCA report as a means to escape the strictures of the Information Act. We rule, therefore, that neither the Church Committee's investigation nor HSCA's probe is sufficiently sturdy a bootstrap to lift appellant's FOIA request over the hurdles erected by the congressional investigation exception to the Information Act.

The court said that it was not unsympathetic to the appellant's desire to learn the details of her father's fate, but concluded that Congress had already balanced the interests of public disclosure and an effective intelligence apparatus, and it was the court's duty not to rebalance those interests but to apply the law "as Congress wrote it."

Notes

¹ 992 F.2d 1249 (1st Cir. 1993). The statute also played a minor role in an earlier case, *Hunt v. Central Intelligence Agency*, 981 F.2d 1116 (9th Cir. 1992).

² 50 U.S.C. § 431 (1993)

³ Sen. Rep't No. 98-305 at 17.

⁴ 992 F.2d at 1254.

⁵ Sen. Rep't No. 98-305, at 24.

Calendar of Events

Nov. 19—Breakfast Meeting, International Club (Speaker: Attorney General Janet Reno)

Dec. 2-3—Conference on "Democracy and the Rule of Law in Foreign Policy" (Capitol Hilton Hotel, 16th & K St, N.W., Washington, D.C.)

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be off-loaded in port and recycled. If stored plastic creates operational or health hazards, however, it will be packed so that it will sink and then be discharged beyond 50 nautical miles from shore. Such discharges would be in violation of the total ban on plastics under Annex V.

Extending Time for Compliance

The Navy's interim report to Congress indicates that it cannot meet the solid waste discharge standards for plastics or special areas by the end of this year, and some standards may never be met. The Navy has recommended that Congress amend the MPPRCA to:

- rescind the current prohibition of all solid waste disposal in special areas to allow non-floating garbage and sinkable plastic to be discharged;
- extend the period for Navy surface ship compliance by 5 years (i.e. until the end of 1998), and;
- extend the period for Navy submarine compliance by 15 years (i.e. until the end of 2008).¹⁴

The Senate has recently acted to extend surface ship compliance until 1998 and to extend compliance with the ban on all discharges in special areas effective after 2008. The Senate also voted to extend submarine compliance until 2008. The House is expected to approve these measures. If the new legislation is approved, the Navy will be granted a few more years to come into compliance. However, even with the extensions, it is uncertain whether the Navy can meet Annex V guidelines. Applying the tenets of Annex V to warships is the first significant departure of sovereign immunity for warships and the law estab-

lishes an unsettling precedent for the Navy. The difficult issues of the ban on all discharges of plastics and the ban on discharges of any type of garbage in special areas are unlikely to be completely satisfied even with extended phase-in periods. In the meantime, Annex V and the erosion of warship sovereign immunity will continue to trouble Navy leaders.

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Notes

¹ "Canadian Navy Rides a New Wave," *The Vancouver Sun*, July 21, 1993 at A1.

² The Special Working Group (SWG/12) on Maritime Environmental Protection was established by the NATO Naval Armaments Group (NNAG) in June, 1992. SWG/12 promotes cooperation and exchanges of information among NATO navies for the development of environmentally sound ship technologies.

³ MARPOL is formally known as the *International Convention for the Prevention of Pollution from Ships, 1973*, done at London 2 Nov. 1973, I.M.C.O. Doc. MP/CONF/WP.35(1973), 12 *I.L.M.* 1319 (1973), as modified by the *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973*, opened for signature 1 June 1978, I.M.C.O. Doc. TSPP/CONF/11 (1978), 17 *I.L.M.* 546 (1978). The acronym "MARPOL" is derived from abbreviating the words "Marine Pollution."

⁴ *International Convention for the Prevention of Pollution from Ships, 1973, Annex V: Regulations for the Prevention of Pollution by Garbage from Ships*, I.M.C.O. Doc. MP/CONF/Wp.21/Add. 4 (1973), 12 *International Legal Materials* 1434 (1973) (entered into force 31 Dec. 1988).

⁵ See generally, Johannes Mattern, *Concepts of State, Sovereignty and International Law* (1928) and Niichiro Matsunami, *Immunity of State Ships as a Contribution Toward Unification of the Laws on the Subject* (1924).

⁶ *The Marine Plastic Pollution Research and Control Act of 1987* (MPPRCA), 33 U.S.C. §§ 1901-1911.

⁷ "[T]he requirements of Annex V to the Convention shall

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The National Security Agenda

Commission on Improving United Nations Recommends Voluntary Quick Reaction Force and Expanding Security Council—The U.S. Commission on Improving the Effectiveness of the United Nations, established by Congress and co-chaired by Representative Jim Leach (R. Iowa) and former Deputy U.N. Ambassador Charles Lichenstein, released a report on 10 September calling for the creation of a military quick reaction force of 5,000-10,000 volunteers to serve at the direction of the Security Council. Six dissenters on the 16 member panel, including former U.N. Ambassador Jeane Kirkpatrick, opposed the plan. By a vote of 6-1, the panel also recommended that Germany and Japan be admitted to the Security Council as permanent members but without a veto power. (*Philadelphia Inquirer*, 11 Sept.)

U.S. Unable to Verify Dismantling of Russian Nukes—Ashton B. Carter, Assistant Secretary of Defense for National Security and Counterproliferation, told the House Foreign Affairs Committee in late September that the United States was not certain that Russia was dismantling the 18,000 nuclear weapons it had committed to destroy through the START agreements. Although the United States estimated that approximately 2,000 nuclear devices were being destroyed each year, the refusal of Russian leaders to allow effective verification measures has forced the United States to rely upon Russian assurances. In 1991 the United States claimed to have 19,000 warheads, while the Soviet Union admitted to 27,300 such devices. Victor Mkihailov, Russian Minister for Atomic Energy, recently acknowledged that the Soviet stockpile reached 45,000 warheads in 1986 and was down to 32,000 by May of this year. (*Washington Times*, 30 Sept.)

Moscow Concludes and then Annuls Nuclear Weapons Agreement with Ukraine—On 3 September Russian President Boris Yeltsin and Ukrainian President Leonid Kravchuk reached an accord calling for Ukraine to turn over all nuclear warheads (as well as its share of the former Soviet Black Sea Fleet) to Moscow in return for cancellation of an estimated \$600 million in debt owed to Moscow. Less than three weeks later, however, a spokesman for the Russian Foreign Ministry announced that the accord had been annulled because Ukrainian officials had announced an intention to retain a portion of the former Soviet nuclear arsenal. (*Wall Street Journal*, 22 Sept.)

Iran Reportedly Using U.S. Computer "Bulletin Boards" to Seek Aircraft Parts—Electronic "bulletin boards" accessible by home computers are reportedly being used by Iranian agents to try to obtain spare parts for F-4, F-5, and F-14 aircraft. Based upon where the ads are appearing, they seem to be targeted at unemployed aerospace industry engineers and technicians who once worked at Grumman and Northrop. The ads offer to buy old technical manuals as "collectors items," and seek to identify individuals willing to re-create key parts from memory or personal notes. (*Security Intelligence Report*, 6 Sept.)

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apply after 5 years after the effective date of this paragraph," to warships, naval auxiliaries, and other ships owned or operated by the United States and engaged in noncommercial service. *Id.* at § 1902 (b)(2)(A).

⁸ MARPOL, Annex V, Regulation 1 (1).

⁹ MARPOL, Annex V, Regulation 3 (1)(b).

¹⁰ MARPOL, Annex V, Regulation 5.

¹¹ The only other feasible alternative to eliminate discharge in special areas is the at-sea transfer of waste to other ships for storage or transfer to shore. This plan, however, poses unacceptable safety and logistical difficulties, including requiring the design and construction of a

small fleet of fast ocean-going garbage barges that could keep up with warships ships underway. In addition, the mission of some vessels, e.g. SSBN or SSN submarines, requires that their locations be kept secret.

¹² Department of the Navy, Report to Congress, *U.S. Navy Compliance with the Marine Plastic Pollution Research and Control Act of 1987* (June 1993) at 29.

¹³ MARPOL, Annex V, Regulation 3 (1)(a). The prohibitions on the disposal of plastic and garbage do not apply in cases of accidental loss, instances where a release is necessary for the safety of the ship, or where the release is a result of ship damage and reasonable precautions were taken prior to and after the occurrence. Annex V, Regulation 6.

¹⁴ *U.S. Navy Compliance with the Marine Plastic Pollution Research and Control Act of 1987* at 35.

¹⁵ S. 1298, 103d Cong., 1st Sess. (1993).