



# National Security Law Report

Volume 17, Number 5 STANDING COMMITTEE ON LAW AND NATIONAL SECURITY May 1995

## Mikva Speaks at May Breakfast

### White House Counsel Discusses Separation of Powers

White House Counsel Abner Mikva spoke about constitutional separation of powers to the Standing Committee's May 11 breakfast at the International Club. A former five-term member of Congress (D, Ill.) and Chief Judge on the U.S. Court of Appeals for the District of Columbia, Mikva was introduced by Standing Committee member Richard Friedman.

Having served at senior levels of all three branches of government, Judge Mikva combines a broad range of personal experience and theoretical understanding about separation of powers issues. He noted that, "as a congressman, I thought I had a grasp of it. I used to say, the legislature is the first branch, and I would point to my copy of my contract with America and would say 'see, it's in Article I. It's not in Article I by accident, there is a reason. Congress was intended to be the first branch of government.'" To be sure, there are substantive and procedural checks—Congress can't pass *ex post facto* laws, and all bills have to be approved identically by both houses and presented to the President—but "Congress is the all-powerful branch. It writes the laws, it provides the legislative history, and it tells how those laws are to be implemented."

"Well, then I became a judge—*Marbury v. Madison*. . . . John Marshall wrote it once, and I have said it a hundred times, 'it is emphatically the province

and duty of the judicial department to say what the law is.' We are final not because we are right, but we are right because we are final." He noted that "Congress usually acknowledges the supremacy of the Court. I recall, when I was in Congress, if you ever got up to argue the unconstitutionality of a bill's provision, it was the surest way to empty out the chamber. Everyone . . . said 'That's why we have . . . the courts. . . ,' and they went back and signed their mail."

"Well, now I've become Counsel to the President, and suddenly again I have to reach for my copy of the Constitution. This time I have to look at the second article, which I never paid much attention to

*Continued on page 2*

## Chicago Annual Meeting Programs **"Law Enforcement and Intelligence" Showcase Set for August 6**

The Standing Committee will sponsor or cosponsor three important programs at the 1995 ABA Annual Meeting in Chicago: a presidential showcase on law enforcement and intelligence, the CEELI Awards Ceremony and Luncheon, and a commemorative program on the modern relevance of the Nuremberg war crimes tribunal.

What should be the relationship between the Intelligence Community and law enforcement agencies? Increasingly, in the post-Cold War world, both groups find themselves addressing such common problems as terrorism, international narcotics smuggling, and trafficking in nuclear materials. There are obvious benefits to be gained from cooperation, but there are also costs. For example, intelligence agents are not trained in safeguarding the individual rights of criminal suspects; and sensitive intelligence information used in identifying, apprehending, or prosecuting an accused criminal may be compromised in the process of a public trial.

To address such issues, the Standing Committee

*Continued on page 5*

### **Inside**

- 3 Review—Col. Terry on Adm. Owens' *High Seas*
- 3 We're Moving—Address Change
- 4 Review—Wood, *A Sense of Values*
- 4 Calendar of Events
- 6 Review—*Regulating Covert Action*

## Mikva Breakfast . . .

*Continued from page 1*

before this." Noting that, because of his prior experience, he was most familiar with the arguments against the expansion of presidential power, Judge Mikva said: "Suddenly, I have one client, and my office is in the attic of his house. My job is to be vigilant in trying to protect *his* powers. . . . Because some of the powers [of] the President . . . come directly from the Constitution, I am delighted to discover that he also must interpret the Constitution." He said that he is now "going through my third rendition" of what the War Powers Resolution really means.

Turning to constitutional separation of powers theory, Judge Mikva said that "the separation of powers doctrine is more than just paper definitions, . . . more than these three little ships circling around in waters, never touching each other. The Founders intended there to be a constructive tension between the branches, and that they should, indeed, touch and interact with each other—as they have to. And each branch has to interpret its constitutional role and assertively defend its independent powers and privileges against inadvertent or intentional intrusion by the other branches. 'The Constitution,' as James Madison once wrote, 'reflects a fundamental conviction that governmental power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.' And so, whether I am a president's lawyer, or a judge, or a congressman, I can think of no better restraint on the aggrandizement of power in two of the branches than constant vigilance by the third branch in defense of its own."

Judge Mikva lived up to his reputation as both a thoughtful and a humorous speaker. In the later category, he mentioned turning to his daughter (an attorney) last summer for advice on whether he should resign from the judiciary to accept the President's offer. She responded: "You want me to assure you that it is all right to exchange a life estate for a tenancy at will—is that the question?"

During the question period, Judge Mikva was asked about the role of Congress in determining the location of embassy buildings abroad. He began by observing: "When I was a judge, I could say 'that's a pending dispute I can't talk about.' Now I can say 'that's a pending dispute and I want to talk about it.' I think it is a pretty silly idea. I happen to be Jewish, and I have spent a lot of time in Israel. I think that, ultimately, that embassy ought to be in Jerusalem. But I think that talking about putting it there now is just creating mischief at a time when we need to

avoid that kind of thing." He said we ought not be undermining the peace process at this time.

When asked about the "terrorism" threat revealed by the Oklahoma bombing, and the possible need for new antiterrorism legislation, Judge Mikva cautioned about overreacting or moving forward on the issue without adequate deliberation. He recalled a postcard he received early during his congressional service, which simply read: "Dear Senator: Vote No." Laughing, he concluded: "Sometimes, that's very good advice."

Asked about his real "client," the Judge noted that he took the same oath "to support and defend" the Constitution as every other government official, and concluded "My primary responsibilities are to the presidency. . . . It has to be to the institution, and not to the person, so if my client were to ask me how to break the law, obviously, I would not be able to aid and abet him."

Asked about the Independent Counsel statute, Judge Mikva said that while a congressman he both "voted for" and "was very enthusiastic" about that law. "Of all the things that I review, I have to say that, on this one, it certainly does not appear to me now as it appeared to me then." While arguing that the original "need" for such legislation was legitimate, and stressing that his comments were not directed at any currently serving special counsel, he expressed concern that some revisions might be warranted to guarantee that such investigations would be politically neutral.

[**Editor's Note:** The breakfast was the subject of additional coverage by the *Washington Times* (Paul Bedard, "Clinton aide would revisit counsel law," May 12, 1995, p. A5.)]

**John H. Shenefield**  
*Chairman, Standing Committee on Law and National Security*

**Holly Stewart McMahon**  
*Staff Director*

**Robert F. Turner**  
*Editor*

**Jackson R. Sharman III**  
*Associate Editor*

The *National Security Law Report*, which is published monthly, contains articles concerning the law relating to the security of the Nation and associated topics. The *National Security Law Report* is sponsored by the ABA Standing Committee on Law and National Security. The views expressed in this publication are not necessarily those of the Standing Committee or the American Bar Association. Comments or original articles should be directed to Professor Robert F. Turner, c/o Staff Director Holly Stewart McMahon at the Standing Committee's Washington office (see box on page 5).

Copyright © 1995 American Bar Association, ISSN 0736-2773.

## BOOK REVIEW

by Colonel James P. Terry, USMC

*High Seas: The Naval Passage to an Uncharted World*

by Admiral William A. Owens, U.S. Navy  
Naval Institute Press, Annapolis, MD (1995)  
Pages: 184. Price: \$27.95.

This challenging new book by Admiral Owens, the Vice Chairman of the Joint Chiefs of Staff, undertakes three very significant tasks. First, it explores the important relationship between new military technology and the conduct, present and future, of naval operations. Admiral Owens makes the case that one cannot conduct naval planning (or joint planning) without taking advanced technology into careful consideration at both the strategic and tactical levels. Second, *High Seas* accurately and forcefully portrays the international significance of advanced U.S. military technology as it relates to U.S. Naval Forces in their intercourse with the forces of other States—and to our political-military coordination with those States. Finally, this rich text dissects the military thinking which undergirds our traditional operational concepts and doctrine and suggests that an operational template for the future must include high technology adaptive force packaging with components from all services, thus enabling joint military operations to ensure battlefield dominance.

The text is structured around naval technological developments and their impact on naval operations but is equally applicable to all U.S. military activities. A critical assumption underlying the text is that overseas naval forces will become the bridge for U.S. Army and Air Force units to maintain working relationships with their foreign counterparts as foreign basing decreases.

This thoughtful and highly readable work is divided into three logical sections. The first four chapters examine the new post-Cold War international environment and the role naval power can play in deterrence, overseas presence, advances in military technology and ways to coordinate security policy more effectively. The second part, and in my view the most important, includes but one chapter, entitled "Operations." This carefully written chapter reviews the context in which forces will operate internationally in the new environment and the role Naval forces will be asked to play vis-a-vis the Army and the Air Force in joint operations. Critical issues addressed in depth include, in addi-

## We're Moving



Effective June 10, 1995, the office of the Standing Committee on Law and National Security will be located in the new ABA Building at 740 15th St., NW, Washington, DC 20005-1009. Our new phone is (202) 662-1035, and the fax is (202) 662-1032.

tion to a thorough review of joint operations, the meaning of Navy-Marine Corps integration, how naval operational configurations will change, and what these considerations imply for undersea, surface, and air operations. The last part, encompassing the final four chapters, examines the size and structure of the naval force required for Force 2021 if the logic, rationale, and conceptual development begun by the current Force 2001 planning is continued.

This is a book for the thinking public. The author's courage in addressing tough, controversial questions about our nation's future naval and defense needs comes at a time in which it is fashionable to ignore our past when addressing the future. The ultimate value of this book is that it educates us to think about the integrated whole of our national defense priorities—to include the relative roles of threat, force structure, strategic planning, and joint operations—in the context of technological advances.

*Colonel Terry is a Marine judge advocate who currently serves as the Legal Counsel to the Chairman of the Joint Chiefs of Staff.*

## Who Would Have Thought?

An interesting table appears in the May issue of the Reserve Officers Association (ROA) *National Security Report*. According to this source, the "Top Ten Countries Voting With the US at the UN" are: Israel, Georgia, Slovak Republic, Hungary, Czech Republic, Poland, Bulgaria, Albania, Moldova, and Slovenia. Nine of the ten are former Soviet bloc countries, and the report states further that Russia votes with the United States two-thirds of the time. Who would have thought this likely a decade ago?

## Book Review

by Colonel Charles J. Dunlap, Jr., USAF

*A Sense of Values: American Marines in an Uncertain World*

By David Browne Wood

photographs by Bob Mahoney

Kansas City: Andrews and McMeel, Publishers (1994)

Pages: 258. Price: \$24.95.

Critics of the current state of civil-military relations cite with growing concern the diminishing numbers of national security policymakers who list military service on their resumes. The absence of that experience, some contend, leads to insensitively viewing military personnel as interchangeable abstractions. In turn, this leads to potentially disastrous political and military miscalculations.

This phenomena is simply one manifestation of a much larger problem. In the post-draft era fewer and fewer Americans have any firsthand knowledge of the military, and often know no one who does. Though short term conscript-level military experience may lead to fewer insights than one might hope, the widening cultural gap between the military and civilian communities is — or should be — a troubling development for a democratic society.

Part of the solution is to foster a greater understanding of military life. The problem, of course, is how to do so. While a few universities have established national security education programs—those at Virginia, Duke, and North Carolina being among the most prominent—their reach is yet too short. They are, in any event, not easily accessible to many decision-makers, let alone the general public.

Books, however, are accessible. One would hope that such classics as John Keegan's *The Face of Battle*, Charles McDonald's *Company Commander*, James Brady's *The Coldest War*, and Philip Caputo's *Rumor of War*, would find a place on the reading list of every American who wishes to understand military service on the human level. Regrettably, readable as these books are, they still might be too taxing for the busy policymaker or a public accustomed to sound-bite learning.

Moreover, few books describe the post-Cold War military. Ever more frequently deployed to obscure locales to support a bewildering array of what are fashionably termed 'operations other than war,' today's armed forces are developing into an organization with much more than warfighting on its agenda. Who are these young Americans who find themselves feeding the starving in Africa, nationbuilding

in Haiti, housing refugees in Cuba, intercepting drug shipments in Latin America, teaching democracy in the former Soviet Union, and serving with the United Nations in the Balkans—along with staring down more traditional military threats in the Middle East and northwest Asia?

David Wood's new book, *Sense of Values: American Marines in an Uncertain World*, begins to answer that question. Wood, a journalist for the Newhouse News service, spent months with a Marine Expeditionary Unit as it traveled from its home base at Camp Lejeune, North Carolina, to hotspots from Somalia to the Middle East and back to Somalia again. Bob Mahoney's brilliant photography gives the book almost a coffee-table quality (though a visiting parson leafing through it might gasp at the salty but authentic quotes from Marines that pepper the text). The superb photography, matched with Wood's exceptionally fluid writing style, makes the book easily digestible in only a few hours.

Wood's volume is a true 'inside look' at a very important part of America's military, and the impact of contemporary national policies upon it. Indeed, a great strength of the work is Wood's depiction of how facile policy statements conceived in comfortable Washington offices are perversely difficult to implement in forlorn locations both physically and philosophically distant. Exactly how is a nineteen year-old Marine, Wood rhetorically asks, supposed to impose security on a profoundly anarchic and often inexplicably hostile environment like Somalia?

There are a few lapses in Wood's text. For example, his background on U.S. involvement in Somalia omits mention of Operation Provide Relief. This small but highly successful airlift of food into Somalia began in August of 1992 and largely ended the worst of the starvation before the massive deployment of thousands of troops that December—something worth decision-makers' consideration given the unhappy denouement of U.S. policy there.

### Calendar of Events

**June 29**—Breakfast Meeting, International Club (Speaker: Rep. Henry Hyde [R, Ill.], Chairman, House Judiciary Committee)

**August 5**—CEELI Luncheon (see pages 5-6)

**August 6**—Presidential Showcase on "Law Enforcement and Intelligence: The Legal Dilemma," Hyatt Regency Hotel, Chicago (see pages 1, 5).

**August 7**—"Nuremberg Revisited—The Judgment of Nuremberg in Today's World" (see page 6).

Importantly, however, Wood seldom falls into the kind of starry-eyed adulation that marred *Washington Post* reporter Molly Moore's otherwise well-written book about her experiences with Marine units during the Gulf War. Though he obviously warms to his subject, Wood, a Vietnam-era conscientious objector who performed alternative service, frankly discusses the shortcomings and prejudices of the Marines he met.

He describes, for example, how a complement of Marines just returned from shore liberty in France were assembled so that a rape victim could identify her assailant. He also reveals the frustration and resentment of many of the troops towards female Marines. Excluded from combat assignments, the women escape the long deployments aboard ship and, in the view of many young Marines that Wood interviewed, fill relatively cushy shore-based billets.

Wood also details the effect of the lengthy separations on the families of the deployed Marines. He poignantly speaks of the heartache of men who miss the opportunity to see their child's birth and first steps. He talks of families who much of the time are one-parent households and all the turmoil and stress such situations occasion, especially for the wives. He describes the distinctive life the Marines and their families live on America's self-contained and increasingly socially isolated military reservations.

Still, Wood leaves the reader with a feeling of admiration for the Marines and the resiliency of their families. Whatever their faults, within them is the kind of courageous altruism that is quintessentially American. Wood's book is a timely reminder that not all young Americans are sulky, languid-eyed whiners out for self gratification; there are still those who are willing to go in harm's way to serve the nation's far-flung interests, however obscure those interests may seem. In short, this is a book

that ought to make its way into the hands of every Washington policymaker contemplating yet another military-dependent solution to a thorny international problem.

---

*Colonel Dunlap is the Staff Judge Advocate of U.S. Strategic Command. All views expressed are personal.*

---

## Annual Meeting Programs . . .

*Continued from page 1*

will present a presidential showcase program on "Law Enforcement and Intelligence Gathering: The Legal Dilemma," on Sunday, August 6, at 3:00 PM in Chicago's Hyatt Regency Hotel. The blue-ribbon panel of speakers will include: Deputy Attorney General Jamie Gorelick, former Deputy Attorney General (and Standing Committee member) Philip Heymann, former Director of Central Intelligence James Woolsey, former National Security Council Legal Adviser (and Standing Committee member) Paul Schott Stevens, and former House of Representatives attorney Reid Weingarten. The program will be moderated by former National Security Agency General Council Stewart Baker.

The presidential showcase will be cosponsored by the ABA Sections of International Law and Practice, Business Law, General Practice, Criminal Justice, and Individual Rights and Responsibilities, as well as by the Law Student Division and the Standing Committee on World Order Under Law. CLE credit will be available.

## CEELI Luncheon

At noon on Saturday, August 5, the Standing Committee will cosponsor the 1995 Central and East European Law Initiative (CEELI) Awards Cere-

*Continued on page 6*

## Standing Committee on Law and National Security

*Chairman:* John H. Shenefield. *Members:* Zoë Baird, Russell J. Bruemmer, Richard E. Friedman, Philip B. Heymann, Lucinda A. Low, J. Michael McWilliams, Elizabeth R. Rindskopf, L. Britt Snider, Paul Schott Stevens, Richard K. Willard  
*Advisory Committee Chair:* Kathleen Buck

*Staff Director:* Holly Stewart McMahon  
740 15th Street, NW  
Washington, D.C. 20005-1009  
(202) 662-1035  
fax (202) 662-1032

## Annual Meeting Programs ...

Continued from page 5

mony and Luncheon in the Hyatt Regency Grand Ballroom. This year's program will honor Slovak Republic President Michal Kovac, and will feature a keynote address by White House Counsel Abner J. Mikva.

Advanced reservations are required for this function. For further information, call 1-800-98CEELI.

### Nuremberg Programs

The Standing Committee is also cosponsoring a commemorative program on "Nuremberg Revisited—The Judgment of Nuremberg in Today's World," being presented by the Section of International Law and Practice. Moderated by former Attorney General Benjamin R. Civiletti, the distinguished group of speakers will include Professor M. Cherif Bassiouni, who chaired the U.N. Commission of Experts on the Former Yugoslavia, and former Nuremberg Prosecutors Whitney R. Harris and Henry T. King. Richard J. Goldstone, Chief Prosecutor of the International Tribunal for the Former Yugoslavia and for Rwanda, has also been invited to take part. The program will take place on Monday, August 7, at 9:00 AM in the Hyatt Regency. For further information, contact Stuart H. Deming at (616) 382-8080.

## BOOK REVIEW

by Robert F. Turner

*Regulating Covert Action: Practices, Contexts, and Policies of Covert Coercion Abroad in International and American Law*

By W. Michael Reisman & James E. Baker  
New Haven: Yale University Press (1992)  
Pages: 250. Price: \$28.50.

W. Michael Reisman is the Wesley N. Hohfeld Professor of Jurisprudence at Yale Law School and one of the foremost international lawyers in the world. James E. Baker is one of his former students—an ex-Marine who worked for several years as a legislative assistant to Senate Intelligence Committee Chairman Daniel Patrick Moynihan, and who since the book was written has worked as an attorney in the office of the State Department Legal Adviser, with the President's Foreign Intelligence Advisory Board (PFIAB), and on the National Security Council.

*Regulating Covert Action* provides an excellent overview of legal issues associated with the coercive use of military, economic, diplomatic, and ideological tools. It is particularly valuable in discussing the low-intensity use of military force. The authors provide a useful overview of the post-San Francisco debate between the more traditional view that the Charter outlaws virtually all non-defensive resort to force in the absence of Security Council approval, and various claims to exceptions—such as Leninist "wars of national liberation," the so-called "Brezhnev Doctrine," and Third World struggles against "colonial" regimes and apartheid.

Also helpful is a discussion of self-defense and countermeasures under the Charter. In this connection the authors note the narrow interpretation of Article 51 by the World Court in the *Paramilitary Activities* case, concluding:

The court's analysis regarding third state use of countermeasures is not persuasive. The presumption that the United States was not engaged in collective self-defense at the request of El Salvador, which the court rendered *juris et de jure* by not permitting El Salvador even to argue for its right to intervene, was outcome-determinative and of dubious lawfulness. Indeed, in subsequent phases of the case, judges who had voted against El Salvador on this point expressed their regret. . . . In contrast, the International Law Commission has seemed to be quite comfortable with a right of counter-measures for states who are party to a violated treaty but not themselves directly deprived by the violation.

The book also includes a discussion of a number of controversial covert operations, including the U.S. intervention in Iran in 1953, Israel's abduction of Adolf Eichmann from Argentina in 1960, the Bay of Pigs operation, U.S. intervention in Chile, and the French attack on the Greenpeace vessel *Rainbow Warrior* in 1985.

The authors conclude with a list of ten "executive guidelines" for future covert operations, which range from a presumption against covertness ("eschew secrecy for its own sake," but "Never say that you will never do things covertly"), to making sure that "lawyers who have the necessary background, but who are not in the direct chain of command," are involved in the decision process and can submit written views. If the book has a major flaw, it is that the narrow title may deprive it of the broad readership it warrants. It is highly recommended.

Professor Turner is editor of the Report. For an elaboration of this review, see Turner, *Coercive Covert Action and the Law*, 20 YALE J. INT'L L. 427 (1995).