

Chapter XII

Roundtable Discussion

Alberto R. Coll, Chair

PROF. COLL: In wrapping up the conference this afternoon, I think it would be quite appropriate to ask each of my fellow chairmen to highlight some of the problems that they think it would be useful for us to consider further this afternoon. Each of the panel chairmen will have an opportunity to do that and, afterward, we will open up the discussion to the floor.

PROF. REISMAN: I found this a very fascinating and challenging two days. A number of our theologians have said that there has been more talk of just war doctrine and natural law approaches to the use of coercion here in two days than in five years at the seminaries—and I must say, in twenty years of my own work. But I have tried to think our subject matter through. I have read the papers carefully, as everyone has, and attended carefully to the discussion. I have read some of the works that have been cited, but I will say that I see many things in a different light at the end of two days of discussion. In a sense, I see this as an extraordinarily creative opportunity for the United States. In other ways, I view it as extraordinarily dangerous. I would like briefly to explore those alternatives, and then make a number of suggestions as to what might be done to maximize the good possibilities and to minimize those which seem to me to be potentially pathological.

I think we've used the words "just war" here in three different ways. In some cases, the same speakers were using it with a shifting content. In one sense, I think in the most innocuous, the notion of just war was used to describe a prudential method—*infra legem*, the Romans called it. When we know that something is permissible by law but we're not certain whether it's appropriate to do, the method we employ is a consideration of larger goals. We think about the means that are necessary for achieving them, the cost that will be expended and encountered in their achievement, and the returns that we ultimately expect. This strikes me as a form of good thinking and it is a contribution that natural law has made to all law application. I think it applies whether we're talking about the use of coercion, as Professor Johnson said earlier, or whether we're talking about the use of the four instruments of strategy that Admiral Lemoyne mentioned. It applies whether we're talking about using non-coercive means

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over a period of time; the military instrument, the economic instrument, the propaganda instrument, or high level diplomacy.

The second meaning, which I think is somewhat more troubling, is the prudential method which is not within the law, not *infra legem*, but *priter legem*, above the law, and in some cases, *contra legem*.

In the discussion this morning, the question was posed to Judge Sofaer as to whether, in some circumstances, the compelling force of certain moral arguments might lead one to do something against the law, and he responded, "Well, we find a way to do it within the law." It struck me that we were, as it were, skirting a serious problem. The problem is that moral discourse does not simply prohibit, but in some cases compels, if it has any force. It does not simply tell you to refrain from doing something. The moral conscience compels with force, greater than that of Caesar, and what it compels can be against the law. Some aspects of the discussions about certain types of covert or low-intensity operations under international law, clearly would come under the second meaning, that of questionable compliance with the expectations of large parts of the international community.

A third, more general use, which I detect in the discussions, is as the justification in the near future for the use of military force by the United States in peacetime. In this respect, the words "just war" are being used to create a vehicle for new ideology which will provide a justification quite distinct from contemporary international law. It is one that will justify or rationalize our decision from time to time to use relatively low levels of force, minor coercions, whether for an extended period or in a single operation.

I think this last meaning is a fairly recent one. Three or four years ago, if a group like this had been convened to discuss low-intensity conflict, it would inevitably have been composed of men intent on using the concept against us and our friends. It was viewed essentially as a pathology. And, we bemoan the fact that the international legal structure, and to some extent the democratic politics of our own country, have tended to restrain our responses to low-intensity conflict. And, now we're talking about low-intensity conflict in a newly ideological sense as a justification for proaction on our part. I'm not saying this critically, and I will discuss in a moment the justifications for this use of low-intensity conflict, some of which I think are quite cogent. But, I think we should appreciate that we have three meanings and certainly the most dramatically innovative is this new ideological meaning.

The doctrine of just wars is an extremely productive method of ratiocination and evaluation of decision options that comes from the natural law tradition. But, to use it for this new ideological purpose, seems to me to be quite dangerous for several reasons. The first is that it's not simply something that corrects the existing law as I've said, but, very often is compulsive. It compels one to do certain things. It may not be consistent with community standards, or as I will explain in a

moment, with the orders one is receiving from above. The second reason why this may not be the best vehicle for the justification for unilateral action by a major power in a unipolar system is the anarchic potential in the just war tradition. Several panel members who are experts in the tradition and have devoted their careers to its study, have pointed out that it is not a science. The use of just war reasoning is an art, it's appreciative, and reasonable people disagree over its results. The weight, the intensity of compulsion of certain factors may vary. The introduction of just war doctrine into a highly disciplined organization like the military could be potentially quite anarchic, unless, I laugh even to say this, we can imagine prohibiting officers of different ranks from using the techniques of just war to appraise whether or not things are right, and supply them with a just war expert who would tell them the correct position. We are introducing something which is, by its nature, democratic and invites every sentient human being to use his intellect and capacity for judgment to determine the justice of using coercion at a particular moment. I ask you whether that is something you want to incorporate into the decision-making apparatus of the military organization. The military, it seems to me, operates best when there is a strict hierarchy in command. As in the language of the Book of Leviticus, one says "This is the law and neither shall you depart to the left nor to the right." It's possible that the introduction of just war doctrine would return us to the chaotic periods of the Book of Genesis, in which, as the scribe explained, each man did that which was right in his own eyes. I cannot imagine an efficient military operating in that fashion.

The third problem, which is explosive, was pointed out by Father Winters in one fashion, Professor Farer in another, and Professor Nardin. It is that we are departing from a set of value judgments that have been made in the largely collaborative process we call international law, which over time has established policies with certain balances attached to them. We are shifting over to the policy or value preferences of one particular country or social stratum and these may not be universal values.

Father Winters talked about the culture specific problem. Carnes Lord, this morning, in talking about strategic cultures, put great stress on the argument that some, including myself, made yesterday, about the universality of norms. They may indeed be universal, but if strategic cultures are quite different, we can assume that culture will dominate in moments of crisis in which those charged with the security of a group will be primarily concerned with the maintenance of its collective integrity. At such times, they will do what is necessary to follow the imperatives of the strategic culture, rather than the larger international norms.

I am, on the other hand, moved by the fact that the United States is in a position in which it has major responsibilities to the rest of the international community. I think that these responsibilities are quite clear and I think that they are the same whether one tries to justify them using a conception of national

interest, or human rights, or international law. We are integrated into a very tight and interdependent international community. If it does not work well, we will suffer precisely because of this inextricable integration. So, we have a major interest in seeing that it works right.

Rhetoric aside, peoples all over the world look toward us in many ways, particularly in moments of crisis, to do something. If you accept that premise, and it is one from which I start, then the question should be: Is just war, as it's developed, the best ideological device for achieving our purpose? Do some of the costs of the just war tradition, which I think would rest very uneasily if it became an official ideology, make it less than the optimum vehicle for achieving this objective? The perspective of just war theory and natural law is that of those committed to making decisions and not those committed to receiving commands. I think it might be useful to generalize a set of intellectual tasks that we ought to follow and spell them out in some detail, rather than tying ourselves to a single tradition. I think that in every decision we ought to be looking at five intellectual tasks, each of which should be performed quite scrupulously. The first is goal clarification. If we are suggesting that in some circumstance we do things differently from what a significant part of the world has prescribed, I think it important that we not think in terms of what we need, which ultimately is a solipsistic justification we would find unacceptable if used by others. We must consider whether what we are inclined to do serves the interest of the international community.

I think we should go through a clear process of goal clarifications which identify common interests. Father Winters' warning about the potential for cultural parochialism in this process of ratiocination, should not be ignored. We should acknowledge it and develop methods for minimizing that particular pathological potential. I think once we've established goals, we should systematically review the extent to which they have been achieved in comparable situations in the past and their costs. I think it behooves us to be extremely responsible in this fashion and to canvass what the past can teach us about the achievement of these particular goals at particular moments.

I think we have to identify the conditions that prevailed then and are likely to prevail in the near future when the strategy is put into place, in order to make sure that the lessons that were learned from the past are still relevant. I think we owe it to ourselves when we are contemplating doing something like this, to consider its likely consequences. I agreed with almost everything Judge Sofaer said this morning but one remark in the discussion troubled me. In response to a comment he asked, "If we don't get these two men, what difference does it make?" I would think that if we can make a projection toward the future and we can find that the cost to our values or to the texture of international politics or world order is minimal, then an individual initiative on our part may not be justified.

Finally, I think we should seriously consider methods for exploring alternative means of achieving our goals that don't necessarily require unilateral action. I, throughout my career, have supported the notion that unilateral action by members of the international community can be justified when it meets international standards and I don't recede from that for a moment. The international community's formal organs of decision are still quite weak and even when they work, it is owing to extraordinary pressure brought on them by one or two major actors. I am not excluding unilateral action, but I am fearful lest we invent an ideological vehicle that makes it easier for us to do things without going through very careful intellectual tasks that assure ourselves, and the world, that our actions are in the best common interest.

Thank you.

PROF. COLL: Thank you, Michael.

That was both a very elegant and provocative challenge to us, and I do hope that we can focus on the kinds of questions that Professor Reisman just raised; they're tremendously important.

Admiral Harlow.

RADM HARLOW: I am mindful of the admonition that Professor Reisman just gave us; we are faced with an extraordinary opportunity, but also a very dangerous arena in which policy may be abused. I would, nevertheless, hope that this conference may serve as a useful basis for United States policy in this very sensitive area.

Let me discuss what might be done in terms of implementing steps. In this arena, perfect is the enemy of good enough. I have a sense that time is of the essence, not only internationally, but domestically. Americans, in my judgment, do have moral fiber. It's not so firm that they can't be led into abusive and corrosive practices, but on the other hand, with wise and prudent leadership, I think we'll find there's a great reservoir of American will to do the prudent and the right thing. So, the key is wise leadership, and with it, we will not lack the will or moral fiber to take on the arduous and complicated task before us.

I would suggest that there is a need for a Presidential statement. I think it tends to be corrosive for Americans not to really know what direction we are going in the long term. It's also damaging internationally. Just think for a moment of the fear that runs through the hearts of our foreign friends and adversaries alike at the prospect of irresponsible use of American power in a unipolar world. I think there's a crying need for a Presidential articulation of national purpose in this ambiguous area of international affairs. This should include the questions of special operations, anti-terrorism, regional strife and drug trafficking. And let me say as an aside, I wrestled with the issue years ago of whether we could translate anti-terrorist acts from the arena of law enforcement into the arena of national

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security. As you know, traditionally, the United States has viewed terrorism as a law enforcement issue. The FBI has cognizance of terrorism in the United States, and the State Department internationally. In 1983, '84, '85, people started looking at that issue and wondered whether the new dimension of State-sponsored terrorism would warrant a different view of our appropriate response. In view of the State-sponsorship of these acts and their impact on American citizens, civil aviation, and the world community in general, I believed that it was appropriate to exercise the extraordinary right of self-defense. So I, for one, supported what led up to the Libya raid. I cannot establish in my own mind, based on the evidence, that it did a hell of a lot of good. I suspect it may have deterred terrorism internationally. In any event, I supported that conversion from law enforcement to national security. The same issue may have to be faced in future years with regard to drug enforcement. I'm not proposing that shift be made now, because I see no firm evidence of State sponsorship of drug running. But if that were to arise, I would support the exercise of the extraordinary right of self-defense.

I think one surprising thing during these last two days was the lack of discussion of the North/South issue. I think many nations perceive this as a situation where the rich get richer and the poor get poorer. International law and international relations have yet to come fully to grips with the question of redistribution of wealth; either voluntarily or through some systematic procedure. I'm not suggesting that I have an answer to that, but I am suggesting that it would certainly please me, and I think please many Americans, if the President came to grips with that issue and expressed the willingness to work with the community of nations toward what the Third World calls a new economic order that would address this issue. I think it's in our selfish interest to do so, if for no other reason than conflict avoidance.

In any event, I think that Americans would support a balanced Presidential statement recognizing that we can and should live with diversity, but at the same time need not live with threats to our economic or social well-being, and that we will protect our interests, and those of our allies.

I think that the theme of such a speech could be taken from the transcripts of our meetings. Going a few steps further, a national decision memorandum supporting the speech might require a Department of Defense concept implementation plan for low-intensity conflict. I would suggest that such a plan contain a statement of the unique nature of the challenge posed by low-intensity conflict. I'd also include in the paper a strategy to deal with this challenge. I would develop a catalog of countermeasures. Additionally, I would include a crisis management plan. There's been a lot of useful discussion here about who would be in charge and how the agencies would coordinate and develop such a plan to implement a policy, if the President announced it.

It would deal with issues of command and control. As Carnes Lord suggested, perhaps the military should be in command even over economic and political aspects of low-intensity conflict. That's a tough nut to crack. It will require an imaginative approach so we don't get bogged down in bureaucratic niceties, and avoid doing the right thing.

I would also make provision for intelligence support. Here let me make a point that I think is important. Intelligence support is often viewed as espionage support. It is not, ladies and gentlemen. One tenth of one percent of intelligence support requires espionage. When I speak of intelligence support, I'm talking about something that is fully lawful. It has to do with intelligently analyzing information that is readily available in the economic, political and military arenas, and communicating one's conclusions to the decision-maker. The point was made this morning that information delayed is information denied. Not only does it have to be delivered in a timely manner, but intelligence requirements have to be carefully assessed. Nipping things in the bud at a low level of violence requires robust intelligence support. If we are to develop a meaningful policy for low-intensity warfare, we must decide who is responsible for intelligence support and how those requirements will be identified.

I would include in such a concept plan the question of legal issues. That draws us back to what Judge Sofaer and many others mentioned, the War Powers Resolution. Frankly, if I wrote the legal memorandum, I would not explicitly use the just war terminology, but would try to present the principles in the context of contemporary reasoning understandable to the military.

Finally, there needs to be a policy oversight to attend to the moral dimension of any low-intensity conflict program and monitor its efficacy. The needs change, and the challenge moves so that reassessment must go on continually.

Although we have listened to many different viewpoints during the symposium, I believe that our deliberations have revealed an identifiable core of consensus that could serve to support the approach I have outlined.

Thank you.

PROF. COLL: Thank you, Admiral Harlow, for your very practical counsel's recommendations. As we continue this project, we should strive to maintain the fruitful tension that we have seen here between the world of policy and practice and the world of philosophy and theology; between the values of the cave and the world of the bright, shining sun.

Let me raise a couple of questions that I think we may want to wrestle with now. I think that the first question that we need to consider has to do with a point that Ken DeGraffenreid made. Ken said that one of the things he discovered in the policy process, is that often there seems to be a vacuum at its core. There is some input of legal advice at times, there are plenty of judgments based on purely strategic considerations, but, in his view, there is no process to ensure

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consistent, adequate ethical reflection at the heart of the policymaking process. Therefore, we often make decisions on the spur of the moment and on the basis of practical considerations, without the illumination of ethical reflection. I think that we want to ask ourselves whether that's really true. Do we agree with Ken's description of the policy process and, if so, is it a good thing or is it something we need to worry about? I sense from Professor Johnson's intervention earlier today, that we should be worried. I share that concern and I wonder how the problem can be addressed. Admittedly, ethical reflection is not something that is taught mechanically and we need to see how we can institutionalize it with a great deal of rigor. But, there are some measures that could be helpful. I'm very encouraged, for example, by the tremendous work that Jim Barry, at the CIA, is doing. He heads a small think tank, within the CIA, that addresses ethical issues and that takes very seriously the mandate, both at the level of policymaking and at the level of professional conduct, to promote a greater degree of ethical reflection within the Agency. This could be one direction for our efforts, and you may want to offer some insights into that question.

The second point that I wish to raise was put to me very provocatively yesterday by Chris Lamb. He said we need to come to terms with the fact that key decision makers in most crises are much more influenced by their broad national security responsibilities and the great global interests of the United States than they are by the moral issues of a particular emergency. An example of this, with which Chris is very familiar because he has written the best book about it, is the *Mayaguez* crisis. During the decision-making process in that affair, the American people were somehow led to believe that the real issue at stake was whether we should risk the lives of American soldiers in order to rescue the ship and its crew. But Chris's book very persuasively makes the case that the decision had little to do with the ethical imperative of saving the lives of American servicemen or even asserting our legal rights over an American ship. The decision was driven by Henry Kissinger's and President Ford's consideration that the United States was, at that point, in a very precarious position. The *Mayaguez* crisis took place in May of 1975. The United States had just suffered the humiliating loss of South Vietnam to the North Vietnamese. There were grave intelligence reports indicating that the North Koreans were contemplating a move against the South. Our adversaries in other parts of the world, including the then mighty Soviet Union, sensed that the United States might be retreating from its international responsibilities. From Kissinger's viewpoint, the seizure of the *Mayaguez* presented an opportunity to send a message to the North Koreans and other people around the world about our resolve and that's what drove the decision to recapture it. The concerns about the crew and the ship were very secondary.

Now that is one example of the way pragmatic goals can outweigh moral concerns in national security decision-making and I think that we could cite others, including

the invasion of Grenada. I would expect Professor Nardin to have decided views on the ethical and political wisdom of that operation because he just finished a case study of it. In my opinion, at least from the outside at that time, the invasion of Grenada was not driven principally by our concern for the lives of the medical students on the island. In fact, we had trouble figuring out who they were when we landed, and if the Cubans had been really nasty, they could have slaughtered the students before we got to them. In my view, what really drove Operation Urgent Fury was a decision by the Reagan administration that this was an opportunity to send a very strong signal to Cuba, to Nicaragua, to the Soviet Union, and to a few other adversaries around the world about the determination of the United States to defend its global interests. The justification about the safety of the students was in truth, I believe, a much less influential concern.

The problem that these sorts of national security decisions raise for us — and there are many others like the ones I just mentioned — is to determine what weight moral and legal reasoning actually bear in relation to the pragmatic considerations. I will leave this question open for a broader discussion. The case can still be made that even decisions based on pragmatic, strategic considerations can be morally and legally justified. But, we need to acknowledge that rather straightforwardly and think about what that may imply.

Let me raise a third question for you to try to answer. Are there any points of significant consensus among us after a day and a half of deliberations, and if so, what might they be? My sense is that there is a great deal of disagreement; there may also be some points of consensus, and I hope that we can make them clear. I think we're in agreement that, in however indirect a fashion, legal, moral and other constraints related to our strategic political culture do limit the way in which we think about and implement low-intensity conflict policy. And, I think we also share the perception that notions of morality derived from just war thought, as Professor Johnson argued strongly in his paper, actually have a very close relationship to common morality and shape American thinking about what is right and proper to do.

Let me close with a couple of challenges. Have we really wrestled with the relationship of low-intensity conflict in the *jus in bello*? Are we prepared to say that low-intensity conflicts are by their very nature inherently more difficult to conduct in accordance with just war doctrine than other kinds of conflict? Is there something different about them, or are we comfortable with saying that they are no more problematic to subject to just war criteria than conventional conflict? I'm certain we would be able to make that case for nuclear or high-intensity conflict. What are the distinctions here?

Finally, how comfortable are we with the possibilities opened up by the United Nations? How far are we prepared to go in strengthening the United Nations as a means of dealing with these conflicts in a multilateral way? I believe, of course, that the United Nations is not the only vehicle for us to act

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multilaterally. In the Gulf War, for example, even if the United Nations Security Council had not given us its approval for the use of force against Iraq, the United States still would have been able to develop a very solid coalition with allies in Europe and the Arab world, North Africa and Japan. Are there any dangers related to our new-found enthusiasm for the United Nations Security Council, or are we comfortable and do we believe, as Judge Sofaer put it, that we have no other choice but to continue along that course? Taking the multilateral route will have tremendous implications for low-intensity conflict because sooner or later, we will probably fail to get United Nations support for a particular policy. Indeed, the dynamics of the Security Council itself are subject to change. We do not know how long, for example, China will be as pliable and as cooperative as it has been over the last two years, and there are still open questions, of course, about the future of Russia and its democratic orientation.

Let me stop at this point and open the floor for questions and discussion. I will exercise my chairman's privilege to ask that we directly address Professor Reisman's point about the danger of just war as an ideology that might be used to justify proactive behavior abroad. I am very curious about how Professors Weigel, Johnson and O'Brien would respond to that concern.

MR. WEIGEL: I think it's a very wise counsel of caution. Put another way, what I hear Professor Reisman suggesting is that we keep intact the border between the just war tradition properly understood, and the crusading or Holy War tradition, which is obviously not what any of us, I think, are talking about here. Part of the problem with getting a grip on this is semantic. If we thought in terms of a justifiable war tradition, that simple semantic shift would make it easier for us to understand that not everything that is morally justifiable is necessarily wise as a matter of State. I think what Professor Johnson said this morning, about the just war tradition as one resource among others for the construction of prudent and wise policy, is very much worth repeating. When we expand the purview of the just war tradition to claim that a morally justifiable action is morally obligatory, or necessarily wise, we cross the border between just war tradition and other forms of reasoning. If we think only in terms of justifiable resort to armed force, we may be able to keep to firmer ground.

PROF. COLL: The expression "just war" often connotes the idea of a war for justice, which is not its key meaning. I think I agree with you that we need to think in terms of justifiable war, but many people read it as a war for justice.

MR. WEIGEL: I think the point is that one can imagine any number of scenarios, even under a low-intensity conflict rubric, in which the result of the moral calculus seems to be positive, and yet, for a host of other reasons, one decides that what is proposed is not prudent.

PROF. COLL: Professor Johnson.

PROF. JOHNSON: I liked Professor Reisman's discussion of the three ways in which the term "just war" is used. I thought he was absolutely right that all three uses have been employed here and they're present in general discussion outside of our deliberations as well. I also agree that the right use of just war, at least from my perspective, is the first. But, I would also suggest that the problem of the ideological use of this set of principles isn't unique to just war thinking. We find that whenever we have a set of principles for practical application. As Professor Coll was talking, I was suddenly struck by the possibility that someone might at some future time take that wonderful category you introduced which we haven't discussed—the use of low-intensity conflict for the purpose of sending signals—cross that with Professor Reisman's third use of just war, and we have low-intensity operations sending ideological signals all over the world for the purpose of keeping people in line or whatever. That's about the worst possible outcome I can imagine.

I also think we should take seriously what Admiral Harlow said about the need to get some fairly concrete policy implications out of our thinking. I don't know how we can accomplish that, but it is one way, it seems to me, to avoid the ideological exploitation of the just war tradition.

I was told that the guy who actually drafted the Weinberger Doctrine had studied at the War College under Donald Davidson, when he was teaching just war. So it was not accidental that the Weinberger Doctrine can be easily translated into just war language. That's one way to get these moral concerns into policies.

The last thing I would say is that just war is a tradition of limitation. That's really what it's all about. It is not principally an effort to invent new justifications for the use of force. It's an effort to look at uses of force that are indicated by political needs, and determine whether they are morally justified.

PROF. COLL: Professor O'Brien.

PROF. O'BRIEN: My response to Professor Reisman would be more or less along the lines of Professor Johnson's. I prefer the first use of just war, the prudential method. The just war doctrine is not substantive. By and large, it's procedural and sets up a series of questions to which you must supply answers. It doesn't tell you what to do. It asks you to justify what you're going to do. And the first use of just war that Professor Reisman sketched out is in harmony with this approach.

Now, cautious as Michael was about the second use, any natural law approach holds out the possibility that the positive law may be found wanting. That's the whole history of natural law, but direct challenges to positive law are rare. So by and large my reaction to your second use is not so much that the just war doctrine

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would be against positive law, but that it might be used to interpret the law in ways that would be more reasonable.

I'd absolutely reject the third use. Natural law is non-ideological by its very nature. It's an ethical framework of analysis. To put content in it, or to make it a tool of some particular point of view would violate its character.

PROF. NARDIN: I noticed two tendencies in the discussion where people have divided ideologically over military issues. I would call one group of speakers separators, and the other group integrators. I'm speaking here about how one combines judgments of legality, judgments of morality, and judgments of interest or prudence. I should indicate before I go further with this that I'm a separator, just so you know.

One of the issues that we've been talking about is the nature of law, because if law is going to govern low-intensity conflict operations, theories about it are not just academic. I think we have a range of quite different views of law here, and if you'll permit me to engage in a little parody which is deliberately unfair, I'd like to identify at least four theories that I've noticed.

First, Professor Teson's view is that we should respect the law except when it's unjust. Then, Professor Turner's view is that we should respect the law except when it's inexpedient. Professor Farer thinks that we should respect the law even when it is inexpedient. And Professor Reisman says that we should do what's expedient and call it law.

Let me immediately apologize to Professor Reisman by acknowledging that he does not intend that the United States should pursue its interests without reference to the concerns of other nations. I understand that he means to advocate a policy making process that is expedient for the larger system of international relations because it takes into account the interests of the international community in formulating American objectives.

However, these are views of law that do not identify it with the common interest. Law is seen instead as a set of constraints on the pursuit of the common interest. So I would say that Professor Reisman is a synthesizer or integrator. Some of you have said that in moral oversight we need to assess the need, accuracy and prudence of our efforts. Admiral Harlow agreed when he connected legality and morality with advocacy, expediency, prudence, and interests.

On the one hand you have people who think that law is essentially a matter of interest and prudence; on the other, people who see it as a matter of rules or constraints in contradistinction to prudence. I think Judge Sofaer indicated repeatedly his commitment to that second view.

I think the same divide persists when we pass from legal to moral issues. What is morality? For some people it's a matter of antecedently authoritative principles that constrain collective international interests as well as those of individual States. The moral point of view is one of conscience, of principle, of civility, of restraints.

This contrasts with an entirely different view of the moral or the ethical, which looks to goals, interests, and outcomes. This is a basic divide in moral theory and it can't be settled here. But I will say that the conflation of law and morality with interests leaves them unable to stand as an independent criterion for judging conduct. They lose their critical force and prophetic judgmental basis, which are precisely the qualities needed by policy makers if they are to subject their work to standards that transcend parochial or nationalistic concerns.

This brings to mind a third dimension which I would characterize as a fundamental cultural question. It's the debate about whether these standards are universal or whether they are particular or communal. That's a very hard thing to decide. I think we all recognize that one reason these debates are so complicated is that we're faced with a series of quite separate ethical outlooks, whether that of international law or American law; whether that of our Christian heritage or the rational natural law version of it; whether American military traditions or foreign. All these different viewpoints are not easily reconciled.

To return to my initial distinction between the synthesizers and the separators, I think the weakness of the former is to strive for consistency at the expense of the critical independence of the various standards that we can call on to evaluate our policy goals. The separator who treats law as one thing, the national interest as something else, and his moral judgment as yet another, may find himself in normative gridlock. Nevertheless, his judgments retain real critical force because he can criticize a policy position on the basis of criteria not already subsumed within it.

PROF. COLL: Thank you.

Professor Farer.

PROF. FARER: I wanted to speak to the question of just war as an ideology, prefaced by a brief comment on Professor Nardin's very important point.

I find Terry is pushing me closer to Professor Reisman. I would distinguish the position that Terry has staked out for himself, a position which I always feel Michael tends toward, in the following way. Government international law tends to incorporate a long term sense of what is in the general or collective interest. It can't have authority distinct from national interests, because after all, the international legal system is a consensual one. We're one of the principal makers of those rules, so there shouldn't be a dichotomy between international law and our longer term interests. There can be a dichotomy between the constraints of law in a particular case, and what is seen as a short-term opportunity to seize an advantage. Unfortunately, political considerations often compel us to make short-fused decisions, even if not in a time of what appears to be a terminal crisis. In such exigencies, we don't have a chance to take into account the whole range of possible implications, short, medium and long term, so the law gives us valuable

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guidance. There ought to be a powerful presumption, it seems to me, in favor of adherence to the law for that reason. Not because we think we are adhering to the law at the expense of interests, but because the law reflects interests contemplated outside the context of a crisis.

With respect to just war as ideology, I disagree, I think, with Professors Johnson and O'Brien. I think there's no way of excluding it from our use of just war reasoning, the ideology is a world view. The temptation to employ low-intensity conflict strategies will be very powerful when others depart from our view of what is a desirable world order. We haven't focused very much on that. When Admiral Harlow talked about North/South problems, he suggested the difficulties that could follow from a conception of order as the maintenance of the existing distribution of power, prestige and wealth. I would predict that if we set ourselves up in this fashion as the guarantors of the status quo, we will become the targets of all of those who want change. This approach would probably increase the use of terrorism and low-intensity conflict strategies against us because they are the methods of the weak. We resort to these methods because the loopholes of the U.N. Charter permit it, as my friend Professor Turner pointed out. They allow this latitude because the existing distribution of power, wealth and prestige influence the capacity to generate norms. To what extent should we identify the minimum of order that we all agree is necessary for our national interests with the existing international dispensation? And let's not exclude the internal affairs of those countries like Saudi Arabia and others where we have important interests. I haven't thought this all the way through myself and I don't think anyone else has. If we do define the minimum of desirable order in this very conservative way, we can be sure that we will be targets for low-intensity conflict strategies by those who want significant change, and that we will respond to them with low-intensity conflict strategies.

PROF. COLL: That's a very good point.

Professor Teson.

PROF. TESON: I would like to address the conclusions drawn by Professor Nardin from Professor Reisman's remarks. I think the distinction between those that separate law and morality and those who integrate them is just too simplistic. It seems to me, as anyone who has interpreted the law knows, that there are many ways, starting from the language of treaties, that you can factor your theories of morality into law. The very act of legal interpretation lends itself to an integrationist position because of the nature of jurisprudential language, quite apart from any desire to use the law in support of a particular moral position. The precise meaning of Article 2 of the U.N. Charter, which prohibits the use of force, has been debated for years. In this expression of the purpose of the United Nations, there is surely room for interpretation, be it by a court, a legal

advisor, an international lawyer, or a policy maker in low-intensity conflict operations; all of whom may introduce appropriate notions of morality into the process of interpretation. So I think that the distinction between separation and interpretation is just simplistic and doesn't wash. I agree with Professor Nardin that treaty law agreed upon by States may not leave room for interpretation. There might then be a point at which separation does take place and we must acknowledge that the positive law is unjust. A low-intensity conflict operation would then have to be justified on a moral basis.

The second point that I would like to address concerns a comment by Professor O'Brien on just war theory. I would like to say that, although I was intrigued by the procedural framework of just war theory, it seems to me that it cannot be just that. It has to be filled in by some substantive notion of what's right and wrong, and when it is correct to exercise international coercion. In my view, the most desirable supplement to the procedural framework of the just war tradition is a theory of respect for legitimacy and human rights.

I would like to make my final point by asking why democracies need to use low-intensity operations. I suggest that the reason is simply the existence of despotism around the world. As Professor O'Brien said yesterday, we don't conduct any low-intensity operations against Denmark. Democracies do not fight each other. Kant said this in 1795 in his book *Perpetual Peace* and it has now been overwhelmingly confirmed by the statistics collected by Michael Doyle and other political scientists. Therefore, I suggest that the promotion of democracy and human rights should be a principal motivation for the people who are planning these operations.

PROF. COLL: Thank you Professor Teson.

Professor Eckhardt.

PROF. ECKHARDT: I noticed that our title is "Legal and Moral Constraints on Low-Intensity Conflict," and following on Admiral Harlow's suggestion, if I were in your position, I would commence a study of every congressional act and statute that you believe constricts justly, or otherwise, your ability to conduct the type of low-intensity conflict that you think is permissible. I would ascertain which statutes you think are invalid and suggest amending legislation where appropriate. I'm thinking about activities like security assistance and funding. I'm thinking in practical terms because, after all, the constitutionally mandated war-making power of Congress has sometimes been amplified through legislation that was only appropriate to the conflict which occasioned it, yet it remains in force.

PROF. COLL: Thank you.

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Of course I heard both Admiral LeMoynes and Ken DeGraffenreid say that those legal constraints really are not that bad; that indeed, it is a good thing for our health as a polity and for the wisdom of these operations, that they have to be reviewed through a careful process of scrutiny which includes all kinds of legislative restraints.

PROF. ECKHARDT: My idea would simply be to ensure that we are not unnecessarily carrying outdated and impractical baggage, not to sweep away all restraints.

PROF. COLL: Professor Turner.

PROF. TURNER: I'd like to make three or four brief points.

Professor Nardin characterized my views in one sentence. I don't think that was simplistic, I take it as humor. If anybody did think that was a representation of my views, I would urge you either to talk to me or re-read my paper. I believe law is extremely important and I was only thinking about an extreme situation in which the safety of the nation might be in jeopardy when I suggested that we might have to argue with the law, and I said even then that we ought to recognize the harm done by so doing.

Also, I'd like to voice my agreement with the way Professor Teson stressed the importance of what John Norton Moore calls rule of law engagement, or promoting democracy in lieu of law. I think it is a tremendously important part of trying to reduce low-intensity conflict.

I think the idea of working on legislation is worthwhile. I thought Abe Sofaer had an A-plus presentation except for his treatment of the War Powers Resolution. He talked about having two months in which to act under the War Powers Resolution. You've got 48 hours to file your report or you're a lawbreaker. When I testified before the Senate Judiciary Committee a little over a year ago, Senator Biden told me that, in his view, the War Powers Resolution was only of academic interest. But I'll promise you that as soon as the President gets us into a situation in which bodies start coming home in bags and the public is unhappy, members of Congress will embrace that law and say "it's not our fault, get the crooks in the White House who concocted this illegal war." That's one of the laws that we ought to attack. You even get people like Senator George Mitchell saying it's unconstitutional, and yet nobody gets rid of it. When there's a Mayaguez operation in violation of the resolution, Congress can praise it, and when Jimmy Carter fails at the Iran rescue, an almost identical operation, they can call him a crook. I think that the resolution does undermine deterrence and may well promote low-intensity conflict.

The last point is a broader one that Admiral Harlow raised earlier. I'm not sure it has gotten as much attention as it warrants, because it will have to be dealt

with by somebody in the government. That's the drug problem. As I understood the Admiral, he argued that the use of force by the United States against narcotics traffickers in foreign countries would constitute a legitimate exercise of self-defense under Article 51 of the U.N. Charter if it could be proven that their operations were State-sponsored.

This position has a drawback that I tried to raise in my paper. Many of the old treaties that outlawed drugs also outlawed alcohol. Smuggling liquor does not involve a use of force as I see it. If it is self-defense for the United States to use force to combat a trade conducted by the agents of a foreign State that extends from their shores into our streets, then it is surely to be expected that the principle of reciprocity would give a foreign power such as Iraq the right under the Charter to fight the liquor trade at its point of origin in the United States. Alcoholic beverages are as offensive to the Islamic faithful as cocaine is to us. In other words, I'm really worried about taking Article 51 into the drug business. If foreign drug traffickers come onto our soil with narcotics or firearms, we can arrest them. But the view that it is a legitimate exercise of self-defense for us to attack residents of other countries who have initiated transactions in which Americans voluntarily engage, seems to me both unsupportable and dangerous. Nevertheless, the drug trade continues to be a considerable threat to our security and we must continue to think of ways to fight it.

PROF. COLL: Thank you.

Father Winters.

FR. WINTERS: I'd just like to raise two questions that I think might be useful as a focus for a part of your book on the symposium and this desire has been sharpened somewhat by Professor Farer's questions.

My first question is this: Do we as a group feel, and does the U.S. Government take the position, that our nation should remain open to the possibility of overturning governments in the name of justice?

Now my own view, which you may already have predicted, is that there are three reasons why we should not remain open to that possibility. We should not be in the business of overturning governments, first of all, because it is contrary to the fundamental value of order, which should be irreplaceable in international affairs. Secondly, it breaks, as Professor Reisman said, a very long tradition of collaborative understanding of the operative principles of international relations, which includes sovereignty. Third, as Michael also observed, the record of success in overturning governments is not all that good.

My second question is whether we should continue to commit ourselves to the possibility of helping governments resist insurgencies. Certainly international law seems to allow that and, perhaps, to encourage it. Just war tradition certainly allows it and is believed by many people to encourage it. I've always felt that it

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was a good idea. The question Professor Farer raises is a very good one. Do we expose ourselves too much by coming down on the side of order? I don't know the answer, but I think that it is of fundamental importance to the low-intensity conflict debate.

PROF. COLL: Thank you.

MR. COLLINS: Professor Farer said that low-intensity conflict is the weapon of the weak. I would suggest to the group that it just seems that way because this conference has been devoted almost entirely to the military aspects of low-intensity conflict. Low-intensity conflict methods can be used by the strong to tremendous effect in non-military contexts such as political, economic, psychological and religious warfare. I'll give you one example. Japan is now in a great position to wage economic warfare against the United States. All four of our military services have weapons and equipment that are inoperable without components from Japan. If they turned off the tap now, we would have to ask how our just war principles would apply in such a crisis. Do they permit us to declare war against Japan for conducting non-military operations against the United States?

PROF. COLL: The same question, by the way, was raised back in '73 with the oil embargo.

MR. COLLINS: Yes sir.

PROF. COLL: And I remember Robert Tucker wrote a very famous piece in which he argued that the United States had the right to seize and occupy the oil fields in Saudi Arabia.

PROF. O'BRIEN: I just would like to voice my agreement with Mr. Lord, Professor Eckhardt and Admiral Harlow about the need for serious study of how the United States Government deals with all the problems that come under the heading of civil affairs, whether they be political, economic, social or psychological. We never have come to grips with it. My experience as a former Army civil affairs officer suggests that the military needs help from the people in AID or the State Department or the universities to deal with all these things. There are a lot of compelling reasons why the military has to take the lead, but it can't go it alone in civil affairs.

There are a lot of problems with getting a grip on civil affairs. First of all, to the extent that you take this business seriously, as soon as the *Washington Post* gets wind of your efforts, there will be an article saying "In the Pentagon they are plotting to take over and rule foreign countries." This has happened before.

The second problem, of course, is that competing bureaucrats will all start elbowing each other out of the way to see who can enlarge his turf. But I think this is simply inescapable because the civil affairs requirement, in most aspects of low-intensity conflict, is more important than anything else, including weapons systems, and all the other kinds of hardware. Ultimately, these conflicts are political and social and that's why civil affairs needs to be taken seriously within the United States Government.

PROF. COLL: Thank you.

Let me thank you most warmly for having joined us for this symposium. I have found it very helpful. As I suggested yesterday, these kinds of gatherings cannot be expected to produce either brilliant new insights or clear solutions to future problems, but I think that they perform a valuable service by airing critical issues that are easily overlooked in the policymaking process. I have found in my brief twenty months in Washington that the greatest moral frailty of policy-makers is not a particular fondness for aggression or a proclivity for hatching secret assassination plots. Our greatest sin is something far pettier and perhaps deadlier for our own society, and that is bureaucratic selfishness and tunnel vision. These failings induce us to mistake the process for the goal, the means for the end; to believe that those things which we are engaged in have a reason of their own, and to forget the fundamental reason for the existence of the vast, elaborate machinery of government, which, in my view, is to uphold the honor of the United States. I take that word "honor" to have a strong normative content. Honor implies doing what is lawful and also doing what is right. That is what we as a people believe. So it's useful to get together once in a while and undertake a serious enquiry about the nature of the constraints that we face. What is their weight? How do they affect who we are and what we do, and the kinds of goals that we should have in mind, and the kinds of means that we should use?

There is something very attractive about Professor Nardin's reminder that law and ethics do have a prophetic quality about them. In other words, they often call us to do things that are not necessarily easy or that are not necessarily comfortable. It becomes tempting to reject these considerations out of hand and pretend that we are actually free to base our policy on nakedly expedient considerations or tailor it to justify the existence of the bureaucracy. One of our distinguishing human qualities, however, is that we are moral beings and live in a society bound by notions of lawfulness, against which we need to compare the substance of our policy.

Low-intensity conflict is intensely problematic precisely because it is low-intensity, because it is ambiguous, because it is indirect. It does not throw into sharp relief the kinds of antinomies with which we are most comfortable. Instead, it pushes us into gray areas, where we are compelled to balance and weigh competing values, moral commandments and legal norms.

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I also, however, consider myself a hopeless integrator, and would like to reply to Professor Nardin's commentary by pointing out one of the dangers of being a separator. The scrupulous separator maintains that the integrity of law and morality must not be compromised by commingling them with the national interest. But his refusal to cultivate any kinds of integrating links or even tentative embraces can sometimes have an untoward result. Morality and law may come to seem irrelevant to the policy process, and a crude understanding of the national interest untempered by normative considerations will be pushed to the fore by bureaucratic interests. This state of affairs is by no means foreign to the halls of our government.

I am not prepared to give up the quest for integration. It is difficult and it has real dangers, including the temptation to equate what is expedient with what is right, or the tendency to equate our own ideology or narrow prejudices with the good of the world. I think that integration is vital to our ethos as a society because it harmonizes with the principles of our founding. The architects of our republican order built according to a vision that was strengthened by allowing for human imperfection. Their genius lay in framing an edifice in which selfish interests, channeled into mutual opposition, would be softened and reconciled with a moral and legal structure of enduring integrity. This is one of the defining features of the American experiment and it is why we are not by inclination separators. Two hundred years after our founding we still believe it is possible to build a society that acknowledges the realities of human sin; our brokenness and lust for power, while preserving the vigor of law and morality.

I do want to close by urging all of you to think further about the influence of these constraints and how we might improve institutional arrangements for conducting this kind of discourse as our policy is formulated. We have been challenged by Chris Lamb and Ken DeGraffenreid to ask ourselves to what extent moral considerations actually play any genuine role in the policy process. As much as I agree with the particular examples given by Chris, I still think that there are many instances in which these considerations manage to push their way in and shape the debate. But this is a question to which there are not yet any clear answers, and one on which I'm open to fresh ideas.

Let me thank you once again for joining us here, for your intellectual friendship, for the books and articles that you have written in the past from which many of us have profited, and for your good, practical counsel at every step of the way. We look forward to staying in touch with you and I hope that this will not be the last of similar efforts that we will undertake in the future as we continue our pilgrimage. And finally, let me thank the Naval War College for hosting this symposium.

Thank you all.