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Drugs and Small Arms: Can Law Stop the Traffic?

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DRUGS AND SMALL ARMS: CAN LAW STOP THE TRAFFIC?

The panel convened at 8:30 a.m., Christopher L. Blakesley* presiding. The Chair expressed his regret that Dennis Foreman of the U.S. Department of State had been unable to attend.

OPENING REMARKS BY PROFESSOR BLAKESLEY

The topic we are discussing this morning is fascinating. It not only concerns international relations and law enforcement, it raises academic and practical domestic criminal law and constitutional issues as well. We hope to approach the topic from all of these points of view. The topic essentially addresses transnational border problems—the problem of the illegal importation of narcotics and small arms. The question is: What can this country do about this illegal importation constitutionally and in accordance with international and domestic law? What are the appropriate legal approaches toward preventing such importation? It is also very important to consider the relationship between the trafficking of narcotics and small arms, and the problem of terrorism.

Initially, I would like just to raise some of the questions that come to mind when approaching this issue. First of all, what are the available means to combat this illegal importation? Which methods should be used? Should the United States, for example, use its military, and if so, what role should the military play? Should it be given the power of arrest? What theoretical standard will provide U.S. courts with jurisdiction over the subject matter if a conspiracy to import narcotics is thwarted outside the territorial United States? How can we articulate a meaningful standard of international law that will be acceptable to our Constitution and our courts, and also withstand the scrutiny of our critics, allies and nonallies alike? What is the role of the judiciary in combating the illegal importation of narcotics? What are the dangers that overreaction to this problem could present to our domestic constitutional values? Especially with respect to its relationship with terrorism, could such overreaction erode the very values which provide the motivation to fight this problem? In other words, do we adopt approaches that may erode constitutional values in the interest of protecting these same values from erosion from without?

REMARKS BY BRADFORD PENNEY**

The past two years have been a period of intense concern within Congress and the administration over the threat of terrorism and the often closely related problem of international drug trafficking. The hijacking of TWA Flight 847 from Athens in June 1985, followed four months later by the hijacking of the Italian cruise ship *Achille Lauro* off Egypt, precipitated an unprecedented series of congressional hearings, new legislation, and executive orders in response to terrorism. Terrorism has come to be perceived in Washington as a source so menacing to vital U.S. security interests that extraordinary and legally unprecedented initiatives are justified in the name of responding to the threat.

Traditional doctrines of international law, such as the “political crimes exception” in extradition law and the customary basis for extraterritorial criminal jurisdiction, have been tugged and stretched in previously unforeseen directions. Terrorism has

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become a commonly invoked "buzzword" in Washington, a justification for extraordinary measures with wide-ranging consequences for international law and our diplomatic relations with other countries.

How has Congress responded to the twin problems of terrorism and international drug trafficking? What are the implications of Congress' search for new solutions in terms of international law and diplomatic relations? Finally, to what extent has Congress come to regard the problem of terrorism and lesser threats such as drug trafficking and arms smuggling as stemming from the same source?

The narcotics issue is perceived today as very closely related to the problem of international terrorism. In recent weeks, Libya has again been linked to drug trafficking enterprises in Latin America aimed at undermining support for governments friendly to the United States. The U.S. Coast Guard and other law enforcement agencies joined in an unprecedented initiative last summer with the cooperation of the Government of Bolivia aimed at wiping out cocaine trafficking enterprises in areas that were beyond the control of the Bolivian Government. In Colombia, the slaughter of members of that country's highest court provided ample demonstration that so-called narco-terrorism is for real and that when that threat is allowed to flourish it will strongly challenge the sovereignty of any government.

Much of the focus of the ongoing Iran-Contra investigation centers on the narcotics trafficking connection between the Contras, elements in Colombia, and individuals in the United States identified with support for the Contras.

Narcotics has become one of the hottest issues in contemporary foreign policy, reflecting not only the growing recognition of the link between drug trafficking and terrorism, but also the realization that stepped-up domestic enforcement alone will not eradicate an \$80 billion-a-year narcotics industry, which is carried out with impunity by means of computers, laundered cash, and sophisticated corporate-style organizational structures. Members of Congress also recognize that more than 90 percent of the illegal drugs consumed in the United States today is smuggled into the country, meaning that any really effective effort to cope with the problem must begin with our relations with those nations primarily responsible for producing the narcotics.

In the last week of March the Senate conducted an unprecedented debate that reflected the concern over narcotics as a foreign policy issue as well as the length to which many if not most members of Congress are prepared to go in order to convince their constituents that they are serious about the narcotics issue. The debate involved what were essentially resolutions of censure against three governments that have allegedly failed to cooperate with U.S. initiatives against drug trafficking. The debate grew out of an amendment adopted last year as part of the Omnibus Anti-Drug Abuse Act of 1986. That amendment to the Foreign Assistance Act required a 50-percent reduction in all forms of foreign assistance to those countries that do not cooperate fully with the United States in stopping the flow of international drug trafficking.

The amendment contained a triggering mechanism in the form of a presidential certification that the country in question had cooperated with U.S. antidrug efforts. That certification is necessary to prevent the reduction in foreign assistance but is subject to override if the Congress adopts a resolution disapproving of the certification, with the disapproval resolution subject to the same expedited procedures for floor consideration provided for arms sale proposals.

The Senate has recently concluded debate of three such resolutions with respect to Mexico, Panama, and the Bahamas. The Mexico disapproval resolution was tabled on a relatively close vote of 49-38, after a great deal of discussion about the sincerity of the Mexican Government in dealing with the drug problem, as well as the impact

passage of such a resolution would have on efforts to restructure Mexico's \$110-billion international debt.

The Bahamas resolution was also tabled, by a vote of 54-34, after concern was voiced about the impact of the resolution on the newly formed U.S.-Bahamas Drug Interdiction Task Force as well as the recently funded plans for a Coast Guard/Customs docking facility to be constructed at Georgetown in the Bahamas.

The Panama resolution was adopted on a voice vote, after a tabling motion was defeated by a vote of 31-58. The effect of passage of the resolution was largely symbolic, since the amount of foreign assistance involved was small, and the resolution passed after expiration of the 30-day period provided for disapproving a presidential certification. No one doubts, however, that the debate over these resolutions sent a strong signal to the three countries involved, as a harbinger of future congressional initiatives linking foreign assistance to cooperation in suppressing the narcotics traffic.

As concern has mounted over international drug trafficking, Congress has also moved to clarify and expand U.S. criminal jurisdiction over extraterritorial drug offenses. Starting in this decade, legislation enacted in 1980 asserted expansive jurisdiction over maritime drug offenses occurring on the high seas.

Last year, also in connection with the Omnibus Anti-Drug bill, the Congress adopted the Maritime Drug Law Enforcement Prosecution Act. This legislation contained a specific congressional finding that narcotics trafficking was a threat to the security and well-being of the United States, a finding based on a wealth of testimony by administration witnesses before various congressional committees.

The specific finding of a threat to national security in drug trafficking expands the so-called protective theory of extraterritorial criminal jurisdiction, which focuses on the nature of the interest that may be injured by a criminal act, rather than the place of the conduct causing the harm or the nationality of the perpetrator. In many drug prosecutions, especially those involving seizures on the high seas, there may be no overt act or harm occurring within the territorial jurisdiction of the state. Prosecution of drug conspiracies thwarted on the high seas must be based on a "protective principle" of extraterritorial jurisdiction.

There is even a suggestion in recent years that international drug trafficking has come to be regarded as a crime falling under the theory of universal jurisdiction, covering offenses regarded as so heinous by the international community of nations that any state may prosecute assuming it has apprehended or captured the alleged offenders. Buttressing support for the inclusion of drug trafficking as a crime of universal jurisdiction is the increasing number of international agreements concerning the suppression of illegal narcotics. The administration has recently concluded a series of bilateral mutual legal assistance treaties which seek to weaken narcotics trafficking empires through asset seizure and forfeiture and interruption of money laundering schemes. A treaty under consideration with Mexico, for example, would provide access to Mexican bank records for use in criminal trials in the United States.

Mutual legal assistance treaties have already been concluded with Switzerland, Turkey, the Netherlands, Colombia, Italy, and Morocco. Negotiations are underway with a number of countries that export illegal drugs, such as Mexico and the Bahamas. These treaties are expected to be highly useful in expediting trials of major drug traffickers seized by the U.S. Customs Service and other law enforcement agencies. They also raise significant legal issues about the right of defendants to challenge or exclude evidence obtained under a mutual legal assistance treaty. The judicial branch can be expected to confront many difficult questions of due process as the use of evidence obtained under these treaties in drug prosecutions increases.

Extradition law is another example of increased international cooperation on narcotics matters. As a result of a recent treaty with Colombia, that nation has extradited a number of alleged major drug conspirators to the United States for trial, and we have extradited U.S. citizens to face similar charges in Colombia. Extradition also points up the need for the United States to develop a coherent and consistent approach to jurisdiction over extraterritorial crimes. Without a coherent basis for such jurisdiction, international judicial cooperation will be difficult to maintain and diplomatic difficulties in handling extradition requests can be expected to arise.

Three other developments bearing on the development of extraterritorial jurisdiction in drug and terrorism cases should be mentioned. The first is the draft U.N. Treaty on the Suppression of Narcotic Drugs, currently under discussion. The draft treaty highlights the degree to which drug trafficking can be regarded as a "universal crime," such as piracy or trafficking in slaves. The debate over the treaty, however, has illustrated the difficulty in developing a consensus within the community of nations about which illegal drugs, if any, should be the subject of an international agreement. The current lack of a consensus in this area suggests that the United States will face difficulties in articulating the basis for expanding its extraterritorial jurisdiction over drug offenses. It also suggests that there are limits to the effectiveness of linking foreign assistance to cooperation on narcotics matters, particularly in those nations in which drug smuggling is viewed from a different social and judicial perspective.

A second development bearing on the expansion of extraterritorial jurisdiction is the trend within the United States toward erosion of the so-called *posse comitatus* doctrine against military departments participating in civilian arrests. Many arrests involving drug conspirators on the high seas are carried out with the assistance of the Coast Guard and the Navy. Aerial intelligence developed by the Navy, for instance, is especially important in arrests made by U.S. law enforcement civilian agencies in the area of the "choke points" in the Caribbean. Once again, diplomatic relations will be affected by the expansion of U.S. antidrug initiatives, such as last year's Bolivian venture in which the U.S. military actively participated in "sweeps" against drug smugglers in that country.

A final point relating to extraterritorial jurisdiction and the development of international law is the future of the political crimes exception in extradition law, by which the United States has traditionally refused to extradite individuals sought by other nations for crimes motivated by political ends. Concern has been voiced by the administration and others that terrorists frequently invoke the political crimes defense when sought by the nations against which they acted. The initial debate about this question involved the actions of the members of the Irish Republican Army and arose in connection with the recently ratified U.S.-U.K. supplementary extradition treaty. That treaty was ratified only after considerable hesitation by the U.S. Senate, and the debate over the future of the political crimes exception will be revisited in connection with the supplementary extradition treaty between the United States and the Federal Republic of Germany signed on October 21, 1986.

The recent U.S. request for the extradition of Mohammed Ali Hamed in connection with his indictment here for crimes allegedly committed during the 1985 TWA hijacking will help to frame the issue for members of the Senate contemplating the new treaty. Hamed's actions will be examined in West Germany under the old extradition treaty signed in 1978. Commentators have noted that under article II of the supplementary treaty, the political crimes exception would be inapplicable to the Hamed case.

The actions I have traced all point to the increasing recognition of the link between terrorism and international drug trafficking, as well as the trend toward expansion of U.S. extraterritorial jurisdiction and novel initiatives in areas such as extradition to respond to the dual threat. The rule of law is indispensable to suppressing the illegal narcotics traffic, yet matters of jurisdiction are often unclear because we are, after all, dealing with crimes that are planned and carried out beyond the borders of the United States. Narcotics is a highly politicized issue, one where full consensus does not exist within the United States or the community of nations over questions of enforcement and what is socially and legally acceptable conduct. Moreover, legal and diplomatic initiatives in this area run up against the seemingly unabated demand for illegal drugs in the United States, a nation of an estimated five million cocaine users where casual drug use threatens to make stepped-up enforcement no more effective than the prohibition initiative of the 1920s.

Increasingly narcotics is an issue with strong implications for foreign policy and our diplomatic relations with countries like Mexico, where our agenda of common interests includes much more than the suppression of illegal narcotics. The challenge for the future will be to respond to the dual menace of terrorism and drug trafficking in a manner that is consistent with both the rule of law and sensible diplomatic interests.

REMARKS BY ETHAN NADELMANN*

I would like to offer an assessment of U.S. international drug control efforts, and discuss the decidedly pessimistic prospects for what could be called the international drug enforcement regime. I also would like to suggest that, given the current direction of international drug control policy, most countries, and particularly the United States, might have been better off had this regime never been developed. It may well be that the creation of this regime has resulted in the imposition of far greater costs than were warranted by the problem at hand. In some ways it has had the perverse effect of exacerbating the very problem it was designed to eradicate. I believe that the time has come to reverse direction in shaping the current drug enforcement regime.

It is instructive to compare the drug regime to other international law enforcement regimes. In certain important respects, it resembles other regimes, such as those that practically eradicated piracy and slavery during the previous centuries and those that have been developed more recently to combat airplane hijacking and the counterfeiting of currencies. In each case, the vast majority of governments ultimately recognized a mutual interest in avoiding direct or indirect participation in such crimes, as well as in cooperating with one another in their suppression. Moreover, each crime has come to be regarded as a truly international crime and therefore as a violation of international law.

The drug enforcement regime differs, however, from other international law enforcement regimes in at least two significant respects. Despite rhetoric to the contrary, it lacks a deeply rooted moral consensus that the activity in question is indeed wrong. Unlike the other crimes that have become the subjects of such regimes, furthermore, the crime of drug trafficking evidences certain features that make it particularly difficult to suppress. Crimes that require limited resources and no particular expertise to commit, those that are easily concealable, and those that create no victims who have interest in notifying the authorities are most likely to prove resistant to regime enforcement efforts. Each of these characteristics describes drug trafficking. Unlike counterfeiting, for example, no particular expertise is required to become a

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drug smuggler. Even within the United States, marijuana is grown profitably by tens of thousands of people with no more training than can be acquired at the local library. In the less developed countries, hundreds of thousands of poorly educated farmers participate in the growing and refining of opium, coca, and cannabis for foreign markets. The potential number of successful counterfeiters is extremely small. The potential number of successful drug traffickers, on the other hand, is virtually infinite.

Second, most aspects of drug trafficking are easily concealable. The crops themselves are often grown in inaccessible hinterlands and camouflaged with legitimate crops. Their transport to the United States is also exceedingly difficult to detect. The estimated six tons of heroin consumed illegally in the United States annually appears as less than a needle in a haystack amid the billions of tons of legitimate goods imported each year. On the one hand there are hundreds of kilos smuggled into the country by criminal organizations such as the Mafia. On the other hand, there are thousands of one-and two-kilo packages brought in each year by an incredible array of foreigners, amongst whom the Nigerians, Sri Lankans, Pakistanis, and Lebanese rate as the most conspicuous. For a return of \$200,000 a kilo, there are few risks that such foreigners are not willing to assume. Indeed, in many cases the trafficker is no more than a courier who is paid about \$10,000 for his efforts. Against such a flow, U.S. law-enforcement officials can do little. For many couriers and solo entrepreneurs, the biggest problem is not getting the heroin into the United States but finding a connection to buy it afterwards. The story is much the same for cocaine. The estimated 60 tons of this drug consumed in the United States during each of the past two years have sold for between \$30,000 and \$50,000 a kilo in American cities. Some drug-trafficking organizations, most notably those run by the Colombians, have demonstrated their ability to transport hundreds or even thousands of kilos to the United States in only one trip. The most common means of transport has been by private aircraft, which are extremely difficult to interdict. Reports abound, however, of cocaine being smuggled by standard commercial aviation as well, both passenger and cargo. The financial incentives are such that there is virtually no limit to the numbers of individuals willing to transport one or two kilos via commercial aviation.

Marijuana is certainly the hardest of the illicit drugs to smuggle. The Drug Enforcement Administration (DEA) estimates that between eight and nine thousand tons of this drug are consumed in the United States each year. According to recent reports, interdiction efforts have been fairly successful at stemming the flow of marijuana, particularly to the northeastern part of the country. The resulting shortage is, however, easily compensated for by the relative ease with which this drug can be grown domestically. Current estimates of the proportion of the market filled by domestically grown marijuana range from the 15 percent estimate of the DEA, to that of 50 percent by the pro-pot lobby, the National Organization for the Reform of Marijuana Laws.

Although the international slave trade, like drug trafficking, was driven by the prospect of higher profits than could be obtained through legitimate commerce, it was a far more visible trade. Ships carrying slaves from Africa were far more readily identifiable than the vessels that transport marijuana and cocaine today. Even more important, the ultimate customers of illicit drugs are far more capable of concealing their possession and use than were the purchasers of slaves. When the U.S. Government criminalized the institution of slavery, the potential for an underground market to persist was virtually nil. Possession of a slave, after all, is very difficult to keep secret. The exact opposite is true of most drugs. These are compact and quickly consumed.

The final and perhaps decisive factor in the persistence of drug trafficking despite the increasing repressiveness of the regime is that the activity creates virtually no victims with an interest in notifying the authorities. Drug trafficking, like most other forms of international commerce, is a consensual activity involving willing buyers and sellers. All the international law enforcement regimes that have achieved some measure of success have involved crimes that create victims. Piracy, for instance, is defined as robbery on the high seas. Slave trading, although involving a willing buyer and seller, in effect victimized its commodity. While counterfeiting also involves a consensual transaction in its initial stage between the manufacturer and the distributor, victims are created thereafter when the false currency is rejected. Governments, moreover, regard the crime of counterfeiting as among the most serious threats to their sovereign powers, as it in effect undermines their monopoly over the supply of currency. Counterfeiters thus victimize the most powerful of potential victims. As for hijacking, the very nature of the crime involves the victimization of passengers held hostage to achieve the ultimate end of the crime. One can argue, of course, that drug trafficking also creates victims. In particular, one might refer to those who become dependent upon the drugs, and less directly, those who suffer as a consequence of such abuse by others. The great difference, however, is that the immediate victims of drug trafficking are self chosen, in the sense that their initial steps on the road to victimization are consensual ones. This is not the case with most other international crimes.

The absence of direct victims with an interest in complaining to the authorities is intricately related to the other major weakness of the international drug regime: the absence of a consensus on its ethical dimensions. None of the previously mentioned international crimes was suppressed effectively until a broad consensus had developed across diverse societies that viewed the activities in question as morally noxious. Such a consensus regarding the immorality of piracy developed throughout much of the world during the 18th century. A similar response evolved with respect to slavery during the 19th century. In each of these cases, as well as those of other international law-enforcement regimes, such a consensus developed essentially because the activity in question directly victimized innocents. The basic problem, then, of the antidrug regime has been the absence of just such a consensus. Efforts in the early part of this century to create antialcohol and antiprostitution regimes faced similar difficulties. Many of those involved in these activities simply did not perceive themselves as victims.

The consensus regarding the drug regime was perhaps strongest in the late 19th century, when the regime was originated. The British Government's strong-arm marketing of opium to an unwilling China at this time prompted a moralistic outcry. Since that time, the United States has joined an army of antidrug crusaders who have devoted substantial energies toward propagating a connection between certain drugs and immoral behavior. Their primary targets have been numerous societies that have not previously perceived such a link. Their success has been reflected in the spread of increasingly repressive and broad antidrug legislation around the world over the last four decades. Much of this legislation is modeled after U.S. statutes. As the regime has gained in repressiveness and scope, it has subjected those for whom drugs have presented no problem to the same prohibitions and punishments as those who have been victimized. Efforts to consolidate the ethical dimension of the regime have faltered. The great paradox, and in some sense hypocrisy, of the antidrug regime has been the very tension between its humanitarian objectives on the one hand and its increasingly repressive instruments on the other. It is quite possible that the gulf between the rhetoric and the practice of international drug control has never been wider

than it is currently. The Prime Minister of Malaysia can seek to justify the death penalty for drug traffickers on the grounds that they are "worse than murderers," and American politicians can proclaim similar sentiments, but the fact remains that millions of people around the world disagree. In the eyes of many the crime of larceny, for example, no doubt constitutes a more immoral act than that of drug trafficking. The former, after all, involves the taking of something from another against his will, whereas the latter involves nothing more than a consensual transaction between two parties. In many countries, furthermore, this transaction was entirely legal until just a few decades ago. It is exceedingly difficult for those impoverished people in less developed countries who become involved in the illicit drug business to partake in a consensus on the immorality of their actions. The hundreds of thousands of peasants in Latin America who grow coca, or in Asia who produce opium, must weigh the ethical obligation to provide for their families as best they can against the impetus to abandon profitable opportunities in the interest of protecting self-destructive Americans from their own vices. The laws that they violate, moreover, are typically ones that have been imposed from above, or perhaps even from abroad, without their consent. Even the notion, for example, that people can cause harm to themselves with cocaine must seem strange to Latin Americans who have chewed coca leaves with beneficial effects their entire lives.

For all of these reasons, the producers of illicit drugs are unlikely to regard their livelihoods as particularly immoral. By the same token, repressive governments are unlikely to be perceived as being backed by any particular moral force. It is not difficult to imagine that those directly involved in drug smuggling, as well as many others, view their commerce as little different from other forms of smuggling. Indeed, many drug smugglers have acquired their expertise in illicit transnational commerce by smuggling cigarettes, whiskey, electronic goods, and anything else that may promise a substantial profit in return for some risk. When smugglers found they could derive greater profit by smuggling drugs rather than more mundane items, the switch was easily made. Their role, as before, was nothing more than to facilitate the connection between the forces of supply and those of demand. Whereas before, however, they had in effect been stealing from the government by depriving it of revenue, now they were stealing from no one. This was the principal difference. Traffickers may, of course, commit many crimes in the course of their trafficking activities, but these are rarely a reflection of the type of item being smuggled. They are, rather, either a consequence of the illegal nature of the market itself, as no possibility of resort to a legitimate criminal justice system to resolve disputes exists, or of the tendency for criminally minded people to be attracted to the particular risks of the business.

Thus, despite the efforts of the United States and some other governments to create the veneer of an international moral consensus on the drug issue, a true consensus exists neither within the United States nor around the world. Despite rhetoric to the contrary, the drug problem is not a disease like smallpox, for which most people would agree upon the need for eradication. There is no popular demand for smallpox. There is, however, a huge demand for illicit drugs. It is unlikely that a consensus will ever develop against the consumption of those drugs that have been illegal for the past few decades. As long as individuals see little or nothing wrong with consuming illegal drugs, there can be no true consensus regarding the morality of drug trafficking.

Any consideration of the international drug control efforts of the U.S. Government ultimately must address the question: what would be the impact on drug abuse in the United States if somehow the entire flow of illegal drugs into the country could be stopped? John C. Lawn, the current Administrator of the DEA, addressed this ques-

tion in an interview with the editors of the *New York Times*. "Law enforcement cannot, did not, and will not solve the appetite for drugs in this country," Mr. Lawn said. "Congress is now talking in terms of interdiction, of putting all of this money into blockading the borders. Number one, that's impossible, and number two, even if we could miraculously put military people arm to arm to surround the United States to keep out cocaine and heroin, we would continue to have a substantial drug problem." Mr. Lawn continued by suggesting that even if cocaine were eliminated in the United States the public would find substitutes such as synthetically produced drugs. Nonetheless, he maintained that law enforcement did indeed play a "critical" role in hampering the spread of cocaine use.

There can be little question that the DEA Administrator was correct in his assessment. Preventing drugs from entering the country from abroad, were this possible, would certainly not eliminate the drug problem in the United States. Such action would, in all likelihood, cause a steep drop in drug usage immediately after the severance. In the long term, however, people would find new mind-altering substances to use and abuse. Whether the drug problem would be worse or better thereafter than it is currently is impossible to predict. As it is, moreover, U.S. drug enforcement efforts cannot significantly disrupt the flow of illicit drugs into the United States. Indeed, with a few isolated exceptions, there has been little connection between U.S. international drug enforcement efforts, and the availability or price of drugs to the American consumer. Minimal levels of law enforcement, combined with the simple fact that trade is illegal, are sufficient to assure dramatic markups in the price of drugs. Thereafter, even significant increments in U.S. enforcement efforts do not seem to have great impact on domestic drug prices.

In understanding foreign reactions to the global drug problem, it is important to remember that the principal concerns of governments and citizens alike are the lawlessness and corruption created by the illegal yet lucrative drug business. The focus, therefore, is gradually changing as foreign countries begin to face increasing domestic drug abuse problems. For most foreign governments, however, and particularly those in Latin America, the principal objective in cracking down on drug trafficking remains the desire to destroy actual and potential competitors for political power. While success in attaining this objective periodically may reduce the flow of drugs out of these countries, it is unlikely that such reductions will be large enough to affect consumption in the United States significantly.

All of this leads us to the conclusion that the international dimension of drug enforcement is not of great importance to the objective of decreasing drug abuse in the United States. The "push-down, pop-up" dynamic of the relationship between illicit drug production and enforcement, the permeability of U.S. borders, the tremendous incentives in impoverished foreign countries to supply U.S. markets, and the absence of real moral consensus on the issue all serve to ensure that U.S. demand will continue to be satisfied by foreign and domestic suppliers until the very nature of that demand changes. For too long, much of the rhetoric and a substantial proportion of the policy concerning this issue has focused on the international angle. The time has come to correct that focus by looking inward rather than outward. We must identify the sources and the nature of the American drug problem. A farsighted approach to the international drug problem must come to grips with two basic dimensions that have been almost entirely ignored in the drug policy debate of recent years. First, the costs of the drug problem extend beyond those of simple drug abuse. Costs also are derived from the illegality of the market. These include the costs incurred by a large underground economy, powerful organized crime groups, governmental corruption, the

deaths of thousands of drug addicts annually due to the increased dangers associated with these drugs because of their illegality, the fact that tens of millions of Americans interact with criminals in order to purchase these drugs, and the fact that 10 percent of all state prison cells and 25 percent of all federal prison cells are filled by people accused of drug trafficking crimes.

This distinction between the costs of drug abuse and the costs derived from the illegality of the market became very clear in the United States during the Prohibition period. At that time, a growing recognition of the latter costs led many earlier advocates of Prohibition to reverse stride. In the case of drugs, however, the two costs have tended to be jumbled together, with little popular sense of the distinction or the relationship between them. In the United States, the costs of criminalization are far greater than is recognized generally. In Latin America, it is these costs rather than the costs of drug abuse which represent the principal component of the drug problem. While acknowledging the undesirability or even political impossibility of repealing the drug laws, drug policies must be improved. They must be directed towards minimizing not just the costs of drug abuse, but the costs of criminalization as well.

The second dimension of the international drug problem that neither the public nor policy analysts have forthrightly considered is its permanence. Virtually all societies throughout history have used mind-altering substances. Though the nature of the substances and the degree of use have varied substantially, this suggests that the current rhetoric emphasizing the objective of a "drug-free society" is misguided and that such an objective is unattainable and very likely undesirable. History furthermore lends credence to the notion that, were the government able to suppress the use of marijuana, cocaine, and heroin, other mind-altering substances would emerge to fill their place. Rather than increase the use of repressive legislation and enforcement in pursuit of an unattainable objective, therefore, a more realistic policy is called for. Such a policy would begin by recognizing that the use of mind-altering substances is here to stay and would attempt to regulate and channel that use in an effort to minimize the totality of costs that it exacts. This would represent a radical transformation of U.S. Government policy. To foreign peoples, however, particularly in Latin America, such a shift would present a tremendous relief of the costs which they currently bear as a result of policies imposed by the United States. North Americans, moreover, as well as Latin Americans would represent the ultimate beneficiaries of such a policy shift.

REMARKS BY PROFESSOR BLAKESLEY

The questions raised by Mr. Nadelmann are fascinating from the perspective of substantive criminal law. They raise some issues that are interesting and that we sometimes fail to connect with international law or law enforcement per se in its procedural aspects. The questions, for example, of whether or not there are victims of international drug trafficking and of what constitutes such victimization are very important. What is the purpose of our criminal justice system and substantive criminal law in terms of criminalizing drug trafficking? Are there aspects of retribution, deterrence, rehabilitation, and isolation that must be addressed? Do enforcement and prosecution promote values suggested by these purposes of punishment? Are there aspects of our reaction domestically to drug trafficking and illegal importation of narcotics that have impacts beyond our borders? These are all interesting issues.

We must ask whether enforcement of our laws against illegal importation of narcotics actually deters its occurrence. As Mr. Nadelmann suggests, could it be true that such enforcement actually raises the value of illegal importation and creates an under-

world that exploits it and promotes other interests—even terrorism—with the profits? A further complicating feature is the relationship of the drug trafficking problem to broader international problems such as terrorism. Is it law enforcement that allows this connection to exist, or is it the nature of drug trafficking itself?

In addition, Mr. Nadelmann's point with regard to the international consensus is extremely important, especially in terms of the discussion of theories of jurisdiction. We must determine whether there is such a consensus that certain drugs are illegal and that enforcement is necessary and to which particular crimes it would extend.

Finally, a question is raised as to whether or not the conduct in question is consensual. What do we mean by consensual and at what point does this conduct become exploitative? There are, perhaps, aspects of drug trafficking that transcend the individualistic conception of consent. There are also, perhaps, aspects of consent that transcend notions of libertarianism or the need even to be considered from a libertarian standpoint. Does a nation-state (the United States) have an interest in attempting to thwart, via prophylactic proscription and enforcement, importation of drugs that individuals take of free will and, as a consequence, a certain number of whom lose their free will? These are all fascinating questions that do have an impact upon international law, and that must be addressed by the courts, the legislature, the executive, and each of us in trying to devise a solution to the drug-trafficking problem.

REMARKS BY BRUCE ZAGARIS*

I would like to comment on four aspects of the international drug-trafficking problem. The first is the need for countries, the United States in particular, to exercise restraint in approaching trafficking and related problems. Second, I wish to emphasize the necessity that the United States work through international organizations, both universal and regional. This is especially important because, as we have seen, the issues of trafficking and other problems such as terrorism are increasingly being linked to one another. The very fact that this panel discussion addresses arms as well as narcotics and many other problems of a criminal nature that overlap shows that each problem simply cannot be isolated and dealt with without considering other ramifications. Third, I would like to stress the need to utilize miniagreements and novel international mechanisms when dealing with both the problem of narcotics and that of arms. I will look at what the United States has done thus far and also what other countries have done in this area. Finally, I will address another important aspect that concerns the ways in which the United States and other countries have gone about planning their efforts to deal with narcotics both on the international and domestic levels.

Let me first, then, address the need for restraint by the United States and other countries in dealing with these problems. In this regard, the comments by Ethan Nadelmann touched upon a number of very important aspects. The U.S. Government's realization that its attempt to enforce prohibition incurred additional costs that were too great to justify this enforcement is instructive. The book, *The Drug Hang-Up*,¹ furthermore, addresses very well the U.S. attempt to export its moralization of the drug issue. The book reviews U.S. approaches to the drug issue between 1900 and 1960. In particular, a chapter entitled "Proselytizing the World" discusses the failure on the part of the United States to impose its moral solution upon other countries.

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¹KING, *THE DRUG HANG-UP* (1972).

Consideration of the history of U.S. attempts to deal with the problems in question is imperative. For one thing, it shows us that currently we are heading down the same road that we have followed in the past. The most recent manifestation of our attempt to export the 'moral solution,' the certification issue addressed by Brad Penney, comes to mind as an example of this. The first certification report was issued on February 27, and it analyzes in great detail the efforts of the governments in producing and/or trafficking countries to control the problem. The State Department, when rating these governments on their efforts, considered four criteria. Initially, they sought to measure verifiable progress in crop eradication. Second, they sought to determine whether laws were sufficient to deter narcotics production, whether, for example, punishments for production and trafficking were sufficiently severe. The third standard was the soundness, or, on the other hand, susceptibility to corruption of each country's judicial system. The fourth measure was the degree of cooperation exhibited by each country in the prevention of money laundering and drug trafficking activities. In this regard, asset seizure and forfeiture was considered a key method of countering such activities. The attempt by the United States to judge the legal systems of other countries and on the basis of that judgment to impose various sanctions is a very dangerous and unwise tactic. Such sanctions would deprive these countries of the very means to address their problems, as well as the means to cooperate with U.S. enforcement objectives. Whether it be Mexico, Panama, and the Bahamas, which were the subjects of the Senate joint resolutions mentioned by Mr. Penney, or other 'questionable' countries such as Jamaica, Colombia, or Peru, the governments in question are struggling against organized criminals who threaten their very existence. This must be taken into consideration. The certification process, therefore, is indeed unwise. Popular sentiment in Congress, however, unfortunately has promoted an atmosphere conducive to the adoption of such resolutions. It is important for those who disagree with this policy to participate in the political process.

Another issue of great importance is the need for governments to use international organizations in approaching the international drug problem. This is particularly important because, as Ethan Nadelmann pointed out, no international consensus exists on the topic of narcotics trafficking. The lack of such a consensus has been evident in the debate of the U.N. Commission on Narcotic Drugs, currently deliberating on a draft convention on the illicit trafficking of narcotics. In some countries, such as the Netherlands, there are no penalties for the simple possession of narcotics. Other countries impose the death penalty for possession or trafficking. U.S. policies certainly differ from those of Bolivia, furthermore, where possession of cocaine is legal for certain purposes. These disparities in approach cannot be overcome without relying on international organizations to force countries to debate and adopt laws and conventions in those areas where agreement does exist. The Council of Europe, and specifically its European Committee on Crime Problems, presents a good example of this. The Committee, which has existed for more than 30 years, provides the opportunity for deputy ministers of justice and their staffs to gather and grapple on a day-to-day basis with a host of problems. In this way the European countries have exhibited a considerable degree of success in dealing with problems as they have arisen. This is not to say that the Committee has been able to agree upon and solve all problems with which it has been faced, but at least the ministries of justice know one another and can communicate in case of a problem. Because their staffs have daily contact, furthermore, much of the traditional mistrust and ignorance of each other's legal system have been overcome. In the Americas, the creation of the Inter-American Commission on Drug Abuse has been a step in the right direction.

A current topic of debate has been whether the United States has allocated sufficient funds to international organizations and toward regional solutions to the narcotics problem. A look at the budget of the State Department's International Narcotics Bureau shows that, while it increased from \$59 to \$118 million in fiscal year 1986, it has been reduced to \$98 million for fiscal year 1988. The budget for international organizations in fiscal year 1987 was reduced from \$4 million to \$3.1 million. Similarly, the 1987 budget for interregional activities is \$6.5 million, while the fiscal year 1988 request is down to \$4.8 million. At a time, therefore, when the entire budget is dramatically increasing, the requested appropriations for international organizations and interregional programs is decreasing. To be successful in coping with the problem of narcotics trafficking, as well as the abundant problems closely related to it, there must be a regional and international consensus. The only way the United States or any other country can build such a consensus is by working through international organizations. If all a country's neighbors chastise it for not cooperating and call upon its government to take action, that government will listen. When the United States unilaterally claims that a certain country is not behaving, however, the chastisement simply lacks legitimacy.

The linkage between narcotics or arms trafficking and money laundering, for example, is very important. Just by dealing with one problem one cannot expect to handle all of the related problems. Only through an integrated approach can one be aware of and address these linkages. Again, an international organization is essential in the interest of dealing concurrently with a large array of interrelated problems. Some universal organizations, including the United Nations and Interpol, have in recent years exhibited moderate success in dealing with narcotics and related problems. Even the United States has over the past five years recognized the effectiveness of Interpol and has substantially increased its support of and participation in the organization. This is a beneficial development and the United States should be applauded for its actions. A key aspect of Interpol's effectiveness in dealing with terrorism, for example, has been its restrained approach. It is essential that the organization continue to exercise restraint and that it remain nonpolitical. As soon as Interpol loses its perceived objectivity in dealing with criminal problems, it will be seen as an ideological organization and will lose its effectiveness. The United Nations also potentially can be quite successful at dealing with narcotics and related problems both universally and regionally. Here the U.S. Government has given a major grant of approximately \$15 million to the U.N. Committee for the Prevention of Crime and Treatment of Offenders in Latin America. Although this particular organization is very new, it has the capability to improve the fight against narcotics, as well as the criminal justice system in general, in the region.

COMMENT BY PROFESSOR BLAKESLEY

It seems to me that each society has a responsibility to develop a program that will promote policies and technical approaches to solving problems that present a threat to the public health and safety. Such approaches, intended to protect the lives and welfare of its citizens, may often have an impact on a country's foreign policy.