

THE FEDERALIST SOCIETY

Presents the

2003 NATIONAL LAWYERS CONVENTION

ADDRESS BY

THE HONORABLE JOHN BOLTON

Under Secretary for Arms Control and International Security

U.S. Department of State

Thursday, November 13, 2003

FEDERALIST SOCIETY**ADDRESS BY THE HONORABLE JOHN BOLTON**

1
2
3 MR. CASS: Good morning. I'm Ron Cass,
4 Dean of Boston University School of Law. I'm
5 delighted to introduce our next speaker, Under
6 Secretary of State John Bolton, to address the
7 topic of international law and American
8 sovereignty. It's a wonderful topic. It combines
9 one term that no one can define with another term
10 that virtually no one believes in, and the
11 wonderful thing is that the entire audience is
12 trying to figure out now which term is which.

13 Many of you may have heard the story that
14 John tells of his trip to France with President
15 Bush when there was an international meeting. And
16 as many of you know, the French are good and true
17 friends and close allies. A lot of people were
18 wondering how the meeting would go between
19 President Bush and President Mitterrand. They were
20 actually meeting at one point on a ship. President
21 Mitterrand has the advantage of having a hairline
22 which looks a great deal like mine. So, he was

1 wearing a hat, which blew off during the meeting.
2 President Bush, being a gentleman, hopped over the
3 side of the ship, walked on the water, picked up
4 the hat, walked back to the ship, and returned the
5 hat to President Mitterrand. The French news
6 reporters observed this, and of course the next
7 day, *Le Monde* had the headline, "Bush Can't Swim,"
8 revealing once again that a great deal of life
9 depends on one's perspective.

10 John has a unique perspective on today's
11 topic. John has worn many hats in his career. I
12 should start, since the last panel had true
13 confessions of associations with academia, by
14 pointing out that John has for many years been an
15 adjunct professor at George Mason University. He
16 also has done stints in private practice, as an
17 associate and partner at Covington & Burling and as
18 one of the named partners at Lerner Reed Bolton &
19 McManus. He's also served as Senior Vice President
20 of the American Enterprise Institute and held quite
21 a few government positions. John has been general
22 counsel for the U.S. Agency for International

1 Development, the assistant administrator at USAID,
2 Assistant Attorney General of the United States,
3 the Assistant Secretary of State for International
4 Organizational Affairs, and now the Under Secretary
5 of State for Arms Control and International
6 Security. This shows not only that John can't hold
7 a job but also that he is not very good at picking
8 the jobs to hold. After all, when the easy part of
9 your job is dealing with North Korea and Iraq, you
10 know you haven't picked a really cushy position.

11 Please welcome a distinguished public
12 servant and friend of the Society, John Bolton.

13 UNDER SECRETARY BOLTON: Thank you very
14 much, Ron. It's a real pleasure to be here today.
15 I consider it not just an honor to appear before
16 the Federalist Society, but a real opportunity to
17 see a lot of old friends and to be in a generally
18 friendly audience, which is not always my pleasure.

19 I want to talk today about the question
20 of legitimacy of American actions, because with so
21 many criticisms of our foreign policy around the
22 world, I think it is important that we establish

1 for ourselves, and perhaps more importantly for our
2 critics, how and why we consider our actions
3 internationally as legitimate.

4 Now, this may sound like a perilously
5 abstract issue, but in fact it daily affects our
6 ability to secure American national interests in a
7 wide range of circumstances. Since many voices
8 question the legitimacy of our policies, it is
9 essential that we both understand and articulate
10 the often unspoken premises on which America
11 typically rests its foreign and national security
12 actions.

13 Let me take three current examples of
14 important American policies where our legitimacy
15 has been questioned: first, key elements of our
16 Iraq policy; second, President Bush's new
17 proliferation security initiative; and third, our
18 efforts to protect American persons against the
19 assertion of jurisdiction over them by the
20 International Criminal Court. Of course, the
21 wisdom of these policies has also been criticized,
22 but I hope to treat here not the substantive merits

1 of these issues, although I would be happy to do so
2 at the drop of a hat, but more fundamentally, and I
3 think perhaps ultimately more damaging, the
4 assertion that we're doing something illegitimate.

5 There are two recent case studies
6 involving Iraq where this legitimacy question has
7 emerged most sharply. First is the question of the
8 authority for, and hence the legitimacy of, the
9 U.S.-led Coalition's recent military action in
10 Iraq. Let me say immediately for those who wonder
11 that we had ample Security Council authority under
12 Resolution 687, which authorized the use of all
13 necessary means to uphold the relevant Security
14 Council resolutions and to restore international
15 peace and security in the region. Resolution 687
16 from 1991 provided for a formal cease-fire, but
17 imposed conditions on Iraq, material breaches of
18 which left member states with the responsibility to
19 enforce those conditions, operating consistently
20 with the underlying authorization contained in 687.
21 Resolution 1441 contains the Council's specific
22 decision that Iraq was and remained in material

1 breach and provided a final opportunity to cure,
2 which Iraq clearly failed to avail itself of.

3 Now significantly, U.N. Secretary Kofi
4 Anan has specifically said, "Unless the Security
5 Council is restored to its preeminent position as
6 the sole source of legitimacy on the use of force,
7 we are on a dangerous path to anarchy." These
8 sorts of statements, which the Secretary General
9 and others have made over the past several years,
10 are unsupported by over 50 years of experience with
11 the U.N. Charter's operation. The case of Kosovo
12 and the previous administration alone proves this
13 point.

14 Since the decision to use military force
15 is the most important decision that any nation-
16 state faces, limiting these decisions or
17 transferring them to another source of authority is
18 ultimately central to a diminution of sovereignty.
19 Importantly, there is no doubt, in light of the
20 October 17, 2002 congressional resolution
21 supporting the use of American force that the
22 President had full authority, and therefore full

1 legitimacy to disarm the Iraqi regime under the
2 Constitution. We should not shrink from the debate
3 on legitimacy to disarm the Iraqi regime under the
4 Constitution. We should not shrink from the debate
5 on legitimacy through concern that following our
6 own constitutional procedures on the use of force
7 is somehow not enough to justify our actions.
8 Indeed, there's a fundamental problem of democratic
9 theory for those who contend, implicitly or
10 otherwise, that the proper operation of America's
11 institutions of representative government are not
12 able to confer legitimacy for the use of force.
13 Make no mistake: not asserting that our
14 constitutional procedures themselves confer
15 legitimacy will result over time in the atrophying
16 of our ability to act independently.

17 The second Iraq case is the fundamental
18 issue, still in dispute, of where the legitimacy of
19 the next government of Iraq will come from. Now, I
20 distinguish legitimacy from actual political power
21 or political impact. These are two separate
22 things. One can certainly have legitimacy without

1 power, and vice versa. I want to talk about
2 legitimacy here. For Americans, the basis of
3 legitimacy for governments is spelled out in the
4 Declaration of Independence. The just powers of
5 government are derived from the consent of the
6 governed. It is, therefore, unequivocally the U.S.
7 view that the legitimacy of Iraq's next government
8 must ultimately derive from the Iraqi populace, and
9 not from other individuals, institutions, or
10 governments. Not from theologians, not from
11 academics, not from the United States, and not from
12 the United Nations.

13 This is a fundamental precondition for
14 understanding the legitimacy of the use of any
15 governmental power, and yet it has been
16 fundamentally misunderstood in the U.N. system.
17 Many in the U.N. Secretariat and many U.N. member
18 governments in recent Security Council debates have
19 argued directly to the contrary. Increasingly,
20 they place the authority of international law,
21 which does not derive directly from the consent of
22 the governed, above the authority of national law

1 and constitutions.

2 The question of legitimacy also arises as
3 the United States seeks to defend its national
4 interests using novel interests and loose
5 coalitions. For instance, one major new policy,
6 the Proliferation Security Initiative, or PSI,
7 announced by President Bush in Krakow, Poland on
8 May 31, has been developed with ten other
9 countries, each using its national level efforts
10 and capabilities. Without question, the PSI is
11 legitimate and will, I predict, be extremely
12 efficient in its efforts against weapons of mass
13 destruction proliferation.

14 PSI is an interdiction program where we
15 cannot convince a state to stop proliferant
16 behavior, or where items are shipped, despite our
17 best efforts to control them; we need the option of
18 interdicting shipments to ensure this technology
19 does not fall into the wrong hands. Properly
20 planned and executed, interdicting critical weapons
21 and technologies can prevent hostile states and
22 terrorists from acquiring these dangerous

1 capabilities. At a minimum, interdiction will
2 lengthen the time proliferators need to
3 disseminate new weapons capabilities, increase
4 their costs, and demonstrate our resolve to combat
5 proliferation.

6 Accordingly, the United States and ten
7 other close allies and friends have created a more
8 dynamic, creative, and robust approach to
9 preventing weapons of mass destruction, missiles,
10 and related technologies flowing to and from
11 proliferant problem countries. PSI has been a
12 fast-moving effort reflecting the urgency attached
13 to establishing a more coordinated and active basis
14 to prevent proliferation.

15 On September 4, just three months after
16 the President's announcement, we agreed on the PSI
17 Statement of Interdiction Principles. The response
18 to the PSI and to the principles has been very
19 positive, with more than 50 countries already
20 indicating their support and readiness to
21 participate in interdiction efforts. President
22 Bush has made clear that PSI will be broadened to

1 involve all countries that have a stake in non-
2 proliferation and that have the will and the
3 ability to take necessary action to address this
4 growing threat. Our long-term objective is to
5 create a web of counter-proliferation through which
6 proliferators will have difficulty carrying out
7 their trade in weapons of mass destruction and
8 missile-related technology.

9 As PSI has been created, some critics
10 have questioned its legitimacy. Some actually
11 liken it to piracy. As the PSI participant
12 countries have repeatedly stressed, however, our
13 interdiction efforts are grounded in existing
14 domestic and international authorities.
15 Participating countries have exchanged extensive
16 information about what we believe our respective
17 national authorities are, and the Statement of
18 Interdiction Principles makes clear that the steps
19 it calls for will be taken consistent with those
20 authorities. The governments of participating
21 countries have conducted thorough reviews of this
22 initiative.

1 We are very confident that we have
2 substantial legal authority to conduct interdiction
3 operations. In the maritime interdiction area, for
4 example, we can find a variety of ways to interdict
5 illegal shipments when the vessels carrying them
6 come to port, given the sovereign power is at its
7 greatest in national waters. Other vessels on the
8 high seas may, under well accepted principles of
9 customary international usage, be stopped by any
10 navy if they do not fly colors or show proper
11 identification. That is not, of course, to say that
12 we have authority to make any seizure that we want.
13 The question of what is permissible for seizure and
14 what is not must be determined on a case-by-case
15 basis.

16 As a nation that has consistently upheld
17 the importance of free trade around the world, we
18 will not act capriciously. Where there are gaps or
19 ambiguities in our authorities, we may consider
20 seeking additional sources for such authority, as
21 circumstances dictate. What we do not believe,
22 however, is that only the Security Council can

1 grant the authority we need, and that may be the
2 real source of the criticism we face.

3 My third example of challenges to our
4 legitimacy concerns our efforts to seek agreements
5 with other countries to protect U.S. persons from
6 the jurisdiction of the International Criminal
7 Court. These efforts have been disparaged as
8 contrary to the letter and spirit of the Rome
9 Statute that created the ICC. As President Bush
10 has argued, starting in the 2000 campaign, and as I
11 detailed here last year, numerous problems inherent
12 in the ICC directly affect our national interests
13 and security, and therefore also affect the
14 security of our friends and allies worldwide. The
15 ICC is an organization that runs contrary to
16 fundamental American precepts and basic
17 constitutional principles of popular sovereignty,
18 checks and balances, and national independence.

19 Accordingly, we are engaged in a
20 worldwide effort to conclude legally binding
21 bilateral agreements that would prohibit the
22 surrender of U.S. persons to the court. These

1 Article 98 agreements, so named because they are
2 specifically contemplated under Article 98 of the
3 Rome Statute, provide U.S. persons with essential
4 protection against the court's purported
5 jurisdictional claims and allow us to remain
6 engaged internationally with our friends and
7 allies.

8 Thus far, the United States has concluded
9 and signed Article 98 agreements with 70 countries
10 all around the globe, representing over 40 percent
11 of the world's population. Each Article 98
12 agreement meets our key objective -- ensuring that
13 all U.S. persons, official or private, are covered
14 under the terms of the agreement. This broad scope
15 of coverage is essential to ensuring that the ICC
16 will not become an impediment to U.S. activities
17 worldwide. Article 98 agreements serve to ensure
18 that U.S. persons will have appropriate protection
19 from politically motivated criminal accusations,
20 investigations, and prosecutions. These
21 straightforward agreements commit our partners,
22 reciprocally or non-reciprocally, not to surrender

1 U.S. persons to the ICC, not to retransfer persons
2 extradited to a country for prosecution, and not to
3 assist other parties in their efforts to send U.S.
4 persons to the International Criminal Court.

5 Indeed, our current tally attests to the
6 growing consensus worldwide that Article 98
7 agreements with coverage for all U.S. persons are
8 legitimate mechanisms as provided in the Rome
9 Statute itself. Of the 70 countries that signed
10 Article 98 agreements with us, 50 are signatories
11 or state parties to the Rome Statute. Based on our
12 extrapolations from negotiations currently
13 underway, not only do we anticipate a rising number
14 of total Article 98 agreements, but even more
15 agreements from state parties and signatories to
16 the Rome Statute. Our ultimate goal is to conclude
17 Article 98 agreements with every country,
18 regardless of whether it is a signatory or party to
19 the ICC, or regardless of whether it intends to be
20 in the future.

21 The main opposition to our Article 98
22 efforts comes from some EU officials and from the

1 presumptuously named Civil Society, which argued
2 that the wording of Article 98 limits the
3 categories of persons that can be covered by
4 bilateral non-surrender agreements. On the
5 contrary, Article 98 clearly allows non-surrender
6 agreements that cover all persons, and those who
7 insist upon a narrower interpretation must in
8 effect read language into Article 98 that is not
9 contained within the text of that provision.

10 Here is a real irony in the legitimacy
11 debate. From our perspective, it is difficult to
12 see how following provisions of the Rome Statute to
13 protect U.S. persons would do unacceptable damage
14 to the spirit of the treaty when the treaty itself
15 provides for such agreements. Indeed, parties to
16 the Rome Statute have used Article 124 to exempt
17 their nationals for a period of seven years from
18 the Court's war crimes jurisdiction, yet there has
19 been no suggestion that triggering these treaty
20 provisions will undermine the Court. One EU member
21 -- France -- has already invoked that exemption in
22 order to protect its citizens from accusations with

1 respect to war crimes.

2 Our detractors claim that the United
3 States wants to use these agreements to undermine
4 the ICC, or that these agreements, as crafted, lack
5 legitimacy under the terms of the treaty. To the
6 contrary, we are determined to be proper in our
7 relations with the Court, proceeding in a manner
8 specifically contemplated by the Rome Statute
9 itself. Moreover, in each agreement, the United
10 States makes clear its intention to bring to
11 justice those who commit genocide, crimes against
12 humanity, and war crimes. This is the stated goal
13 of ICC supporters, and a goal that the United
14 States has and will maintain.

15 The real legitimacy issue here is the
16 Rome Statute's purported claim that the ICC can
17 exercise jurisdiction over U.S. persons, even
18 though the U.S. is not a party and no longer even a
19 signatory to the treaty. It is, to say the least,
20 most ironic of all that a human rights treaty is
21 advanced on a theory that fundamentally rejects and
22 seeks to override the exercise of popular

1 sovereignty in the United States by seeking to bind
2 us without our consent. One can only imagine the
3 criticism we would receive if we tried something
4 similar on other nations. Our efforts to secure
5 Article 98 agreements are not only legitimate under
6 the Rome Statute itself, but reflect a basic right
7 of any representative government to protect its
8 citizens from the exercise of arbitrary power.

9 The question of legitimacy is frequently
10 raised as a veiled attempt to restrain American
11 discretion in undertaking unilateral action or
12 multilateral action taken outside the confines of
13 an international organization, even when our
14 actions are legitimated by the operation of our own
15 constitutional system. The fact, however, is that
16 this criticism would de-legitimize the operation of
17 that constitutional system, while doing nothing to
18 confront the threats we are facing. Our actions,
19 taken consistently with constitutional principles,
20 require no separate external validation to make
21 them legitimate. Whether it is removing a rogue
22 Iraqi regime and replacing it, preventing weapons

1 of mass destruction proliferation, or protecting
2 America against an unaccountable court, the United
3 States will utilize its institutions of
4 representative government, adhere to its
5 constitutional structures, and follow its values
6 when measuring the legitimacy of its actions. This
7 is as it should be, in the continuing international
8 struggle to protect our national interests and
9 preserve our liberties. Thank you very much.

10 MR. CASS: Secretary Bolton has agreed to
11 answer questions for a few minutes before we take
12 our lunch break. Please come to the microphone.

13 MR. MITCHELL: Secretary Bolton, I'm Sean
14 Mitchell from the Colorado Chapter. You responded
15 to Kofi Anan's assertion by laying out the
16 substantive legal case for American authority to
17 exercise force consistent with its constitutional
18 process and with international agreement. But, I
19 think you side-step to some extent the explicit
20 normative claim Secretary Kofi Anan was making,
21 which is he thinks it would be a better world if
22 states had to get permission from the U.N. to draw

1 their guns. Tell us why that's right or why that's
2 wrong.

3 UNDER SECRETARY BOLTON: Well, you know,
4 in any appearance that I make or that any senior
5 official makes, you have to say things that are
6 fully cleared within the government, and that's a
7 legitimate point. I'm not here because of my
8 personal opinions, and it's very important that we
9 not say anything that can be construed as having
10 gone beyond the clearance process. My authority is
11 entirely derivative. So, although I like to be
12 straightforward, I will be straightforward in this
13 sense and say I'm not going to answer your question
14 specifically because I'm not sure that anything I
15 said would make it through the clearance process.

16 I will simply say this. Fundamentally, I
17 think it's the duty of any administration to try
18 and advance American interests in whatever is the
19 most effective way possible consistent with our
20 constitutional principles. There are, without
21 doubt, many occasions when seeking an affirmative
22 vote in the Security Council would make sense, that

1 it would advance our interests, and that we should
2 proceed to do so. I think we've consistently tried
3 to do that in this administration where it was
4 appropriate.

5 I would say that in the previous Bush
6 administration, we did the same thing. And
7 ultimately, the question for America is how to
8 build the broadest coalition in support of our
9 actions, consistent with our ability to take the
10 actions we need to defend ourselves, and where that
11 comes out in any given case is going to depend on
12 the circumstances. At some point when I'm a
13 civilian, I hope somebody asks me that question
14 again.

15 MR. CASS: That's a great answer for
16 someone who said he wasn't going to answer the
17 question. We have time for another question back
18 there.

19 MS. BENNETT: My name is Brook Bennett.
20 I am a law student at Tulane. I have a question
21 about your comment that we're no longer a
22 signatory. This is an honest question; I am quite

1 confused because my understanding is that you can't
2 actually un-sign. And in fact, there is a very
3 substantial footnote that limits our participation,
4 but nonetheless, we cannot un-sign. Could you
5 please clarify that?

6 UNDER SECRETARY BOLTON: Well, I would
7 say that un-signing is not a term of art, but that
8 the practical effect pursuant to Article 18 of the
9 Vienna Convention on Conventions, which by the way,
10 we've never ratified either, just showing our
11 respect for all these unratified treaties, is to
12 eliminate the effect that Article 18 will give to a
13 signature to a treaty.

14 I think there are a lot of reasons to be
15 concerned about the over-interpretation of Article
16 18 that some people have given. But by declaring
17 our intention not to seek ratification of the Rome
18 Statute, I think what we have done is eliminate any
19 argument that Article 18 has any lingering effect
20 on us, and that is the practical equivalent of
21 taking a big bottle of Wite-Out to the treaty
22 depository and doing the necessary -- I'm sorry we

1 don't have more time. I know you're on a very
2 strict schedule today. I realize, also, I'm the
3 last thing standing between this group and lunch.
4 So, my best wishes to you. It's a real pleasure to
5 have been here.