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FOREWORD*

The United States and the other great democracies learned dramatically during World War II of the need for effective intelligence. Pearl Harbor was a bitter lesson which drove home, at the cost of many American lives, the danger of the failure to get effective and timely intelligence to those who are on the line. In just as dramatic a manner, but in the reverse direction, the United States learned of the advantages of such intelligence at the decisive naval battle of Midway, in which it defeated a substantially larger Japanese force through intelligence derived from the breaking of Japanese codes. Similarly, our British allies benefited greatly from the intelligence which came into their possession as a result of the so-called ULTRA project which broke the machine-crafted German codes.

In the post-World War II context, intelligence has become even more important to meet the challenge of enhancing strategic stability in a nuclear world, as well as the challenges from terrorism, sustained low intensity conflict and disinformation campaigns targeted against the democracies.

In addition, we have come to understand that effective intelligence is a critical component of arms control, which of necessity depends on verification as an essential element. Although there is no unanimity, there is today a broad popular consensus to the proposition that the Western democracies, in meeting the challenges and threats to world order that sadly characterize our present world, should have intermediate options between open diplomacy and war. These options cover activities which,

* The views reflected in this volume are those of the authors only and do not necessarily reflect the views of the American Bar Association, the Standing Committee on Law and National Security, the University of Houston Law Center, or the *Houston Journal of International Law.*

strictly speaking, belong to the field of counterintelligence, and which are popularly know as "covert," or more accurately under current law, as "special activities." It is these activities that were involved in the Iran-Contra Affair and which in general give rise to greater public debate.

But just as there is a popular consensus overwhelmingly supporting the need for an effective national intelligence capability, there is a similar consensus in support of strong and effective oversight of such intelligence activities. In a democratic society we must especially ensure that secret activities are fully controlled by democratically elected leaders, and that we have an oversight process which generates public confidence in our intelligence services. During the mid-seventies, as a result of the Church and Pike committee hearings, the nation learned of the great cost to effective intelligence when there is a loss of public and congressional confidence in activities of the intelligence community.

In the aftermath of this scrutiny, a wide-ranging new oversight structure was built into American law. This structure now includes separate Senate and House select committees on intelligence, an independent President's Intelligence Oversight Board, and oversight mechanisms within the Justice Department and within each separate intelligence agency. It also includes a series of laws and Executive orders establishing oversight procedures and substantive limitations on intelligence and special activities. Oversight, of course, must also ensure that the intelligence process (and associated oversight) must proceed within the broader context involving the rule of law, the separation of powers, and respect for individual rights and freedoms that we regard as fundamental values. It must also carry out its important functions while ensuring, or ideally enhancing, the effectiveness of intelligence and special activities.

The fact that the oversight process takes place in a democratic society and that it reflects both areas of agreement and areas of disagreement, is one of the difficulties inherent in the oversight process. At the same time, it is a source of strength. The substantial "overt-covert" assistance to the Mujahideen in Afghanistan has engendered little controversy largely because of the substantial consensus, indeed enthusiasm, in Congress for this policy. Yet the "overt-covert" assistance to the Contras in response to the prior Cuban-Nicaraguan assistance to the FMLN in El Salvador and other "secret warfare" against neighboring states, took place in a setting of white-hot public debate.

Another inherent difficulty is the underlying—and perhaps intensifying—constitutional debate as to the respective roles of Congress and the President in intelligence oversight. On the one hand, many in Congress have argued for broad congressional authority in this area. On the other hand, many in the executive branch and some in Congress have

taken the view that the control of intelligence is largely, if not exclusively, the responsibility of the executive branch. This underlying dispute was reflected in the ambiguous language in the Intelligence Oversight Act of 1980 which, in turn, led to one of the key fights in the Iran-Contra Affair concerning the scope of any Presidential reporting requirement to the congressional Intelligence Committees. This dispute has been continued in the post-Iran-Contra period by legislative proposals that would require increased Presidential reporting of special activities.

The Iran-Contra Affair sharply poses not only traditional oversight issues but a variety of newer and related concerns. Among the issues that have now been raised are the following:

> To what extent has a climate of reasonably-based fear about leaks contributed to a progressive narrowing of advice and expertise on special activities?
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> Are overly weak laws and procedures concerning leaks from either Congress or the executive branch harming the oversight process itself?
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> Were laws at the center of the Iran-Contra Affair ambiguous in their application to the operations in question? If so, should freedom of action remain with the President in a constitutional area of strong Presidential authority? And if so, should those carrying out such activities be subject to criminal prosecution?
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> Is oversight of failed intelligence operations by public congressional hearings the most appropriate mechanism for oversight?
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> What is the effect of such public oversight process on present and future sources and methods and on the willingness of other nations to assist with future special activities?
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> What is the effect on the integrity and strength of the regular oversight process by such ad hoc public hearings?
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> What is the effect on the separation of powers?
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> What is the effect on individual liberties and freedoms of such hearings when nationally televised, and what procedures should be required for the protection of individual liberties and freedoms?

The papers in this volume are the product of a conference on "Legal and Policy Issues in the Iran-Contra Affair: Intelligence Oversight in a Democracy," jointly sponsored by the American Bar Association Standing Committee on Law and National Security and the University of Houston Law Center, to explore the full range of legal and policy issues in intelligence oversight in light of the Iran-Contra Affair. The conference, one in a series of national security workshops sponsored by the ABA Standing Committee, was organized around four panels, for each

of which we sought to assemble the nation's most competent experts and scholars. These panels were:

I. Intelligence Oversight in a Democracy
II. Legal Issues in the Iran-Contra Affair
III. Policy Issues in the Iran-Contra Affair
IV. The Iran-Contra Affair and the Intelligence Oversight Process

One of the participants, George A. Carver, Jr., of the Center for Strategic and International Studies, made available to the conference a letter dated May 10, 1988, which had been sent to Congressman Louis Stokes, Chairman of the House Permanent Select Committee on Intelligence, over the signatures of Zbigniew Brzezinski, George A. Carver, Jr., William E. Colby, Richard Helms, Henry A. Kissinger and General Brent Scowcroft, opposing H.R. 3822, a post-Iran-Contra oversight bill. The bill would require the President to notify Congress within forty-eight hours of any covert activity in which our intelligence agencies were engaged. The letter argued against the inflexibility of this clause in the following terms:

> Had H.R. 3822 been on the statute books in 1980—to cite but one example of the kind of problems the language of this Congressional notification provision would create—President Carter could not lawfully have enlisted the Canadian assistance that was essential to the successful exfiltration from Iran of the six American escapees from our seized Tehran embassy. Canada provided that assistance on the express condition that Congress not be notified while the operation in question was in progress, and the duration of that "special activity" was measured in weeks—not hours.
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> Particularly where matters as complex as covert action are involved, even the most astute, discerning legislators and staff drafters of legislation cannot possibly forsee [sic] or codify with precision, in advance, all the concrete contingencies and difficult real life dilemmas that are bound to arise. If H.R. 3822, with its rigid, inflexible notification provisions, should become law in its present form, there is no way of telling what future President's hands that law may tie, under what particular circumstances, with what adverse impact on U.S. interests—in ways likely to be rued by future Congresses as well as by future Presidents, regardless of party.

The issues raised by intelligence oversight in a democracy are difficult and important. It is clear from this conference, as well as from the general debate that has taken place in the period following the Iran-Contra hearings, however, that for the most part the oversight mechanism

put in place in the late 1970's is working reasonably well. The principal exception is the dispute, rooted in separation of powers, as to any obligation of the President to immediately notify Congress of "special activities." This unresolved legal issue was a major source of the differences between the legislative and executive branches in the Iran-Contra setting. Unless these differences are resolved, they are likely to continue to generate friction in the oversight process. Whatever the resolution of this and other current oversight issues, the conference papers in this volume should make a major contribution to an understanding of the difficult issues of intelligence oversight in a democracy.

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