Annual Meeting Program

Panel Discusses Problems of Law Enforcement and Intelligence

by Stewart Baker

The ABA's annual meeting in Chicago featured an all-star panel discussing the newly difficult relationship between law enforcement and intelligence agencies. The panel, sponsored by the Standing Committee on Law and National Security, included Deputy Attorney General Jamie Gorelick. She was joined on the panel by her predecessor as Deputy Attorney General, Standing Committee member Philip Heymann, by former Director of Central Intelligence (and former Standing Committee member) R. James Woolsey, by noted defense lawyer Reid Weingarten, and by Paul Schott Stevens, former Legal Adviser to the National Security Council and the new Chair of the Standing Committee. The discussion was moderated by Stewart Baker, former General Counsel of the National Security Agency and Standing Committee member.

The new tension in relations between law enforcement and intelligence stems in part from the fact that "Such matters as terrorism, weapons proliferation, narcotics and others have both foreign and domestic tails to them, so to speak," said Jim Woolsey. Phil Heymann predicted that "we are going to see a major wrestling match between the CIA . . . and the FBI for control of this type of intelligence gathering abroad."

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Three New Members Appointed

Former NSC Legal Adviser

Paul Stevens Named New Standing Committee Chair

ABA President Roberta Cooper Ramo has appointed Standing Committee member Paul Schott Stevens as the group's new chairman and has added General E. F. Anderson, former National Security Agency General Counsel Stewart Baker, and Central Intelligence Agency General Counsel Jeffrey H. Smith to the Committee. In addition, Zoë Baird—who was appointed last year to serve the remainder of the term vacated upon the death of Edward Hidalgo—has been appointed to a full three-year term, and six new members have been added to the group's 23-member Advisory Committee.

A Scholar of the House at Yale University, from which he received his B.A. magna cum laude in 1974, Paul Stevens received his J.D. from the University of Virginia School of Law in 1978 and subsequently has distinguished himself both in private law practice and government service. Perhaps most noteworthy, from the perspective of the Standing Committee, he served as the first Legal Adviser to the National Security Council in 1987. As a

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The National Security Lawyers

An Interview With NSC Legal Adviser Alan Kreczko

As a new feature, the Report will from time to time publish interviews with prominent members of the National Security Law community. We are pleased to initiate this series with the following interview of National Security Council Legal Adviser Alan J. Kreczko. Mr. Kreczko received his J.D. magna cum laude from the University of Michigan Law School, where he served on the Michigan Law Review. Before assuming his current position in April 1993, he had a distinguished career in the Department of State, most recently as Deputy Legal Adviser. The questions were posed by the Standing Committee’s new chairman, Paul Schott Stevens, who served as the first NSC Legal Adviser in 1987. —Ed.

STEVENS: The National Security Council has proved to be a highly-flexible policymaking instrument since it was established under President Truman in 1947. One important innovation made in 1987 was the establishment of a Legal Adviser in the NSC staff. How would you describe the mission of your office and its role within the Clinton NSC?

KRECZKO: We have a variety of roles. Probably the most important is to provide legal advice to the National Security Adviser and NSC staff on national security issues under consideration. “Providing advice” takes several forms. Ordinarily, it starts with knowing the legal position taken by the relevant general counsel. With a staff of two, we can’t possibly analyze the variety of domestic and international legal issues flowing through the NSC process. However, we are frequently closest to the decision-making action and have the best view of precisely what issues are being considered at senior levels. And, frequently we provide the only lawyer present at senior NSC meetings.

Our first job then is to spot legal issues; then to identify the general counsel best suited to address them; and then to make sure they are addressed in a timely manner. Since many national security issues affect the interests of several agencies (e.g., State, Defense, including JCS, and CIA), we frequently lead inter-agency legal studies of the issues, with a view to providing consensus legal advice or options to the principals. These inter-agency studies have proven very useful. For one thing, with more lawyers working an issue, bringing dif-

ferent perspectives, I think we get better legal conclusions. Moreover, the process can also fortify a general counsel who may be being pressed on his or her legal conclusion for policy reasons. On the other hand, it can complicate providing legal advice when counsel fundamentally disagree with each other. Either way, it is important that the legal issues be identified and resolved, or at least addressed, before senior policymakers are asked to make decisions.

While we always seek to convey accurately the positions of other counsel, we reserve the right to assess the legal issue independently and offer our own legal view. Given our size, we tend to concentrate on issues affecting fundamental presidential prerogatives, such as the President’s war powers or responsibility for the conduct of diplomacy.

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BOOK REVIEW

U.S. Intelligence at the Crossroads: Agendas for Reform
Ernest May, Roy Godson, and Gary Schmitt, Editors
Brassey's, Inc., McLean, VA (1995)
Pages: 325. Price: $25.95.

Reviewed by John M. Flanagin

When the Central Intelligence Agency was created nearly half a century ago, it was more revolutionary than evolutionary. Never before had the Executive Branch sought the authority and funding to maintain a predominately civilian foreign intelligence service during peacetime (or what might be more accurately described as an inter-war period). There were lines of continuity between the CIA and its wartime precursor, the Office of Strategic Services, particularly in their leadership. However, the CIA and the other intelligence organizations that eventually coalesced into "the Intelligence Community" were geared toward new challenges in a world that had been transformed by conflict.

The current debate over the future of US intelligence, to which this volume contributes, addresses several questions: What is "intelligence" and who should use it? Should those who produce intelligence be insulated from the policymaking process? How will priorities for collection and analysis be established? These are open questions because the threat that the Intelligence Community organized itself around during the Cold War has dissipated. Emerging threats to US national interests are difficult to define in the post-Cold War period, just as they were in the years immediately following World War II. From this observation follows the catalytic question: Can the old intelligence apparatus be adapted to new circumstances, or should we dismantle it and start over?

In the early 1990s, David Boren and Dave McCurdy, who chaired the Senate and House intelligence oversight committees respectively, proposed fairly radical plans for centralizing and streamlining the Intelligence Community. Senator Patrick Moynihan argued for dismantling the CIA and against establishing a new foreign intelligence bureaucracy in its place.

The Consortium for the Study of Intelligence organized a Working Group on Intelligence Reform in 1992 (co-chaired by Roy Godson and Ernest May), to consider these and other proposals for reforming US intelligence. U.S. Intelligence at the Crossroads: Agendas for Reform is a compendium of papers developed by the Working Group over the past few years. This is not a consensus report. The contributors represent different orientations—academic, military, civilian intelligence, and law enforcement—and their differences of opinion are illuminating. The book offers a set of alternatives rather than a single agenda for reform.

How should "intelligence" be defined? One can define it expansively or narrowly. The expansive definition would include any information that might be useful to a policymaker involved with international matters. Information relating to economic competitiveness, environmental problems, and the illegal drug trade could all have a bearing on what Joseph Nye, the former head of the National Intelligence Council, refers to as "US national welfare." This expansive definition is used by those who believe that US intelligence should diversify. In fact, it has. The Environmental Protection Agency, the Drug Enforcement Administration, the Center for Disease Control, and the International Atomic Energy Commission have access to current intelligence and estimates. There is now a National Intelligence Officer for Global and Multilateral Issues (what issues does this title exclude?)?

What about the private sector? Should US firms that compete internationally have access to US intelligence? This matter has received a great deal of attention since the end of the Bush administration. It should be noted that the Intelligence Community has, in the past, made sanitized reports available to US businesses through a database maintained by the Department of Commerce. Yet, demand for intelligence produced by the US government is not strong, according to Randall Fort, a former senior government official now with TRW.

The practical problems with such arrangements are considerable. First, what would be the selection rules for identifying intelligence products that can be disseminated? The Intelligence Community does not cover all international markets equally. Would there be a bias in favor of large industries—or high value-added industries? Would intelligence support of private US businesses be tantamount to a subsidy? If so, lobbyists might well descend on Langley. The potential for corrupting the Intelligence Community, through politicization or graft, is not hard to imagine. Would the recruitment of agents be more difficult if US businesses lurked in the background of intelligence operations? For that matter, would intelligence officers be willing to accept the same level of personal risk in order to win and protect market share for US businesses?

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Book Review—Intelligence . . .
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The broad definition of intelligence has a long legacy. The notion of intelligence as "a universal social science" goes back at least to the Second World War, when the Research and Analysis Branch of the OSS was staffed by some of America's most distinguished scholars. By sifting through fragmentary "open source" materials, they were able to produce valuable intelligence on the Axis Powers and the occupied areas. Boren's call for the creation of a "world-class think tank" at Langley fits within this all-encompassing analytical tradition.

An alternative school of thought defines the mission of intelligence narrowly: obtaining and protecting secrets that put states at an advantage or disadvantage in the geopolitical competition for power. It is in the realm of secrets (which are discoverable, as opposed to "mysteries" and "excursions," which are speculative) that the US Intelligence Community can claim to have a comparative advantage. The Commerce Department, for example, can probably produce market forecasts more quickly than the CIA can—Commerce does not labor under the extensive security procedures that the CIA does. Likewise, the National Academy of Sciences is probably in a better position to coordinate studies on environmental issues that the CIA is. The real value-added provided by intelligence professionals is in the development of information that analysts and decisionmakers elsewhere in government or the private sector could not obtain through their own networks or open sources.

There are two questions that might be given more attention in a future volume. First, should US intelligence officers be given unofficial cover more often? Typically, they carry a diplomatic title (and immunity), but they are tied to an embassy. The recent contrettemps involving a US operative in France, who was purportedly affiliated with a private foundation, suggests that this practice may already be changing. Second, how great a risk is politicization? The consensus view of contributors to this volume is that intelligence professionals can work in close proximity to policymakers without conceding their intellectual independence. Indeed, a close working relationship may be imperative in the area of arms control. President Clinton's decision to elevate the Director of Central Intelligence to cabinet rank may test the assumption that intelligence production must be segregated from policy deliberations.

John Flanagin is Research Director at the Chicago-based National Strategy Forum.

Change of Venue

The closing of the International Club will require us to find new locations for Standing Committee breakfasts, conferences, and other programs. The October 19-20 conference (see box on page 5) has been moved to the Hotel Washington, at 15th and Pennsylvania Avenue in Washington DC.

If space is available, we hope to return our breakfast series to the University Club, 1135 16th Street, NW, Washington, DC—but please read your invitations carefully for other possible changes.

Intelligence Panel . . .
Continued from page 1

But the problems are not just a matter of turf. While Phil Heymann discounted the risk to civil liberties, he saw difficulties for the intelligence agencies when they try to comply with constitutional and statutory criminal discovery rules, a view seconded by Jim Woolsey, who characterized the intelligence agencies as "archivally challenged"—in part for good security reasons.

"Why is the CIA any different than the FBI? If the CIA has snitches, and the snitches provide information that I can use to impeach government witnesses, why shouldn't I get it?" asked Reid Weingarten, giving a defense counsel's perspective.

"We now have a protocol for when you may and may not search or seek a search of Intelligence Community files," announced Jamie Gorelick, who sees the hardest question as when—or whether—prosecutors can task intelligence agencies to gather case-specific information.

Paul Schott Stevens, in turn, noted that the Intelligence Community was not created simply to serve prosecutors, and that it was essential to have a process for resolving conflicts about whether intelligence resources should be exposed in an effort to preserve criminal cases in international cases.

While complete agreement was difficult to find, on one point the panelists were unanimous—this is an issue with which we will be grappling for years in the post-Cold-War era.

Stewart Baker is a member of the Standing Committee and former General Counsel to the National Security Agency (NSA).
New Members...
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Special Assistant for National Security Affairs to President Reagan, he later served as Executive Secretary of the NSC under General Colin Powell. He also served as General Counsel to the President's Blue Ribbon Commission on Defense Management (the "Packard Commission"), and as Executive Assistant to Defense Secretary Richard Cheney in 1989.

General E. E. Anderson earned his J.D. with highest honors from George Washington University Law School. A combat veteran of World War II, Korea, and Vietnam, General Anderson was the first Marine aviator to earn four-star rank and the youngest officer promoted to that grade in the Corps history. During 1994-95, he served as Chairman of the Government and Public Sector Lawyers Division of the ABA, and was Editor-in-Chief of the Law Review.

Now in private law practice, Stewart Baker clerked on the Ninth and First Circuit Courts of Appeals and for Supreme Court Justice John Paul Stevens prior to becoming Deputy General Counsel at the Education Department. Between 1992 and 1994 he served as General Counsel to the National Security Agency.

A graduate of West Point and the University of Michigan School of Law, CIA General Counsel Jeffrey Smith has previous experience as Assistant Legal Adviser for Law Enforcement and Intelligence at the Department of State and as General Counsel of the Senate Armed Services Committee. In 1994 he was appointed by Secretary of Defense Perry to serve on the congressionally-mandated Commission to Review the Roles and Missions of the Armed Services, and the previous year he chaired the Joint Security Commission established by Defense Secretary Aspin and DCI Woolsey to review security policy and practices in the defense and intelligence communities.

Recently added to the Advisory Committee were: Judge Robinson O. Everett (founder of Duke Law School's Center on Law, Ethics and National Security), Judge Harris L. Hartz (New Mexico Court of Appeals), L. Christine Healey (Senior Counsel, House Permanent Select Committee on Intelligence), Judge William W. Schwartz (Federal Judge for the Northern District of California), Laurence Storch (former Deputy Assistant Legal Adviser for Political-Military Affairs, Department of State), and former Standing Committee member L. Britt Snider (Executive Director, Commission on the Roles and Capabilities of the US Intelligence Community and former Chief Counsel to the Senate Select Committee on Intelligence).

Duke W. Thomas, an attorney in private practice in Columbus, Ohio, will serve as liaison from the Board of Governors; and Lorraine Lawson, a third-year law student at the University of Missouri-Kansas City, will serve as Liaison with the Law Student Division.

Moved to Hotel Washington

"Review of Field" Conference on October 19-20

The Fifth Annual Review of the Field conference, entitled "National Security Law in a Changing World," scheduled for Thursday and Friday, October 19-20, has been moved to the Ballroom in the lower lobby of the Hotel Washington, which is located at the corner of Pennsylvania Avenue and 15th Street, NW, Washington, DC. The hotel room reservation number is (800) 424-4540.

Following welcoming remarks by new Standing Committee Chairman Paul Schott Stevens at 8:30 AM, the first panel will examine new developments in the field from the perspective of senior lawyers at the Pentagon, State Department, CIA and National Security Council. A panel on "The Press and National Security" will be followed by lunch and an address by Assistant Secretary of Defense (Public Affairs) Kenneth H. Bacon.

Thursday afternoon will begin with a panel on "Reinventing the Intelligence Community" (featuring former DCI's William E. Colby and William O. Studeman and former FBI Director William Sessions), followed by a panel on "Problems of Counterintelligence." Thursday evening's dinner will honor Standing Committee Counselor Eugene V. Rostow, a Founding Father in the field of National Security Law, and will include remarks by Professor W. Michael Reisman of Yale Law School, where Rostow served as Dean, and by Peter W. Rodman of the Nixon Center for Peace and Freedom.

Friday morning's program will include panels on international and domestic terrorism, followed by lunch with an address by the Honorable Frank Keating, Governor of Oklahoma.
Kreczko Interview ...

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On a less exciting note, we also handle internal NSC legal issues. We serve as “agency” ethics officers, and advise on administrative, personnel, and litigation matters.

Finally, we provide the last legal review of all documents going to the President in the national security area with “legal effect.” This includes Presidential determinations, reports to Congress, Executive orders, and Presidential Decision Directives. Generally, these documents are drafted by an agency and have been reviewed by agency counsel, although we may take a direct hand depending on the specific topic. In any event, we provide a final check on such documents.

STEVENS: Typically, the NSC Legal Adviser has had a very close working relationship with the White House Counsel and his staff. The matters in which they work overlap in many important respects. How would you characterize this relationship currently?

KRECZKO: We have been very fortunate in our relationship with the White House Counsel; each has been extremely supportive of our work. As a general matter, our work overlaps less than you might expect. The Counsel has expected the NSC lawyers to handle the national security legal work in the White House, keeping him informed of significant legal issues we are working. In particular, if a policy issue with a significant legal component is going to the President, we ensure that the Counsel concurs in our characterization of the legal issues. However, the particulars of the relationship vary somewhat with the interests of the Counsel. Lloyd Cutler, for example, had a particular interest in intelligence matters; Ab Mikva, in legislative and constitutional matters; and Bernie Nussbaum, in Presidential prerogative. And each Counsel, of course, has been involved in our approach to war powers issues.

STEVENS: What is your role vis-à-vis the Justice Department, as opposed to the counsel of the key national security agencies?

KRECZKO: Perhaps the biggest “surprise” to me in coming to serve as NSC legal adviser is the importance to our work of the Office of Legal Counsel at the Justice Department. I understood that we would work closely with the lawyers at State, Defense and CIA. However, I did not anticipate how much we would rely on OLC.

As mentioned, we pay particular attention to matters (such as legislation) affecting fundamental Presidential prerogatives. This frequently requires us to consult OLC on core constitutional issues. Moreover, while we strive to achieve interagency consensus on legal positions, the NSC legal office ultimately does not have authority to “resolve” legal disputes between agencies. If agency counsel have irreconcilable views on a question of domestic law which is critical to policy deliberations, the legal issue needs to be resolved. In that situation, it is OLC which “adjudicates.”

In a different vein, we also serve as the channel of communication with the Justice Department on active criminal or civil cases. NSC discussions related to ongoing cases should generally occur between us and designated Justice officials.

STEVENS: You came from a senior position within the Legal Adviser’s office at the State Department. How would you compare the functions of these two offices with respect to matters of international law?

KRECZKO: At one level, the functions are quite different. The State Department Legal Adviser is the primary Administration lawyer on international law issues. Other agencies may have expertise in particular areas, but the Legal Adviser has responsibility for promoting a certain consistency in how we interpret and apply international law, and must explain and defend our positions to the public, Congress, foreign governments and international courts. At another level, however, our functions are quite similar. Both positions call for you to present to senior policy makers objective advice concerning the international law relevant to a policy issue. That advice should include not only a view of the law, but how clearly established it is, how other countries view it, how compliance with the law advances long-term U.S. interests, etc. One might assume that the Legal Adviser’s Office at State has a stronger institutional interest than the NSC Legal

Calendar of Events

Adviser in promoting international law. However, I think that depends more upon the Legal Advisers at the NSC or State Department, and less on position.

STEVENS: Certainly there has been no shortage of major issues in the Clinton Administration’s national security agenda. Many, if not most, have some important legal component. What matters has your office devoted most attention to in the past two years?

KRECKZO: Three come to mind. First, there has been the debate over the applicability of the ABM treaty to theater missile defenses. This has become a hotly contested policy issue, and, to an extent, a partisan issue. I think the lawyers have done a very good job of providing objective legal advice concerning the ABM treaty. Second, and I must be less specific here, is the intelligence area. Working with CIA General Counsel’s office, we have subjected sensitive intelligence activities to rigorous interagency legal review. While adherence to a process of legal review can sometimes be frustrating, in my view it has paid-off.

Finally, this Administration has supported a less combative role with Congress on war powers issues. This does not mean we have been willing to sacrifice any fundamental Presidential prerogatives. However, we have supported closer consultations with Congress on troop deployment issues. And, we have tried to avoid debates over the War Powers Resolution itself by reporting to Congress frequently, even when reports may not legally be required.

STEVENS: Do you think the office of Legal Adviser should be a lasting feature of the NSC staff organization?

KRECKZO: Absolutely. More and more foreign policy issues require coordination through the NSC process. Many of these issues have legal component, whether constitutional, statutory, international, or all three. The NSC principal or staffer who is chairing that policy coordination needs a source of coordinated legal advice on those issues. Moreover, NSC-led meetings are frequently kept intentionally small. Since a lawyer from each agency cannot attend, the NSC lawyer often finds himself the sole lawyer present. And, at a more practical level, increasing attention to ethics, EEO, and other issues require a dedicated, in-house NSC lawyer. At the same time, however, primary responsibility for providing legal advice on national security issues needs to rest with the agency counsel. They have the resources and expertise; the NSC legal office should remain small and should not try to assume the role of the agency counsel.

STEVENS: What has been the biggest “plus” in moving over to the NSC?

KRECKZO: The small size of the bureaucracy here, both within the NSC and the White House more generally. This is an incredibly small place. We have very easy access to our principals and to other senior officials in the White House. We can give advice, and get guidance, very easily. Moreover, and perhaps most importantly, the National Security Adviser and his deputies have ensured that we are an integral part of the process here. Whether or not they like the legal advice they’re getting from us, they keep soliciting it.
The National Security Agenda . . .

by Jackson R. Sharman III

House and Senate Approve Intelligence Bills—On September 12, the House voted to increase funding for the nation’s intelligence programs 1.3% above the Administration’s request. The bill includes funding for programs at the CIA and other components of the Intelligence Community, including NSA, NRO, FBI, and a variety of military intelligence organizations. The Senate, on September 29, took action on its companion bill, which authorized non-tactical intelligence and intelligence-related programs. The Senate accepted an amendment which calls for audits of the NRO’s financial practices and which reduced its forward-funding account, reported to be equal to $1.5 billion, to no more than the equivalent of one month’s funding. The bills include similar provisions that would authorize the President to delay up to 120-days the imposition of sanctions related to proliferation activities that would seriously risk the compromise of an intelligence source or method. Conference is expected in mid-October.

Intelligence Commission Update—The bipartisan commission established to review and assess needed changes in the United States Intelligence Community is on track to produce its report in March of 1996, according to L. Britt Snider, Executive Director of the Commission on the Roles and Capabilities of the US Intelligence Community. Formerly known as the Aspin Commission, after its late Chairman and former Congressman and Defense Secretary Les Aspin, the commission is now headed by former Secretary of Defense Harold Brown. Snider is the former General Counsel to the Senate Select Committee on Intelligence. The report will be a public document, although the Commission will also produce a classified annex. The Commission will hold public hearings on the afternoon of November 8 and all day November 9 at the National Press Club in Washington.

DC Bar Foreign Trade & Sanctions Panel Set for 25 October—The Law & National Security Committee of the DC Bar Association, in cooperation with several other organizations, will present a panel on “Understanding US Foreign Trade Controls and Sanctions: Clearing Away the Questions and Ambiguities,” on Wednesday, 25 October, at 6:00 PM in the 11th floor conference center at Covington & Burling, 1201 Pennsylvania Ave., NW, Washington, DC. Panel members will include former Standing Committee members Monroe Leigh and Davis Robinson (both of whom served as Legal Adviser to the Department of State), Deputy Chief Counsel of the Office of Export Administration Cecil Hunt, Office of Foreign Assets Control Director Richard Newcomb, former President of the American Society of International Law Peter D. Trooboff, and Washington attorney Mark S. Zaid. Admission is $8 for members of sponsoring organizations and $13 for the general public.

Nonproliferation Conference on Capitol Hill Set For 30 October—Representatives Curt Weldon and Howard Berman will cosponsor a Nonproliferation Policy Education Center forum on “US Nonproliferation Controls: What’s Next?” Speakers will include senior officials from the US Customs Service, the General Accounting Office, and thestaffs of the Senate Armed Services and House International Relations Committees. The program will in held in the Gold Room, 2168 Rayburn House Office Building, Washington, DC, from 9:00 AM until noon. For details and reserved seating, call (202) 466-4406.

Journal of National Security Law Announced—Professor Robert N. Davis, of the University of Mississippi Law Center, has announced plans to publish a new periodical, the Journal of National Security Law, beginning with one issue during 1996. The Journal will be the product of a cooperative effort involving the Center for National Security Law at the University of Virginia, the Center on Law, Ethics and National Security at Duke Law School, and the Mississippi Law Center. In welcoming the newly-announced Journal in a letter to Professor Davis, Standing Committee Chairman Paul Schott Stevens raised the possibility that papers or proceedings from Standing Committee conferences might provide material for the new Journal.