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## The CIA and Covert Operations: To Disclose or Not to Disclose – That is the Question

*Marcus Eyth\**

### I. INTRODUCTION

When the president does it, that means it is not illegal.<sup>1</sup>

President Richard M. Nixon

If Mr. Nixon's statement were unconditionally true, many United States citizens would presumably find the very pillars upon which the United States was founded to have been significantly shaken, and some might even consider a permanent move to another country. With respect to the implications this statement has upon the president's discretion in conducting covert operations without first consulting Congress, some scholars would opt to reach for pen and paper.<sup>2</sup>

The issue of whether Congress and the executive branch must share the power to authorize and conduct covert activities, or whether it may be unilaterally exercised by the CIA, under the direction of the National Security Council (NSC), has become ripe for critique since Congress took significant steps to reign-in the discretion of the executive which for nearly two centuries enjoyed virtually *carte blanche* authority in this area. Initially, Congress arguably acquiesced through its actions (i.e., appropriating funds with a somewhat *laissez-faire* attitude)<sup>3</sup> to covert operations which were conducted with significant executive discretion until the beginning of the Second World War. However, the creation of the CIA in 1947 served as a wake-up call for the United States, not only

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1. Excerpts from Interview with Nixon about Domestic Effects of Indochina War, N.Y. TIMES, May 20, 1977, at A16 (interview by David Frost) *available at* LEXIS, Nexis Library, NY Times File.

2. Or more appropriately, keyboard and screen.

3. Ray S. Cline, *Covert Action as Presidential Prerogative*, 12 HARV. J.L. & PUB. POL'Y 357, 358 (1989). For example, from 1790-93, George Washington "requested and received [up to \$1,000,000] from the new Congress for the purpose of conducting secret intelligence activity" through a "Contingent Fund for Foreign Recourse" without having to name the agents involved. *Id.*

to officially recognize the need for covert operations, but to engage in a discussion about whether American interests are best served by excluding or limiting Congress from taking part in decisions to proceed with covert operations.

Congress cast its vote through the legislation it enacted. Based on the fundamental argument of needing to preserve the underlying values of democracy via government checks and balances, Congress passed applicable legislation with the objective of overseeing executive conduct in this arena by requiring the CIA—absent exigent circumstances—to report decisions to commence covert operations to congressional committees within a reasonable time before actually proceeding. Though this argument appears fair and reasonable at first glance, the practical realities are not as clear-cut, as there are legitimate reasons why it may be in the best interest of the United States—and more importantly, the interests of the individual agents involved—not to disclose that covert operations will be conducted. This is at least a legitimate concern of the Executive until the safety of the men and women involved is secured. This Article considers why, at least in some situations, the Executive should have the option not to report planned or ongoing covert operations to Congress, even though such conduct may conflict with the democratic idealist view of preserving democratic principles at all costs.

Part II of this Article examines the history of general covert activity in the United States, touching upon colonial times and subsequently discussing the two eras during which most covert operations were conducted: the Cold War and the War on Terrorism. Part III defines covert operations in terms of types that are used. Additionally, Part III describes the legislative development, scope and authority of covert activities as defined in law and via executive orders. Part IV addresses whether unilaterally conducted covert operations fail, by their very nature, to conform to democratic principles, and consequently result in constitutional violations, or whether there are circumstances under which the Executive has the authority to preempt or circumvent legislation which effectively limits the President's authority. Part V concludes the Article.

## II. A HISTORY OF COVERT ACTIVITIES IN THE UNITED STATES

### A. *Colonial Times: The Origins of Covert Actions*

While the debate over the legitimacy of United States covert action with limited or no congressional review is a relatively recent theme addressed in Congress, in the press, and in classrooms, American covert activities have a long history. During colonial times, there was no

dispute about the need for secret political activities in pursuit of international goals—activities which today would be considered covert operations.<sup>4</sup> In the late eighteenth century alone, colonial political leaders like George Washington (and almost every president to follow) secretly appointed a total of 400 special agents to conduct activities with or against foreign countries.<sup>5</sup> They later justified the non-disclosure to other branches of government by explaining that Congress simply consisted of too many members to be able to keep a secret.<sup>6</sup> For example, in 1843 President Tyler attempted to influence public opinion in England about relations between the United States and Great Britain by sending an agent to meet secretly with English government leaders.<sup>7</sup> President Grant also decided to send an agent to Canada in 1869 to “foment sentiment” in central and western Canada to separate from Canada and join the United States.<sup>8</sup> The potential for leakage illustrates one of the key arguments in favor of limiting congressional knowledge of such activities.

The activities conducted to extract intelligence and secretly influence citizens, officials, and events in foreign countries by leaders of the pre-constitutional era are strikingly similar to those used today, though, not surprisingly, attained with less sophisticated means. Eighteenth century covert activity ran the gamut “from non-attributable propaganda and psychological warfare to the opening of mail and the recruitment of secret agents of influence.”<sup>9</sup>

In drafting the Constitution, the Framers recognized that the creation of a strong executive branch was imperative to maintain a balance of powers and thus conferred significant responsibility upon the president, not only to operate as the commander-in-chief of the armed forces, but as the entity in charge of foreign policy as well. The first president did not take long to make use of his broadly defined powers with respect to covert operations, when, between 1790 and 1793, he requested and received appropriations exceeding one million dollars for conducting

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4. *See id.* at 357.

5. *See U.S. Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence: Hearing Before the House Select Comm. on Intelligence, 94th Cong. 1729, 1731-33 (1976) hereinafter Hearing* (statement of Mitchell Rogovin, Special Counsel to the Director of the CIA).

6. *See* 50th Cong., 1st Session., Revolutionary Diplomatic Correspondence of the United States (Oct. 1, 1776), Serial Set 2585 (1889). *See also* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 419 (2d ed. 1997) (“The need for secrecy in conducting diplomatic affairs was recognized by the Congress in 1790 when \$40,000 was appropriated in an account for the president ‘for the support of such persons as he shall commission to serve the United States in foreign parts.’”)

7. Hearing, *supra* note 5, at 1732-33.

8. *Id.* at 1733.

9. Cline, *supra* note 3, at 357.

secret intelligence activity, including covert and clandestine operations.<sup>10</sup> Though no relevant legislation was passed into law for more than a century, members of Congress seemed satisfied with this type of less formal arrangement and acknowledged and respected the need for covert operations without requiring the president to reveal the identities of the agents or the activities involved. Despite the potential concerns about violating basic democratic norms through this type of congressional acquiescence,<sup>11</sup> a standard was thereby recognized early-on in the U.S. government. Following the successful formation of the United States, covert operations became less of a priority throughout the nineteenth century and first half of the twentieth century, at least in comparison to the amount of covert activities conducted in the latter half of the 20th Century through the present.

### *B. The Cold War Era and the Birth of the CIA*

Why it took more than a century and a half for the United States to become more closely attuned to the existence of—and need for—proficient covert operations may be explained by the fact that the United States was virtually isolated from world affairs until it entered the Second World War. Covert operations were not a priority, especially since the U.S. geographic disposition seemed to provide—at least to the public—a sense of insulation from military threats abroad.<sup>12</sup> However, the United States was rudely awakened from its complacency by the Japanese surprise attack on Pearl Harbor in 1941.

Though secret diplomacy had certainly existed even where international threats were virtually non-existent and the need to conduct international affairs was less of a priority, the U.S. government quickly recognized the legitimate threat to American sovereignty and consequently established the Office of Strategic Services (O.S.S.), the first “central coordinating intelligence agency.”<sup>13</sup> Following the defeat of Hitler and the German Reich in 1945, the O.S.S. disclosed that the United States had conducted behind-the-scenes “political and paramilitary operations” as a means to secure German defeat. These activities were largely condoned by the public, especially in light of the successful nature of the operations which played a role in securing

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10. *Id.* at 358. The same privilege was given to the Director of Central Intelligence in 1949. See 50 U.S.C. § 403j(b) (1994).

11. DYCUS ET AL., *supra* note 6, at 400 ([T]he Framers realized that [the capability of the president to keep matters secret] posed a threat to the democratic concept of accountability.”).

12. *Id.* at 395 (“[U]se of private forces to achieve military goals had fallen into disuse by the mid-nineteenth century . . .”).

13. See Cline, *supra* note 3, at 358.

European and world independence from fascism and later from communism.<sup>14</sup>

Although the O.S.S. was disbanded by executive order in 1945, Congress sensed that excessive presidential autonomy could lead to the potential for abuse in the covert operations arena. In an effort to define the parameters of presidential authority (e.g., by precluding the Agency from assuming any “internal security functions,” which were to be solely reserved for the FBI),<sup>15</sup> Congress passed the National Security Act in 1947 and the Central Intelligence Agency Act in 1949. The beginning of the Cold War presented an ongoing threat to democracy that helped legitimize the official establishment and public recognition of an intelligence-gathering agency.<sup>16</sup> Though the extent to which covert operations are authorized under the Act is highly debated,<sup>17</sup> history has shown that presidents have made extensive use of the broad language in the Act in conducting covert operations “[in response to] political, military and ideological challenges that threatened to undercut . . . [U.S.] dreams of a more hopeful world.”<sup>18</sup> This, in turn, has brought covert operations authorized by the National Security Council (the committee supervising the CIA) back into the public eye.<sup>19</sup> Consequently, in comparison to the pre-Cold War era, the number of publicized covert operations has increased manifold over the last fifty years, beginning with the NSC’s first top-secret report on the crisis in Italy. In response to the imminent Soviet-dominated communist movement within Italy, the NSC directive proposed for the United States to “[a]ctively combat Communist propaganda in Italy . . . by all . . . practicable means” including covert actions.<sup>20</sup>

Due to the classified nature of many undercover operations conducted by the U.S. government, it is impossible to ascertain how many covert operations the United States has pursued over the lifetime of

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14. *Id.* at 358-59.

15. See Sherri Conrad, Note, *Executive Order 12,333: ‘Unleashing’ the CIA Violates the Leash Law*, 70 CORNELL L. REV. 968, 971 (1985).

16. David Wise, *Covert Operations Abroad: An Overview*, in THE CIA FILE 3, 24 (Robert L. Borosage & John Marks eds., 1976).

17. See DYCUS ET AL., *supra* note 6, at 412. (“[P]ublic legislative history of the [NSA] indicates that the issue of covert action was not raised during enactment.”).

18. See the statement made by the Acting Director of Central Intelligence, George J. Tenet, before the Senate Select Committee on Intelligence hearing on current and projected national security threats to the United States, Feb. 5, 1997, available at [http://www.cia.gov/cia/public\\_affairs/speeches/archives/1997/dci\\_testimony\\_020597.html](http://www.cia.gov/cia/public_affairs/speeches/archives/1997/dci_testimony_020597.html).

19. See Cline, *supra* note 3, at 359.

20. See *id.* at 361-62. The CIA managed to provide money and technical help to Italian party leaders needed to secure the election of a democratic leader. *Id.*

the country.<sup>21</sup> However, a number of operations have surfaced through newspapers, magazines and other publications. In some cases, former CIA employees (often disgruntled ones) have voiced their opinions during lectures and speeches, volunteering details of covert actions to which they were exposed.<sup>22</sup>

During the forty-year period following the Second World War, there were few areas of the world with which the CIA was not covertly connected. During the 1950s, the CIA conducted operations in Burma, China, the Philippines, Iran, Guatemala, Cuba, Indonesia, and Tibet. The activities ran the gamut from passive roles (e.g., assisting nationalist Chinese troops who fled to Burma following the communist takeover), to more ambitious operations, such as actively organizing and directing a coup in Iran to dethrone Premier Mohammed Mossadegh, or overthrowing the Communist-dominated government of Guatemala with U.S. arms and a secret CIA air force.<sup>23</sup>

The 1960s were marked by even more prevalent and publicized involvement in covert operations directed by the CIA in countries including Singapore, Cuba (the Bay of Pigs—including the secret training of Cuban exiles in Guatemala), Brazil, Vietnam, Chile, Congo, Greece, Bolivia, Laos, and Italy.<sup>24</sup> As in the 1950s, the CIA played a more passive role in some operations compared to others, both in terms of the amount of money invested and the number of agents assigned to achieve the missions. For example, “[t]he CIA spent a reported twenty million dollars” both to ensure that the leftist Brazilian president was denied control of Congress in 1962, and an additional twenty million dollars one year later to ensure the election of a democratic candidate in Chile.<sup>25</sup> The massive number of CIA covert operations conducted during the Vietnam conflict are too gross in number to list individually. However, more than 20,500 individuals were killed during one of the more notorious operations to “‘neutralize’ the Vietcong”—the “Phoenix

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21. Some experts estimate that the U.S. has conducted approximately “2000 operations (all dangerous, some absurd-like sending Fidel Castro a poisoned scuba-diving suit) designed to change the course of political events abroad.” Tim Weiner, *For 3d Time in 21 Years, Saddam Hussein’s Foes Pay Price for a Foiled U.S. Plot*, N.Y. TIMES, Sept. 11, 1996, at A6, available at LEXIS, Nexis Library, NY Times File.

22. E.g., John Stockwell, *The Secret Wars of the CIA*, Lecture (June 1986), in 5 E.J. POL. SCI. (Winter 2002), at <http://www.geocities.com/CapitolHill/Lobby/2897/secretwars1.html>. At the time his lecture was given, Stockwell was the highest-ranking CIA official ever to leave the agency and go public. *Id.* He ran a CIA intelligence-gathering post in Vietnam, was the task-force commander of the CIA’s secret war in Angola in 1975 and 1976, and was awarded the Medal of Merit before he resigned. *Id.*

23. See Wise, *supra* note 16, at 20-21.

24. *Id.* at 21-23.

25. *Id.* at 22. However, CIA efforts to block Salvador Allende’s election six years later went afoul, along with the prospect of maintaining democracy in Chile. *Id.*

Program.”<sup>26</sup> During CIA involvement in Laos (at a cost estimated by one author at “between ten and twenty billion dollars” over a ten-year period),<sup>27</sup> the CIA not only backed political leaders to run government affairs to the tune of U.S. interests, but a Senate Foreign Relations Committee publication reported in 1971 that the CIA had maintained a 30,000 person army operating under the direction of General Vang Pao.<sup>28</sup> Finally, the Iran-Contra covert operation of the late 1970s and early 1980s to overthrow the Sandanista regime in Nicaragua (partly via raising money by selling U.S. arms to Iran) caused an infamous upheaval in Congress after the CIA’s suspect secret operation surfaced.<sup>29</sup>

The means and techniques used to conduct operations in foreign countries have varied from operation to operation, while the principal objective—to influence the politics of other countries by secret means—has remained the same. Many of these secret missions have been consistently denied by American presidents, a practice often referred to as “plausible deniability.” Examples include:

[D]ropping of agents by parachute, support of anti-guerilla activity, overthrowing governments regarded as unfriendly to Western political or economic interests, training of secret police, training of foreign guerillas in the continental United States, full-scale paramilitary invasion, attempts to rig elections, training and financing of a secret army to fight a secret war, and clandestine support of friendly political parties.<sup>30</sup>

With the establishment of the CIA and its corresponding legislation, the U.S. government recognized the need to have a United States agency that has the specific duty to carry out operations in support of U.S. foreign policy via overt and covert means abroad. However, along with designating a heroic—or “fall guy”—agency which could now officially be held accountable for botched operations, a discussion was sparked by the U.S. government and the American public about the irony in recognizing the mysterious and covert aspects of the agency. While the CIA operates to protect democratic principles around the world, the

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26. *Id.*

27. Fred Baufman, *The President’s Secret Army: A Case Study - The CIA in Laos, 1962-1972*, in *The CIA File 46, 75* (Robert L. Borosage & John Marks eds., 1976).

28. Wise, *supra* note 16, at 23.

29. The president authorized the CIA to spend up to nineteen million dollars for this mission. Paul Gumina, *Title VI of the Intelligence Authorization Act, Fiscal Year 1991: Effective Covert Action Reform or “Business As Usual”?*, 20 HASTINGS CONST. L.Q. 149, 168 (1992). This mission was controversial, not only because of the lack of authority and consent of Congress, but also because the mission continued after Congress ordered it to cease (Boland II) and because the president directly violated the Arms Export Control Act. *See id.* at 170-172.

30. *See* Wise, *supra* note 16, at 24.



secret manner by which such operations are conducted fails to provide for an open check by other government branches regarding whether covert operations are in fact legitimate and in the best interest of the people who elect the president.<sup>31</sup> The debate over balancing the need to conduct certain operations in secret with the interests of public disclosure is discussed in a later portion of this Article.<sup>32</sup>

### C. *Exit the Cold War, Enter the War on Terrorism*

The focus of CIA covert action shifted following the dissolution of the Soviet Union, marked by the crumbling of the Berlin Wall in September of 1989. Inasmuch as the communist threat was no longer as imminent, CIA activities focused on other threats, such as the ones posed by Iraqi ruler Saddam Hussein in the 1990s and Taliban leader Osama bin Laden beginning in the late 1990s, which climaxed with “9-11,” the date marking the terrorist attacks on New York City and Washington, D.C.

Following the Gulf War and the successful liberation of Kuwait in 1991, the CIA was assigned the task of finding a means to remove dictator Saddam Hussein from power while allowing the regime to continue in an effort to maintain Iraqi stability in the Gulf.<sup>33</sup> Between 1991 and 1998, the United States reportedly spent more than \$100 million (approximately \$20 million per year) in the unsuccessful effort.<sup>34</sup> During the 1990s, CIA covert activities included developing a base in Kurdistan for Iraqi and Kurdish dissidents, labeled the Iraqi National Congress (INC). The CIA supplied “financing, arms . . . and an implicit understanding”<sup>35</sup> that if the INC cover was blown, the United States government would assist in bailing them out.<sup>36</sup> The United States used this base to “gather[] intelligence, coordinate[] propaganda broadcasts, and provide[] safe passage for Iraqi military defectors.”<sup>37</sup> When Saddam sent an army to destroy the base after having learned of the operation from spies,<sup>38</sup> the CIA was able to extract scores of friendly Iraqi agents.

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31. *Id.* at 26. (“[T]here is no way to graft secret political action onto the body politic in a system that rests upon consent.”)

32. *See* discussion *infra* Part IV.

33. *See The CIA-War in Iraq*, at [http://www.englisch.schule.de/state\\_of\\_the\\_union/group3/project/the\\_cia.htm](http://www.englisch.schule.de/state_of_the_union/group3/project/the_cia.htm). (last visited Sept. 14, 2002)

34. *See id.*

35. Kevin Fedarko, *Saddam’s CIA Coup*, Time Magazine, Sept. 23, 1996, at 42 (according to surviving witnesses).

36. *See id.*

37. Weiner, *supra* note 21, at A6.

38. According to some reports, Saddam’s spies had infiltrated the CIA-run group months earlier. *See id.*

However, critics view the CIA as having abandoned many Iraqi agents in the withdrawal.<sup>39</sup>

This Kurdistan example is one of several covert operations that the CIA has conducted in an effort to depose the Iraqi dictator. Aside from backing “Kurdish dissidents in the north of Iraq,” the CIA has supported “Shiite Muslim groups in the south,” and “Iraqi exiles in London and Iraqi military defectors based in Jordan.”<sup>40</sup> Much has been reported in the press about the unsuccessful attempts to dethrone Saddam, perhaps unfairly. There appears to be a tendency to report about more botched missions than successful ones. However, the bottom line, namely that Saddam is still in power, speaks for itself.

It is suggested that the broadest presidential discretion ever bestowed upon the CIA in the history of the United States to make use of covert operations may involve the current agenda “to destroy Saudi-born militant Osama Bin Laden and his Al Qaeda network.”<sup>41</sup> According to the presidential order, the “finding,” which spells out the parameters of CIA authority for the operation, the CIA may “do ‘what is necessary to bring down Al Qaeda and its leadership.’”<sup>42</sup> Though it is premature for the public to know details about the kinds of covert activities that are currently being conducted to capture bin Laden, the CIA’s budget has been cushioned with “more than \$1 billion” to facilitate the mission.<sup>43</sup> Though little, if any, concrete information can be confirmed in order to protect both Taliban opponents and the United States under the “plausible deniability” shield, the United States has not only helped train opposition groups such as the Northern Alliance in weaponry, but has provided medical supplies, food, and communications equipment in an effort to facilitate and coordinate attacks.<sup>44</sup> Furthermore, CIA secret paramilitary units both on the ground and in the sky over Afghanistan (consisting in September 2001 of approximately 150 fighters) have assisted rebel forces by providing intelligence which has resulted in significant progress and more effective and efficient strikes against the

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39. See Fedarko, *supra* note 35, at 43. One U.S. official described the mission’s failure when Saddam uncovered the covert operation in the following way: “Our entire covert action program has gone to hell.” *Id.* According to some experts, thousands of Iraqi agents were left to die, whereas government officials claim these reports to be fabrications because “[t]here were never hundreds [or thousands of Iraqi CIA agents] to begin with.” See Weiner, *supra* note 21.

40. Tim Weiner, *C.I.A. Drafts Covert Plan to Topple Saddam*, N.Y. TIMES, Feb. 24, 1998, at A11, available at LEXIS, Nexis Library, NY Times file.

41. Tabassum Zakaria, *CIA gets ‘New Leeway’ to Destroy Bin Laden Covertly*, MIDDLE EAST TIMES (Oct. 26, 2001), [http://www.metimes.com/2K1/issue2001-43/reg/cia\\_gets\\_new.htm](http://www.metimes.com/2K1/issue2001-43/reg/cia_gets_new.htm).

42. *Id.*

43. *Id.*

44. Tabassum Zakaria, *Covert CIA Support Seen For Anti-Taliban Forces*, at <http://www.afghanradio.com/news/2001/october/oct1u2001.html>.

Taliban.<sup>45</sup> Aside from paramilitary units, the CIA is using specialized case officers from the Agency's Near East Division, some of which have rekindled previous relationships with rebel forces, including case officers who had been active in the 1980s covert Mujaheddin rebels operations, to strengthen the anti-Taliban Network.

While the anti-Al Qaeda operation climaxed with the attacks on U.S. soil, President Clinton originally authorized the effort to capture bin Laden in the late 1990s, following the bombings of two U.S. embassies in East Africa, to which bin Laden had been linked. Following alleged Al Qaeda involvement in the Cole bombing in 2000, even more CIA attention was focused on finding, arresting, and if necessary, providing a mechanism for killing bin Laden and other Al Qaeda leaders through covert operations.<sup>46</sup> While it is probably still early-on in the War on Terrorism, and may therefore be premature to judge the effectiveness of CIA covert operations, the results have presumably been more successful than in missions past. It should be pointed out that it may in fact be premature in almost *all* covert actions cases to judge the effectiveness of the operation due to the very nature of the secrecy involved, and the fact that many successes (or successful portions of missions) are not publicly released.<sup>47</sup>

### III. COVERT ACTION DEFINED

For an operation to qualify as "covert," covert actors must proceed in a hidden or disguised manner, so that if the action is discovered, the actors can deny responsibility because there is no evidence to *prove* their involvement.<sup>48</sup> The buzzword for this shield from accountability in the trade of covert activities is "plausible deniability."<sup>49</sup> The term "covert action" is used interchangeably with "special activities," perhaps to do away with the negative stigma accompanying the former label.<sup>50</sup> Critics claim that "covert action" is too mild of a characterization of the activities involved and should more appropriately be termed "secret

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45. Bob Woodward, *Secret CIA Units Playing a Central Combat Role*, WASH. POST, Nov. 18, 2001, at A1, available at <http://www.washingtonpost.com/wp-srv/politics/CI18.html>.

46. See Zakaria, *supra* note 41. ("While the order allowed the covert operation to contribute to Bin Laden's death, that does not mean the CIA would actually kill him, but the spy agency could prompt others to carry out a lethal attack.") (quoting unnamed sources).

47. See Woodward, *supra* note 45, at A1. As President Bush pointed out just days after the attack on the World Trade Center and the Pentagon, "the war might include covert operations, secret even in success." *Id.*

48. JOHN JACOB NUTTER, *THE CIA'S BLACK OPS: COVERT ACTION, FOREIGN POLICY AND DEMOCRACY* 73 (2000).

49. MARK M. LOWENTHAL, *INTELLIGENCE: FROM SECRETS TO POLICY* 114-15 (2000).

50. Gumina, *supra* note 29, at 152.

warfare,” since the United States has conducted armed hostilities against nearly two dozen nations since the end of the First World War “without a formal declaration of war.”<sup>51</sup> Notwithstanding these taboo characterizations and labels, covert actions are official government efforts to influence political events in other countries in a concealed manner.<sup>52</sup> As previously described in this Article, some actions are basic in nature (e.g., disrupting a communist rally) while others involve long-term operations (e.g., combating terrorism in Afghanistan and in other countries over a period of years). Though some authors have sliced covert operations into numerous categories,<sup>53</sup> at least three different kinds of actions comprise “covert actions”: political action, propaganda and disinformation, and paramilitary action.

#### A. Three Types of Covert Activities

One of the most common forms of covert operations involves political action, which is usually designed to influence political processes and voter decisions. During this type of operation it is common for the CIA to provide political advice and training, conduct psychological operations known as “psyops,” and to provide financial and non-monetary subsidies to politicians and organizations.<sup>54</sup> For example, the CIA not only secretly advised Presidents Diem (Vietnam) and Duarte (El Salvador) on how to govern their respective countries in crisis, but also provided Russian President Boris Yeltsin with American election specialists to help direct the election campaign as recently as the 1990s.<sup>55</sup>

Subsidies to individuals and political parties in the form of “goodwill gestures” and bribes are also commonplace mechanisms to achieve political objectives. Non-monetary subsidies might include allowing foreign governments access to restricted technology under a quid pro quo understanding that the recipient government will return the favor.<sup>56</sup> For example, in the 1980s, the United States forwarded restricted aircraft technology to Saudi Arabia in exchange for Saudi cooperation in

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51. *Id.*

52. *Id.*

53. One author has included “asset development” and “economic warfare” as at least two additional categories. See generally NUTTER, *supra* note 48, at 75-91. However, this comment focuses on the more common types of covert actions and therefore does not address asset development and economic warfare.

54. See Gumina, *supra* note 29, at 179.

55. See NUTTER, *supra* note 48, at 79. “Advice” on how to run the country often involved the “‘carrot and stick’ approach to stability:” the “carrot” involved “advice [] and money for schools, hospitals, and businesses,” while the “stick” involved “how to oppress” tactics such as “police operations, riot containment, [and] infiltration of political opponents.” *Id.* at 80.

56. *Id.* at 83.

funneling money to Nicaragua.<sup>57</sup> Finally, psyops involve some of the most creative mechanisms to obtain political objectives. For example, one CIA plan involved dusting the inside of Fidel Castro's shoes with thallium salts, causing him to lose facial hair (a machismo trait in Cuban society), and consequently humiliating him in the Latin American political arena.<sup>58</sup> Other plans involved slipping Castro some LSD, a hallucinogenic drug, shortly before he would make a speech to cause him to ramble incoherently!<sup>59</sup>

Use of propaganda and misinformation is another mechanism frequently chosen for covert actions, particularly when coups and paramilitary operations are involved. While the term "propaganda" often carries a negative connotation, propaganda does not necessarily have to be false information.<sup>60</sup> Information employed may be true, false, misleading, or technically or partially correct. Propaganda is commonly separated into three different shades—white, gray and black—and is labeled according to the source of the information. White propaganda is based on public statements, such as when government officials make statements or issue press releases.<sup>61</sup> The source of gray propaganda is neutral, such as a newspaper reporter of an uninvolved country. In this case, a greater degree of credibility is established because of the third party source, even though the information may have actually originated with the CIA.<sup>62</sup> One example of gray propaganda occurred during the Iraqi invasion of Kuwait when a book was published about the atrocities allegedly committed by Iraqi troops.<sup>63</sup> Few knew, however, at the time the book was published that the book was actually subsidized by the Kuwaiti government. Finally, black propaganda, also known as "disinformation," involves the fabrication of information that appears to come from another source through means such as falsified documents, video or audiotapes, and radio broadcasts that appear to originate with the target.<sup>64</sup> Some examples of fabricated documents include ones

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57. *Id.*

58. *Id.*

59. *Id.* Other plans included spreading the word in Cuba of the Second Coming of Christ and subsequently firing star shells over Cuba from submarines on the "predicted" day! *Id.*

60. *Id.* at 84.

61. *Id.* This occurs when, for example, the USIA releases a statement, the underlying objective of which is to persuade a foreign government or population of something. White propaganda is usually (but not necessarily) true because it is used to build credibility. *Id.* at 84-85.

62. *Id.* at 85-86.

63. The book was entitled *The Rape of Kuwait* and involved "a lurid account of the atrocities committed by Iraqi troops when they invaded the tiny country . . . [including a] vivid account of babies ripped from their incubators and dashed on the floor, splashed in painful detail before the American public." This information was in fact false. *Id.*

64. *Id.* at 86.

produced by the KGB, the main Soviet security and intelligence agency,<sup>65</sup> which “prove” that the U.S. government was involved in a 1980s conspiracy to kill off African-Americans and to depopulate Third World countries by creating and spreading the AIDS virus!<sup>66</sup>

Paramilitary actions are a third means to direct covert operations. This mechanism is the most glorified and spectacular version,<sup>67</sup> probably due to its usually violent and exceedingly daring nature compared to other covert operations.<sup>68</sup> Some forms of paramilitary actions include supporting guerilla wars and supporting coup d’etats. Recent examples of paramilitary action include terrorist activities conducted under the direction of Osama bin Laden and the Al Qaeda network. Those activities include anonymous embassy bombings, hijackings and bombings of civilian aircrafts, hostage seizures, kidnappings and political assassinations.<sup>69</sup> Governments like the Taliban often provide the tools to carry out such operations, including financing (i.e., Hawala networking), intelligence, arms and training, which are assets and means that bin Laden and his network used to support the attacks on America.

### B. Legal Authority to Conduct Covert Actions

While there is relatively little qualm in government over the legal definition of covert action which is set forth in the National Security Act of 1947 (NSA),<sup>70</sup> issues have been continuously raised over the extent to which the CIA must consult the legislative branch of government before proceeding. The legislation fails to expressly authorize or deny covert

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65. The KGB (Komitet Gosudarstvennoi Bezopasnosti, or The Committee for State Security) existed from March 13, 1954 until its dissolution on November 6 1991. See <http://www.wikipedia.org/wiki/KGB>

66. *Id.* A less spectacular fabrication involves the CIA producing extra invitations to a communist “invitation only” reception for Soviet officials in Mexico, which not only resulted in chaos but also caused the hosts to run out of food and drink, forcing them to shut the doors and keep “invited” individuals out. Consequently, the bond between local Mexican and Soviet communists was strained, as the Soviet guests perceived the hosts to be incompetent. *Id.* at 87.

67. Hollywood has been producing movies on this type of covert action for decades. Some examples of movies include *Navy Seals* and *Clear and Present Danger*.

68. One author has suggested that there is a direct relationship between the amount of violence the mechanism requires and the potential success in being able to ensure plausible deniability: While paramilitary operations often include increased violence, it becomes more difficult to hide behind the plausible deniability shield. Conversely, where violence is at a minimum (like in a propaganda operation), plausible deniability increases. See LOWENTHAL, *supra* note 49, at 115.

69. See NUTTER, *supra* note 48, at 90.

70. Section 503(e) of the NSA defines covert action as “an activity or activities of the United States Government to influence political, economic or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” 50 U.S.C. § 503(e) (1994).

operations and merely describes the authority of the CIA in very general terms. The Act provides:

In the Director's capacity as head of the Central Intelligence Agency, the Director shall-

- (1) collect intelligence through human sources and by other appropriate means, except that the Agency shall have no police, subpoena, or law enforcement powers or internal security functions;
- (2) provide overall direction for the collection of national intelligence through human sources by elements of the intelligence community authorized to undertake such collection and, in coordination with other agencies of the Government which are authorized to undertake such collection, ensure that the most effective use is made of resources and that the risks to the United States and those involved in such collection are minimized;
- (3) correlate and evaluate intelligence related to the national security and provide appropriate dissemination of such intelligence;
- (4) perform such additional services as are of common concern to the elements of the intelligence community, which services the Director of Central Intelligence determines can be more efficiently accomplished centrally; and
- (5) perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct.<sup>71</sup>

The most controversial section of the law involves Section 102(d)(5) which states that the Agency is "to perform such *other functions* and duties related to intelligence affecting the national security."<sup>72</sup> While some have argued that this clause is sufficiently broad to include conducting covert activity without congressional notification, approval, and oversight, a former CIA general counsel and drafter of the NSA has suggested that the clause does not extend such broad authority.<sup>73</sup> Following NSA enactment, the CIA conducted numerous covert operations without congressional approval. Alleged abuses of discretion in these operations led to the passage of several amendments to enhance congressional oversight.

While appropriations statutes were passed to ensure that the executive branch would respect Congress' power of the purse by only spending *lawful* appropriations on covert actions, Section 504 of the

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71. 50 U.S.C. §403-3(d). The Act was slightly amended and recodified in 1992 and 1993.

72. See Wise, *supra* note 16, at 5-6 (emphasis added).

73. See Gumina, *supra* note 29, at 162-163.

NSA also made it illegal for the CIA to obtain funds from other sources.<sup>74</sup> Congress stripped the CIA of more discretionary power via the Hughes-Ryan Amendment of 1974 (now repealed) and the Congressional Oversight Act of 1980 (COA) (which amended Hughes-Ryan). “Section 501 [of the COA] required the CIA director . . . to ‘fully and currently inform’ Congress ‘of all intelligence activities’ of the U.S. government . . . [including] ‘intelligence operations in foreign countries’ . . . [in a timely manner], *except in times of extreme national emergency*.”<sup>75</sup> Hughes-Ryan and the Congressional Oversight Act were later amended in the new Section 503 of the NSA in 1991,<sup>76</sup> the wording of which is similar to that of the previous law. In relevant part, the new Section 503 differs with respect to the president’s reporting requirements in that the president does not need to report the plan to conduct a covert action prior to proceeding if “‘extraordinary circumstances’ affecting vital U.S. national interests exist, [and if he] ‘fully informs the intelligence committees in a timely fashion.’”<sup>77</sup> The president is also required to provide Congress with a statement of reasons for failing to secure approval before commencing.<sup>78</sup> However, the Oversight Act provided for a controversial loophole in that the executive is only required to report “important” covert activities, leaving it up to the discretion of the President not to report what he considers to be “unimportant” covert activity.<sup>79</sup> Since the law fails to define what qualifies as an important covert action, another set of exceptions has been created which the president may employ,<sup>80</sup> arguably limiting the ability of the two established oversight committees of Congress<sup>81</sup> to attack executive findings and consequent “important” CIA covert activities authorized by the president.<sup>82</sup>

Aside from Congress’ legislative enactments, presidents have issued several National Security Council Intelligence Directives (NSCIDs), commonly referred to in the intelligence community as “Nonskids,” which address the scope of the CIA’s, and vicariously the NSC’s, activities.<sup>83</sup> Not surprisingly, the tendency for presidents has been to

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74. *Id.* at 164.

75. *Id.* at 165 (emphasis added)(quoting 50 U.S.C. § 413 (1994)).

76. 50 U.S.C. § 413(b)(a) (1994).

77. Gumina, *supra* note 29, at 179-80.

78. *Id.*

79. See NUTTER, *supra* note 48, at 304.

80. *Id.*

81. The two oversight committees are the Select Committee on Intelligence in the Senate and the Permanent Select Committee on Intelligence in the House of Representatives.

82. See *Accountability and Oversight*, at <http://www.access.gpo.gov/intelligence/int/int018.html> (last visited Oct. 29, 2002).

83. See Wise, *supra* note 16, at 9.



broaden the scope of executive authority over time, as evidenced in the nature of two commonly referred-to orders drafted by Presidents Carter and Reagan. While Carter's Order 12,036 (now repealed) limited the CIA's role to solely overseas activities, the Reagan Order 12,333 not only permits the agency to conduct covert activities abroad, but also broadly defines "special activities" as those "conducted in support of national foreign policy objectives."<sup>84</sup> The broad scope of NSA duties is set forth in 50 U.S.C. § 401-1.12(d)(1), which states that the U.S. foreign intelligence and counterintelligence elements shall be responsible for:

[c]ollection, production and dissemination of military and military-related foreign intelligence and counterintelligence . . . with guidance from the Director of Central Intelligence. Collection of national foreign intelligence, not otherwise obtainable, outside the United States shall be coordinated with the CIA, and such collection within the United States shall be coordinated with the FBI.

Furthermore, the statute provides under 1.1(b) that "[a]ll means, consistent with applicable United States law and this Order, and with full consideration of the rights of United States persons, shall be used to develop intelligence information for the President and the National Security Council."

Since the order does not explicitly preclude or provide authority for the executive to make use of covert operations under the "all means" language, the relatively vague nature of such (now codified) directives added even more fuel to the controversial debate between Congress and the executive over (1) the amount, if any, of necessary disclosure to Congress, and (2) the fashion and scope of covert activities. While congressional oversight is addressed in the order, it merely requires the CIA to "cooperate with Congress 'to the extent provided by law,'" <sup>85</sup> which, absent further guidance, leaves the door open for significant presidential discretion.

Although the amendments and directives issued since the creation of the NSA and the CIA were intended to provide greater clarity to the process of authorizing and conducting covert operations within legal parameters, the ultimate dichotomy in interests, and consequent ongoing debate over whether the NSA reflects a shared powers theory (or whether covert operations are within the inherent purview of the executive branch) continues. The language of the statute still lacks clarity, and both sides continue to make arguments that on the one hand, there is an

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84. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401(3.4)(h) (1994).

85. Conrad, *supra* note 15, at 980 (emphasis added) (quoting Exec. Order No. 12,333, 50 U.S.C. § 401 (1982)).

express requirement for the CIA to inform Congress of covert operations within a reasonable time of commencing them, while the exceptions to the rule include such open-ended language, that it is hard to imagine an exception into which the CIA could not squeeze a non-reported covert activity (e.g., whether a covert activity qualifies as “important”).

#### IV. ARE UNILATERAL COVERT OPERATIONS UN-DEMOCRATIC AND THUS UNCONSTITUTIONAL?

While Congress pursues its interests in sharing control over whether to launch secret missions under the balance of powers doctrine, the public interest represented vicariously through Congress may not be neglected. Besides the difficulty in drafting clear and mutually acceptable<sup>86</sup> legislation which provides for predictable application of covert operation law, the ongoing debate over the legitimacy of covert activities is founded upon perhaps the most fundamental idea that the United States political system represents: democracy. By allowing the CIA to point the finger at another source (i.e., maintaining “plausible deniability”), covert operations effectively impair government accountability, leaving certain individuals and agencies without an obligation to answer to anyone<sup>87</sup> unless Congress’ approval is sought. It appears that, at least with respect to making use of paramilitary operations to overthrow governments (which has been considered by Congress to be essentially “undeclared war”), commencing covert activities solely at the executive branch’s discretion is arguably unconstitutional.<sup>88</sup> “Congress and the public, which Congress represents, have no opportunity to debate or approve such operations in advance.”<sup>89</sup> The arguments for and against making use of covert operations absent congressional review are separated into at least two views: the idealist and the pragmatist.<sup>90</sup>

##### *A. The Idealist Approach: A Narrow View of Democracy*

The idealist view with respect to the legitimacy of unilaterally commencing covert activities is unambiguous. Since democracy rests on the consent of the governed, and the governed are unable to approve, disapprove, or even comment on the government activity in question, the essence of democracy is not served. Quite to the contrary, unilateral

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86. Acceptable, that is, to both the executive and congressional branches of government.

87. See NUTTER, *supra* note 48, at 305.

88. *Id.*

89. See Wise, *supra* note 16, at 25.

90. See LOWENTHAL, *supra* note 49, at 113.

decision-making by one branch, without the knowledge of the other branches, upsets the American doctrine of checks and balances—the pillars upon which the United States government rests—and arguably runs blatantly afoul of the legislative intent expressed by the Framers of the Constitution.

Extremists even go so far as to argue that the allegedly unchecked CIA executive power to engage in covert operations reflects the political agenda of a supremacist government! Arguments—probably surpassing the paranoia threshold—have been made pointing out that the CIA is so involved in international as well as domestic civilian life that the “people will have to get over their 1984 fear that Big Brother is watching.”<sup>91</sup> According to one author, absent a real check on CIA activity, “[p]olitically, [the United States] is plainly and simply a dictatorship. This is as complete a dictatorship as ever existed in history . . . . Hitler had no more power than John F. Kennedy.”<sup>92</sup>

A more even-keeled and less propagandistic advocate of the idealist view might argue that such unilateral decision-making not only runs contrary to the democratic principles upon which the United States was founded, but that the fiascos that have surfaced following the exposure of unsuccessful secret operations have proven extremely costly in terms of public confidence in government, both domestically and internationally. Domestically, the confidence of U.S. citizens was gravely shaken following the Watergate scandal, the impeachment vote of the House, and subsequently the first resignation of a president while in office in nearly 200 years.

On an international scale, foreign countries may not only argue that conducting international covert activities runs contrary to international law, but that it has tainted the United States’ reputation as a result of both successful and failed operations. For instance, a global awareness that the U.S. participates in covert activities has led other countries in some instances to jump to the conclusion that the CIA was involved in operations in which it had not actually taken part,<sup>93</sup> providing further fuel to already fiery relationships with some foreign countries. Third party countries<sup>94</sup> (“TPCs”) might also criticize the United States for acting hypocritically with respect to western democratic standards under its unilateral approach to covert activities. TPCs may feel that moving

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91. Blanche Wiesen Cook, *Surveillance and Mind Control*, in UNCLE SAM’S SECRET AGENTS 188 (Howard Frazier ed., 1978).

92. *Id.* at 189.

93. See Wise, *supra* note 16, at 26.

94. Third parties are those countries which are not directly affected by the covert activities conducted by the United States but which are contemporaneously or subsequently made aware of U.S. clandestine involvement in another country.

forward with such operations without consulting nations that may have at least an indirect interest in the missions (especially in light of globalization marked by international treaties and alliances advocating cooperation among countries) legitimizes TPCs' concerns that the United States is in essence trying to police (or more bluntly stated, "dominate") the world without taking into consideration the interests of neighboring countries. It has been argued that such operations are in direct violation of the charter of the United Nations.<sup>95</sup> Consequently, the argument goes, democratic principles should not only be served on a domestic scale (i.e., balanced between legislative, executive and judiciary branches), but on an international one (i.e., through the United Nations) as well.

In sum, the idealist view strongly opposes the idea of unilateral covert activity due to the theoretical inconsistency with the concept of democracy inherent to secret missions, the practical blunders that have resulted from some disclosed operations ("the historical record [of which simply do] not justify covert intervention"),<sup>96</sup> and the bad reputation that the United States will have to combat in light of possible international law violations. As one dire critic of U.S. covert operations explains:

The standard of "plausible deniability" has no place in the American constitutional system. For in plain language it means that the government can act as it pleases if it can get away with lying about its activities . . . . Covert operations have not proved workable in the American system; *they are like a transplant rejected by the democratic host.*<sup>97</sup>

*B. Responding to the Idealist: Paying Homage to Democratic Principles and the Pragmatist Approach*

Pragmatic arguments rely on the premise that despite some legitimate interests and points raised by the idealist perspective, "the self-interest [regarding national security] of a state occasionally makes covert action necessary and legitimate,"<sup>98</sup> even if absolute democratic principles will arguably be blurred. However, an argument can first be made that democratic principles are indeed served via the procedure that the executive must employ before proceeding with the operation. Even if the critic is not satisfied that covert actions are indeed legitimate and democratic, there are still valid arguments that can be made to support the theory that where the president is acting to protect "national security

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95. See Wise, *supra* note 16, at 25.

96. See LOWENTHAL, *supra* note 49, at 113.

97. See Wise, *supra* note 16, at 26 (emphasis added).

98. See LOWENTHAL, *supra* note 49, at 113.

interests,” such an objective, if pursued in good faith, effectively trumps the idealists’ democracy argument, even absent prior congressional review.

*1. Serving democratic principles: procedure involved in conducting covert operations*

A first defense to the argument that democracy is compromised in the way the CIA conducts covert operations is apparent when taking into consideration the fact that although the public is not directly involved in the decision-making process, the public *is* represented through the presidential election process and through its representatives in Congress.<sup>99</sup> Prior to voting for a presidential candidate, the public may participate in a number of activities, such as viewing presidential debates, to get a sense of how a potential executive officer is likely to conduct covert operations. In addition, the public has the option of not re-electing the president within four years if it feels that the president has not lived up to its expectations.

Furthermore, as described above in the legislative definition and scope of covert operations, the executive does have the duty, absent exigent circumstances, to report the intention to conduct covert activities before proceeding.<sup>100</sup> The public, represented through both houses of Congress (through democratic elections of representatives and senators), is therefore at least indirectly consulted in the effort to ensure the existence of a system of checks and balances. Obviously, sharing classified information with a congressional population of more than 500 people would be ludicrous due to the great potential for leaks. Therefore, the number of people to whom this information can be disclosed is limited.<sup>101</sup> As part of the Intelligence Oversight Act passed in May of 1980, one committee from the Senate and one from the House would serve as the information contact point between the executive and the legislature.<sup>102</sup> Thus, with two congressional committees to review executive decisions to pursue covert operations, presidential discretion is

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99. As a government agent points out, “[i]ntelligence agencies . . . are institutions within a democratic form of government, responsible not only to the President, but to the elected representatives of the people, and, ultimately, to the people themselves. They are funded by the American taxpayers.” See *Accountability and Oversight*, *supra* note 82.

100. See *supra* Part III.B.

101. PETER HACKES ET AL., FOREIGN INTELLIGENCE: LEGAL AND DEMOCRATIC CONTROLS 6 (1980) (transcript of a symposium sponsored by the American Enterprise Institute for Public Policy Research, and held on December 11, 1979).

102. See *id.* at 6. See also Allan E. Goodman & Bruce D. Berkowitz, *Background Paper to THE NEED TO KNOW: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON COVERT ACTION AND AM. DEMOCRACY* 65 (1992).

limited, as provided for under the Constitution and fundamental norms of democratic government.

Despite the theoretical satisfaction of democratic principles via the discussed procedural guidelines, critics argue that congressional oversight is merely a myth in practice because first, both representatives and senators allegedly avoid intelligence briefings on covert operations, and second, because the process is so tainted by political bipartisanship that “every covert action is seen as an opportunity to score political points.”<sup>103</sup> Critics point to representatives’ and senators’ fears of (1) accidental disclosure of classified information potentially resulting in somebody’s death and (2) being blamed for a leak and thus being held at least partly accountable for a covert operations fiasco.<sup>104</sup> In addition, presidential fear of allowing one’s political adversary to know and then possibly to leak such information to gain political advantage has resulted in non-disclosure of covert operations, even to congressional committees.<sup>105</sup>

Directly related to the latter point is probably the critics’ strongest argument—that oversight committees are limited because they have no way to verify the information shared by the executive about covert operations. In other words, the CIA can select what, if anything, the agency wants to disclose, and Congress has little choice but to accept the information.<sup>106</sup> Thus, the argument goes, while democracy might be served in theory, the reality is another story.

## 2. *The pragmatist approach: a practical view of democracy*

However, even assuming that the idealist advocate of democratic principles is not convinced that the process the executive must follow in notifying Congress of planned covert activity truly reflects a democratic process, the critical reality of the situations in which covert operations are called upon may be such that it is in the best interest of global democracy and both American and non-U.S. lives to bend the reporting requirement in a way that still passes constitutional and statutory muster.<sup>107</sup> While even the idealist<sup>108</sup> will concede that there are

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103. See NUTTER, *supra* note 48, at 307.

104. *Id.* at 306.

105. *Id.* at 307.

106. *Id.* (“Without a separate agency to gather, analyze, and report information regarding covert activity, Congress is blind.”)

107. Even the former chairman of the Commission on Protecting and Reducing Government Secrecy during the mid-1990s, Senator Daniel P. Moynihan, recognized the need for heightened executive secrecy with respect to the related, yet distinct, topic of domestic secret activities (i.e., FBI) when he stated: “Would you prefer not to be protected from terrorists? . . . Inevitably in the [terrorist] crisis we are in – and it will be a prolonged one – there will be more secrecy.” See Miles

compelling reasons to keep covert missions from the public, and that therefore restricting the number of reportees within Congress is a fair and necessary compromise (if done in good faith), there are some “important” situations in which the value of keeping Congress initially uninformed preempts the need to strictly adhere to timely reporting requirements under the Oversight Act.

The main concern, as briefly discussed above, is the risk that congressional reportees are unable to keep the information confidential. Most commonly classified information makes its way to the public as well as to enemy nations via leaks to the press, including situations recently addressed by President Bush and Defense Secretary Rumsfeld with respect to the War on Terrorism.<sup>109</sup> Aside from, but related to, the leakage problem is the argument that granting the executive more discretionary power to conduct unilateral covert operations includes the need to use literally all possible means to protect the United States from (then) communist and (now) terrorist threats, even if such action would mean to test the legal boundaries set forth in the law and granted under the Constitution.<sup>110</sup> Next, the need to be able to react quickly and without delay is often imperative for successful missions. Furthermore, and in response to the above argument that covert operations potentially violate international norms, there is no international law that proscribes covert operations; rather, there is evidence that some foreign leaders may actually prefer the United States to conduct some operations covertly.

However, the seminal argument for limiting congressional oversight is that not only members of Congress, but vicariously their staff and other Capitol Hill affiliates, will expose an ongoing covert operation, thereby compromising the objectives of the operation, and more importantly, human lives. As former Director of the CIA William Colby pointed out in a public debate, even in the 1770s, when there were only about sixty members of Congress (compared to today’s more than 500), the Constitution’s Framers recognized the fundamental “leakage” problem. According to Mr. Colby, a congressional committee

refused to release some information about our intelligence activities because it said that “fatal experience had shown that there were too many members of Congress to keep secrets” . . . . You cannot conduct

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Benson, *A New Cast of Hawks and Doves Debate Government Secrecy in War on Terrorism*, at <http://www.newhouse.com/archive/story1a012502.html> (last visited Oct. 29, 2002).

108. The idealist viewpoint is perhaps most poignantly represented by some civil libertarians, who have admitted through American Civil Liberties Union legislative counsel Tim Edgar that some “very sensitive information” . . . must be kept secret.” *Id.*

109. See *infra* notes 112 and 113.

110. NUTTER, *supra* note 48, at 300-01. (“The Constitution, it would often be remarked, is not a suicide pact. In essence, the Constitution could be suspended. . .”).

covert action in that situation because . . . one man has the power to frustrate the whole thing.<sup>111</sup>

Such leaks may be inadvertent or deliberate and may be for the most nearsighted and politically egocentric reasons, including trying to embarrass the president or the CIA, gaining political support by blaming the party for a mishap, and even criticizing a successful operation for which the president (for good cause) may not have strictly adhered to legislative guidelines but arguably remained within constitutional and statutory legal bounds.

The issue of leaks to the press recently surfaced again with respect to the War on Terrorism, when President Bush accused congressional members of breaching their responsibility to keep classified information confidential and thereby “[putting U.S.] troops at risk.”<sup>112</sup> Following a presidential order which reduced the disclosure of classified information to an eight-person parliamentary panel for an indefinite period of time, Democratic Senator Tom Daschle reacted by acknowledging that such leaks are unacceptable and need to be stopped because they damage collaboration between congressional and executive branches of government.<sup>113</sup>

As pointed out earlier in this Article, the status of world politics during times of war and peace plays a significant role in assessing not only the need for—and scope of—covert activity, but whether Congress should be consulted in the decision making process. During the Cold War, the United States considered the threat of “monolithic international communism” (founded on the Soviet Union model) to be so imminent and multifaceted that the need to justify the use of covert operations did not arise.<sup>114</sup> In fact, Congress basically acquiesced to executive actions

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111. See HACKES ET AL., *supra* note 101, at 6 (internal quotations omitted). Aside from congressional members, other potential culprits include 23,000 Pentagon employees, millions of military personnel, and “any number of thousands of people who can and will give background briefings to reporters.” See a statement made by Ms. Victoria Clarke, Assistant Secretary of Defense for Public Affairs, “*Classified Leaks Have ‘Dropped Considerably’*” at <http://www.fas.org/sgp/news/2002/01/press.html> (Jan. 9, 2002).

112. See “*Drive to plug leaks sidelines Congress*,” at <http://old.smh.com.au/news/0110/11/world/world10.html> (Oct. 11, 2001). Though the White House did not specify what information was leaked to the press, a congressional aide pointed the finger at a *Washington Post* article identifying intelligence officials’ disclosures about imminent additional Osama bin Laden terrorist attacks. *Id.*

113. *Id.* Additional leaks were addressed in a radio broadcast by Defense Secretary Rumsfeld in which he accused unnamed sources of violating federal criminal laws by leaking classified information to the public, as well as consequently hindering U.S. intelligence gathering activities, as sources have dried up when confidentiality of the information was breached. See *Defense Secretary Rumsfeld Roundtable with Radio Media*, at <http://www.fas.org/sgp/news/2002/01/dod011502.html> (Jan. 15, 2002).

114. See LOWENTHAL, *supra* note 49, at 113.



and rarely second-guessed unilateral decisions to conduct covert activities.<sup>115</sup>

While some have argued that the need for covert action has dwindled since the foundation of the communist threat largely dissipated following the collapse of the Soviet Union,<sup>116</sup> the recent terrorist attacks experienced in the United States, a geographic area considered by many to be insulated from significant direct hits, has quickly revived the pragmatist advocates' theory in support of the need to conduct purely covert operations for national security reasons. Consequently, critics of U.S. covert operations regarding Osama bin Laden and his terrorist network, perhaps attributable in part to a fear of being viewed as unpatriotic,<sup>117</sup> have largely been silenced.

In making use of the most effective and efficient means to thwart the growing communist and terrorist cancer, presidents have argued that the executive needs to be able to freely pursue a third (or "middle") option in situations in which providing overt military or economic aid for a mission fails to adequately achieve the goals of the United States, while direct military intervention might carry risks too grave to endure under the circumstances of a particular situation.<sup>118</sup> Additionally, making use of the middle option with the underlying objective of protecting national security is even more imperative to combat foreign governments which fail to play by American—and, arguably, international—rules and which engage in covert political operations of their own, thereby leaving the United States no option but to engage in covert operations in an effort to learn of some of their potentially damaging secrets.<sup>119</sup>

Furthermore, an executive decision to pursue the middle option absent prior congressional review provides the president with a means to quickly and efficiently conduct foreign policy, largely due to the fact that he is not subject to excessive bureaucratic delays or political or public debate. Consequently, absent the typically cumbersome and time-

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115. Aside from conducting covert operations in support of European countries subject to a more imminent geographic threat, the threat to the United States became even more of a priority upon the spread and increase in popularity of communism in the Western Hemisphere. Hence, the U.S. pursued covert operations in Cuba to destabilize Castro, who provided the Soviets with a base dangerously close to U.S. soil. Additionally, Chile, with its newly (and ironically) democratically elected communist leader, Allende, posed another threat due to Chile's friendly relations with Castro and other communist allies. *See id.* at 113-14.

116. *See* NUTTER, *supra* note 48, at 330.

117. According to Roger Hamburg, a political science professor at Indiana University, "I worry because the public is scared, and anything seems justified in the name of combating terrorism." *See* Benson, *supra* note 107.

118. *E.g.*, RICHARD NIXON, 1999: VICTORY WITHOUT WAR 109 (1988).

119. *See* HACKES ET AL., *supra* note 101, at 3. *See also* Goodman & Berkowitz, *supra* note 102, at 41.

consuming process of receiving congressional approval,<sup>120</sup> the interests of American agents and the public are best served by minimizing costs (in terms of avoiding red tape)<sup>121</sup> and risks (in terms of lives at stake) via this foreign policy tool that allows for timely and protected steps in reaction to an imminent national security threat.<sup>122</sup>

Despite the fact that some initially un-reviewed covert operations have not been successful, it is undisputed that many such activities have enjoyed significant success, thereby resulting in favorable public review and increased national security. However, many such successes (as well as failures, although unsuccessful missions are more likely to surface in the press) have not become public due to the agency's ability to keep many missions undisclosed even after completion. Some disclosed successes have been addressed above and include infiltrating and thwarting anti-terrorist as well as drug activities as recently as several weeks ago when the CIA uncovered evidence of follow-up terrorist plots to the 9-11 attacks. Other success stories include funding democratic leaders and political parties against communist-backed, radical, or fundamentalist regimes around the world (most notably against the Soviet Union before and after the Cold War). More recently, covert operations have been successfully utilized to track down and hold individuals responsible for the financial backing of the Al Qaeda terrorist organization (i.e., the Hawala network), without which terrorist organizations' plots would be crippled or at least significantly thwarted. Although it is impossible to come up with an accurate success/failure ratio due to the fact that many activities on both ends of the spectrum simply do not surface, the mere fact that "successive presidents continue to use covert action"<sup>123</sup> indicates that the ratio favors making use of covert activities,<sup>124</sup> both those that are and those that are not initially reviewed by the appropriate committees.

In response to the global democracy argument that the United States is violating international standards by conducting covert activities in TPCs or in countries which have an indirect effect on TPCs (with or without the knowledge of TPCs' government officials), it can be argued

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120. For example, the War Powers Act requires the president to acquire congressional permission if American troops are involved in a conflict anywhere in the world for more than 60 days. See Goodman & Berkowitz, *supra* note 102, at 42.

121. As former Director of Central Intelligence, Hoyt S. Vandenberg pointed out during a hearing before the Senate Service Committee, making use of covert operations would be far more efficient and less costly because the CIA would not have to "rely on the painstaking study of . . . available overt material" and could "avoid 'wasteful duplication'" in its research and analysis of intelligence information. See Wise, *supra* note 16, at 7-8.

122. See Goodman & Berkowitz, *supra* note 102, at 42.

123. *Id.*

124. *Id.*

that there is no international sanction for covert activities, unless, for example, the United States pursues covert operations in a particular fashion (e.g., in uniform) in which case a targeted country “may consider the [operation] an act of war.”<sup>125</sup> Therefore, as long as the covert activity can be qualified so as not to fall within the purview of the Charter of the United Nations definition, international law does not present an additional obstacle for the United States to overcome in its cause.

In fact, there have been cases in which foreign nations have actually welcomed U.S. use of covert activity over the alternatives. For example, when the Pakistani government was serving as a conduit for U.S. arms to Afghan rebels, the desire to maintain operational secrecy was mutual. The Pakistani government did not want its relationship with the United States revealed due to potential political complications with neighboring countries.<sup>126</sup> With respect to the terrorist attacks since 9-11, however, there is no need for Pakistan to request that its receipt of U.S. aid be kept secret, since the Pakistani government officially and actively supports the war against terrorism, including the support of anti-Taliban fighters (i.e., Northern Alliance) in Afghanistan.

In sum, both idealist and pragmatist advocates make valid arguments to support their respective positions. While on the one hand the idealist correctly points out that the democratic principles that the United States was founded upon will necessarily be violated by the inherent nature of secret operations (i.e., no check or balance by the public or other branches of government), the discussion turns on what circumstances permit the executive to temporarily or permanently escape from absolute democratic principles, where a derogation therefrom may be in the nation’s (and possibly the world’s) security interest. Reasonable minds can differ on where to strike the balance between narrowly adhering to the democratic theory and recognizing the practical need to exceed idealist democratic parameters within the purview of the law. Since the ultimate authority to protect the United States rests with the executive branch directed by the president as set forth in the Constitution,<sup>127</sup> the CIA should be allowed to continue conducting important covert operations, even if Congress or the public is not consulted before commencing the activities. The effectiveness of the operation and safety of the persons involved would be compromised by involving more people than necessary in order to satisfy a mere reporting requirement, and the benefit derived from secret intelligence gathering would be lost or at least minimized, needlessly putting innocent lives at risk both in the

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125. See LOWENTHAL, *supra* note 49, at 116.

126. See Goodman & Berkowitz, *supra* note 102, at 43.

127. See Wise, *supra* note 16, at 25.

United States and abroad. Therefore, the balance weighs in favor of allowing the executive to conduct covert operations without the need to receive permission from another source in all circumstances when the United States is at war, and even in times of peace where a threat may nevertheless be imminent.

## V. CONCLUSION

The debate over covert operations between Congress, the executive and the public regarding the president's scope of authority to conduct the activities absent initial or timely review by Congress is relatively recent compared to the number of years that presidents have been using this foreign policy tool. While the executive branch was rarely challenged in its decisions to go forward with a variety of covert activity methods for nearly 200 years, Congress sensed that its position was being compromised after alleged abuses of CIA authority surfaced. In an effort to reign in the executive in response to questionable covert activities during the Cold War<sup>128</sup> and beyond, Congress passed legislation to curb CIA discretion and to provide for congressional oversight in making decisions whether to proceed with operations.<sup>129</sup> In order to preserve the very democracy upon which the U.S. system is founded, the democratic idealist argues, every covert action must be at least checked by a congressional committee or, better yet, by the public directly.

While it is understandable that congressional oversight or even a public hearing is theoretically the best way to ensure that U.S. democratic principles are respected by the executive, the latter option is unrealistic and the former is difficult under the circumstances of most covert operations. However, it is argued that the way current legislation is drafted, there is sufficient wiggle room for the executive to circumvent the reporting requirement. If Congress accepted this argument, there would be little consequent debate. Rather, idealistic advocates argue that there is always a reporting requirement (within a reasonable time of commencing the operation), which leads to the counterargument that there are circumstances (i.e., where immediate action must be taken to combat an imminent threat) where protecting the national security interest effectively trumps any limiting legislation in this area.

It is necessary to balance the need to preserve democracy in the United States (and to some extent around the world), a process that in many circumstances does not leave margin for error (i.e., where lives are

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128. *See generally*, for example, *supra* note 16.

129. For example, Congress passed legislation requiring the executive to report planned covert activity within forty-eight hours in 1991. *See* 50 U.S.C. §413b(a)(1).

at stake), with the need to strictly adhere to the requirements set forth by the oversight statute. If the CIA, in good faith, believes that lives will be put at risk by following a reporting requirement, then the executive should be able to apply its constitutionally and legislatively granted power to conduct covert operations absent initial congressional review. The public still has an opportunity to ensure that fundamental principles of democracy are respected in U.S. government by participating in a political system in which the most significant government officials (e.g., the president, senators, and representatives) are elected and in which the public is free not to reelect its representatives for any reason it chooses.

Although the CIA should not have the right to conduct covert operations absent good cause, the public should have faith that elected government officers are competent enough to appoint capable and proficient staff which can make reasonable decisions on when it is imperative that not even the designated congressional committees should be made initially aware of covert operations. While it is difficult to draw a bright line beyond which the Executive shall no longer be under an obligation to report, the instances when the committees are not informed should be kept to a minimum. However, where both America and American agents' lives are at stake, the Executive will be able to show (immediately or later) good cause, and if the action is taken in good faith, the Executive should not be second-guessed. Granting such discretion should not be viewed as a violation of democratic principles or of the Constitution.