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# An Overt Turn on Covert Action

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# An Overt Turn on Covert Action

## **Abstract**

Long past the soul-searching of Watergate, very few people question the need for covert action as a part of American foreign policy. The world is so dangerous after 9/11 that it would be irresponsible to suggest that our intelligence agencies should be disbanded or that our government should acknowledge everything it does on the dark side. Today the question is not whether we should engage in covert action at all, but how often and under what circumstances.

Not everything stays secret. Our Nation has been conducting covert action with greater transparency and more congressional participation than during the Cold War. Despite the doomsayers, the statutory checks on covert action that started in the 1970s have not damaged the Nation.

This Article, casting additional light on covert action, provides a framework for answering two sets of questions: one about delegations of presidential authority to the Central Intelligence Agency, the other about notices to Congress. For background, this Article presents a selected history of covert action since World War II, and reviews the statutes and regulations that affect covert action's legality. After that, this Article examines the extent to which the President may (and should) delegate authority for covert action, then balances the need for congressional oversight against the President's prerogative to limit knowledge of covert action to a small and trusted group. Recognizing the need to protect intelligence sources and methods, this Article proposes a new executive order (or a new statute) to clarify and to publicize the internal procedures that take place before the United States fixes foreign elections, beams propaganda onto foreign radios, supplies weapons to insurgents who fight our enemies, or kills suspected terrorists with missiles from Predator drones.

## **Keywords**

CIA, Covert action, Oversight, Separation of powers, Intelligence gathering, National security, Delegation, Notices

## **Disciplines**

Military, War, and Peace | National Security Law

# AN OVERT TURN ON COVERT ACTION

## A. JOHN RADSAN\*

“At its best, covert action should be used like a well-honed scalpel, infrequently, and with discretion lest the blade lose its edge.”†

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† RICHARD HELMS WITH WILLIAM HOOD, *A LOOK OVER MY SHOULDER: A LIFE IN THE CENTRAL INTELLIGENCE AGENCY* 184 (Random House 2003).

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## INTRODUCTION

Soon after 9/11, President Bush issued what has been described as the most comprehensive plan for covert action since the Cold War.<sup>1</sup> *Attack al Qaeda everywhere. Disrupt its plots. Penetrate its cells. Capture or kill its members. Do what is necessary.*<sup>2</sup>

The Bush plan probably continues to this day in some classified form. My plan, in this open format, is to provide a foundation for answering two sets of questions about American covert action. The first set is about delegation. Of particular relevance after 9/11, may the President designate, say, fifty members of al Qaeda for capture or death, giving the Central Intelligence Agency the discretion to go after “similarly situated persons?” To be more specific, may the Director of the Central Intelligence Agency (DCIA), under the broadest presidential authorization, order a Predator strike to kill a suspected terrorist? Or must the DCIA return to the President for approval? The second set of questions is about notice. May the President routinely limit congressional notification of covert action to only eight members of Congress, not including any congressional staff? In other words, may limited notice be the rule rather than the exception after 9/11?<sup>3</sup>

These two sets of questions, more about the process than the substance of covert action, are large enough for one article.<sup>4</sup> Process is most important

1. Dana Priest, *Covert CIA Program Withstands New Furor; Anti-Terror Effort Continues to Grow*, WASH. POST, Dec. 30, 2005, at A1.

2. *See id.*

3. Another former assistant general counsel has already opined that limited notice is contrary to the spirit of current legislation. *See* Suzanne E. Spaulding, *Power Play: Did Bush Roll Past Legal Stop Signs?*, WASH. POST, Dec. 25, 2005, at B1 (urging that limiting classified briefings to only eight senators and representatives amounts to “a process that effectively eliminates the possibility of any careful oversight”). Spaulding further opined that under the National Security Act, “[t]hese gang of eight briefings” should be rare and only exercised under “extraordinary circumstances”—especially since “[i]t is not realistic to expect them, working alone, to sort through complex legal issues, conduct the kind of factual investigation required for true oversight and develop an appropriate legislative response.” *Id.*

4. A “lethal” covert action presents two other questions not treated in this paper: (1) whether it is consistent with the ban on assassinations in Executive Order 12,333; and (2) whether it comports with United States and international law. *See* Abraham Sofaer, *The Sixth Annual*

when the checks from Congress and the courts are soft to non-existent. Process may determine whether the White House fails or succeeds on the dark side.

Not drawn into a broad discussion of counterterrorism, a few separate factors are held constant here. Both the Executive Branch and Congress, in an invitation to struggle, have overlapping national security powers. Among many powers, the President has broad reach through the Commander-in-Chief Clause whereas Congress controls the purse. As to policy, dealing with international terrorism involves a paradigm somewhere between law enforcement and the laws of armed conflict, or, perhaps more precisely, something beyond both paradigms. In terms of national security, international terrorists do not pose as great a threat as the Soviet Union during the Cold War, but they are more dangerous than drug traffickers and bank robbers. Those things are all given.

Long past the soul-searching of Watergate, very few people now question whether the United States should conduct any covert action at all. Times have changed, and a foreign policy that is always humane and honest has been left for dead. The world is so dangerous after 9/11 that it would be irresponsible, perhaps insane, to suggest that our intelligence agencies, whether engaged in covert action or intelligence gathering, should be disbanded. The question is not whether we should engage in covert action, but how often and under what circumstances.

The trend is toward transparency. Our nation has been conducting covert action with a greater public awareness and a higher level of congressional participation than during the Cold War. Despite the doomsayers, the statutory checks on covert action have not damaged the nation. Although most accept that Congress should not second-guess battlefield decisions and that the President best embodies the necessary qualities of secrecy, vigor, and dispatch, those notions are not definitive in an analysis of separation of powers on a complicated matter such as covert action.

To help answer the questions about delegations and notices, this Article proceeds in classical form. Parts I and II provide background: Part I is a selected history of covert action since World War II, while Part II provides the framework of statutes and regulations that affects covert action's legality. Parts I and II do take a large share of pages. Someone new to the subject should not jump into the current conversation without a general understanding of the history and the law. For that reader, Parts I and II summarize what is

otherwise available in books.<sup>5</sup> A reader who already knows this history and law (or is not interested in it), can jump to Part III.

Part III discusses the extent to which the President may (and should) delegate authority for covert action. (Unless the President expects to do everything himself, some things must be entrusted to subordinates.) Part IV revisits a perennial theme: the balance between congressional oversight and the President's prerogative, for operational and political reasons, to limit knowledge of a covert action to a small group. Part V, before a short conclusion, suggests how covert action could become more transparent while preserving its sources and methods. To that end, a new executive order and a new statute are considered.

## I. HISTORY

This history samples the covert action the CIA has conducted since its creation in 1947. Covert action is separate from the two core functions of our intelligence agencies: collecting and analyzing foreign intelligence. Since World War II, every President has ordered some form of covert action. Thus, covert action remains a third option for American foreign policy beyond the first two options of diplomacy and combat.

On covert action, the CIA is often damned when they do, and damned when they do not. The first type of damnation came in 1961 after the landing at the Bay of Pigs failed to inspire a revolt against Fidel Castro.<sup>6</sup> The second type came in criticisms, after 9/11, that the CIA should have killed Osama bin Laden, rather than just trying to capture or to disrupt him.<sup>7</sup>

Our moment in 2009 continues to be dramatic. Today, animals and machines reach places beyond the stride of American loafers and boots. Just a few years back, on November 7, 2002, something that resembled a large mosquito flew over a distant region of Yemen, hovering without much of a buzz at 15,000 feet.<sup>8</sup> It was an aircraft without a pilot.<sup>9</sup> A camera on board

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5. See WILLIAM J. DAUGHERTY, *EXECUTIVE SECRETS: COVERT ACTION AND THE PRESIDENCY* (2004); ROY GODSON, *DIRTY TRICKS OR TRUMP CARDS: U.S. COVERT ACTION AND COUNTERINTELLIGENCE* (1995); JOHN JACOB NUTTER, *THE CIA'S BLACK OPS: COVERT ACTION, FOREIGN POLICY, AND DEMOCRACY* (2000); JOHN PRADOS, *PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS FROM WORLD WAR II THROUGH THE PERSIAN GULF* (1996); JOHN RANELAGH, *THE AGENCY: THE RISE AND DECLINE OF THE CIA* (1986); EVAN THOMAS, *THE VERY BEST MEN: FOUR WHO DARED: THE EARLY YEARS OF THE CIA* (1995); GREGORY F. TREVERTON, *COVERT ACTION: THE LIMITS OF INTERVENTION IN THE POSTWAR WORLD* (1987); TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* (2007).

6. See *infra* Part I.D.

7. See BOB WOODWARD, *BUSH AT WAR 5-7* (2002).

8. James Risen, *An American Was Among the 6 Killed by U.S., Yemenis Say*, N.Y. TIMES, Nov. 8, 2002, at A1; Brent Sadler, *In the Sights of a Joystick Killing Machine*, CNN.com, June 9, 2006, <http://www.cnn.com/2006/WORLD/asiapct/06/09/sadler.predator.btsc/index.html>.

transmitted images, in real time, to an operator at Nellis Air Force Base in Nevada.<sup>10</sup> The operator, seated in a non-descript office, controlled the aircraft with a joystick.<sup>11</sup> Man and machine, based on prior tips, searched for a target on the ground—a lone vehicle racing through the desert outside of Sana.<sup>12</sup> After the operator spotted the target, he used a remote control to deploy a Hellfire missile at supersonic speed.<sup>13</sup> Within seconds, the vehicle, its driver, and all the passengers were obliterated.<sup>14</sup>

In this way, a group of six al Qaeda members were killed.<sup>15</sup> Included in the strike was Senyan al-Harathi, their leader.<sup>16</sup> Having entered a brave new world after 9/11, they did not know what hit them. They were not given any warning or any opportunity to surrender. All in all, it was one victory for Team America, one defeat for the international terrorists.

As a method against the terrorists, the strike from the sky was cleaner than captures, renditions, or detentions. Whether or not the Americans gave the Yemeni government advanced notice of the strike, there were legitimate concerns about cooperation in a country where there is widespread support for al Qaeda.<sup>17</sup>

Al-Harathi's group was the unsuspecting prey of a new American killer: the Predator drone.<sup>18</sup> The Predator kills suspected terrorists who do not wear uniforms on traditional battlefields. Originally developed for overhead surveillance,<sup>19</sup> the Predator has become a key part of America's strategy of taking the battle to the terrorists.<sup>20</sup> The Predator, in its armed and updated version, is about America being on offense.

Not all covert action, however, is as spellbinding as the silent Predator. The Predator is just a recent example of the third option between diplomats sending notes and Marines hitting the shores. Between diplomacy and combat, the CIA does many things on the dark side. Some categories within its covert

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9. Risen, *supra* note 8.

10. Sadler, *supra* note 8.

11. *Id.*

12. David Johnston & David E. Sanger, *Hunt for Suspects: Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16.

13. Risen, *supra* note 8.

14. Johnston & Sanger, *supra* note 12.

15. Risen, *supra* note 8 (noting that one of the six people killed in the attack was a United States citizen).

16. *Id.*

17. Greg Miller & Josh Meyer, *CIA Missile in Yemen Kills 6 Terror Suspects*, L.A. TIMES, Nov. 2, 2002, at A1.

18. Josh Meyer, *CIA Expands Use of Drones in Terror War*, L.A. TIMES, Jan. 29, 2006, at A4.

19. See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 189 (2004).

20. Meyer, *supra* note 18; see also Priest, *supra* note 1.

action arsenal are political action, propaganda, paramilitary actions, and economic subversion. The CIA, since its creation, has taken on a shroud of secrecy to fix foreign elections,<sup>21</sup> plant stories in the foreign press,<sup>22</sup> supply insurgents who fight against our enemies,<sup>23</sup> help American hostages escape from captivity,<sup>24</sup> and much more. For American covert action, there is a wide range of themes and variations. Or, as a former CIA manager noted, "If one is to comprehend what lies behind this bland definition, one must look to the record of what the CIA has actually done under the orders of successive Presidents of the United States."<sup>25</sup>

To go beyond a bland definition, this section reviews some covert actions since World War II.<sup>26</sup> Of particular interest to the two sets of questions about current covert action are the processes the Executive Branch has used in approving covert actions and the role Congress has played in watching over them.

#### A. *Political Action in Italy*

Although the Axis and Allied powers signed armistices in 1945, the international conflict continued. Two allies during the war, the United States and the Soviets, morphed into vicious adversaries. Their battles, however, no longer took place between tanks, troops, boats, and planes. Their battles took place in the shadows. For the shadow war, the CIA was created in 1947, one prong to the Truman Administration's policy of Soviet containment made famous by George Kennan's essay under the pseudonym "X."<sup>27</sup>

Even after the Soviets cut a line from Stettin to Trieste, Stalin was not satisfied. He wanted more of the world. Not fully deterred by America's temporary monopoly over nuclear weapons, the Soviets continued to provoke. As they exerted more influence through local Communist parties in Germany, France, and Italy, it became clear to American policymakers that something

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21. Ray S. Cline, *Covert Action as Presidential Prerogative*, 12 HARV. J.L. & PUB. POL'Y 357, 360–63 (1989).

22. *See id.*

23. Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT'L L. 284, 300–01 (1992).

24. *See* Antonio J. Mendez, *CIA Goes Hollywood: A Classic Case of Deception*, STUDIES IN INTELLIGENCE, Winter 1999–2000, at 2, available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art1.html>.

25. Cline, *supra* note 21, at 360.

26. As the following section reveals, much of American covert action has been targeted against the Soviets and their proxies. Now that the Cold War is over, covert action is being updated to deal with new threats.

27. *See X, The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566 (1947).



more was needed to address the threat.<sup>28</sup> America's diplomats and generals, in short order, agreed that the freedom of Western Europe depended on exposing and countering Soviet machinations.<sup>29</sup>

Italy, battered by years of hot war, was very weak.<sup>30</sup> To prevent Italy from falling to the Soviets, a newly formed National Security Council (NSC)—in its first top secret report—concluded that:

The United States should make full use of its political, economic and, if necessary, military power in such manner as may be found most effective to assist in preventing Italy from falling under the domination of the USSR either through external armed attack or through Soviet-dominated Communist movements within Italy . . . .<sup>31</sup>

Economic assistance, as a part of the Marshall Plan, helped attain America's goal in Italy.<sup>32</sup> Even so, the NSC recognized that spreading money around was not sufficient to suppress the Soviets.<sup>33</sup> For this reason, the NSC also recommended that the United States “[a]ctively combat Communist propaganda in Italy by an effective United States information program and by all other practicable means.”<sup>34</sup> These “other practicable means” were later defined as covert actions.

28. See Cline, *supra* note 21, at 360–62 (citing 3 U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: WESTERN EUROPE 724–89 (1974)); cf. S. REP. NO. 94-755, at 40 (1976) (noting that federal intelligence agencies used “aggressive covert actions” to disrupt domestic Communist Party activities).

29. Cline, *supra* note 21, at 360 n.10 (“[A]mong the officials who argued that the United States had to fight, covertly as well as overtly, against such subversive efforts sponsored by the Soviet Union were Secretary of State George C. Marshall, probably the most distinguished statesman to emerge from World War II; Secretary of War Robert Patterson; Secretary of Defense James Forrestal; George Kennan, Director of the State Department's Policy Planning Staff[;] and not least, President Harry S. Truman.”).

30. See DAUGHERTY, *supra* note 5, at 116 (stating that the “intelligence analysts foresaw a possible Communist victory in Italy in the forthcoming spring 1948 elections”—a result Kennan and the Truman Administration believed “would erode governments throughout Western Europe”).

31. A REPORT TO THE NATIONAL SECURITY COUNCIL: THE POSITION OF THE UNITED STATES WITH RESPECT TO ITALY, NSC 1/2, § 8 (Feb. 10, 1948).

32. MARK A. STOLER, GEORGE C. MARSHALL: SOLDIER-STATESMAN OF THE AMERICAN CENTURY 162–68 (1989). Officially called the European Recovery Program, the Marshall Plan (named after Secretary of State George C. Marshall) injected \$17 billion worth of aid into the ailing post-war economies of Western Europe. *Id.* at 165. The rationale was that economic health would produce political stability which, in turn, would prevent Europe from going communist. *Id.* at 162. (The Marshall Plan was also offered to the Soviet Union and the other eastern bloc countries, but it was rejected.) *Id.* at 165. The Plan was a boon to American industry since the goods purchased were largely American and were transported to Europe on American merchant vessels. *Id.* at 167.

33. NSC 1/2, *supra* note 31, at § 3.

34. See *id.* § 9(e).

The NSC also approved the “Coordination of Foreign Intelligence Measures,” which instructed the Director of Central Intelligence (DCI) and his operatives to carry out “covert psychological operations designed to counteract Soviet and Soviet-inspired activities” in Italy.<sup>35</sup> In more specific terms, the Truman Administration sought to prevent the Italian Communist Party (PCI) from winning a plurality in the Italian Parliament.<sup>36</sup> The CIA, taking up the challenge, used a special group (the Office of Special Operations) to ensure a favorable outcome in the Italian election scheduled for the spring of 1948.<sup>37</sup>

The goal was to help those aligned with American interests as much as it was to hurt those opposed to American interests.<sup>38</sup> The basics to winning elections—organizing political parties, putting up posters, and mobilizing civic organizations—were applied to the local scene.<sup>39</sup> All over Italy, the Americans tried to match what the Soviets were doing.<sup>40</sup> The CIA provided both technical and financial assistance to the Christian Democrats, other non-communist political parties, labor unions, and church groups, and provided stories to be planted in newspapers and journals throughout Italy.<sup>41</sup> Some of the CIA’s more devious tactics included bribing officials and co-opting labor unions.<sup>42</sup>

The CIA, in Italian political action, tried to leave few fingerprints on the assistance being provided. That was how our Italian friends wanted it because, as with other covert actions, evidence of an American role would have exposed friendly Italians to retribution and reduced the program’s effectiveness.<sup>43</sup> Moreover, exposure would have supplied the Soviets with anti-American fodder as they attempted to expand their influence over Italy and the rest of Western Europe.

The covert action in Italy proved successful at the Italian elections in April 1948.<sup>44</sup> In the Chicago way, some people may have voted more than once, and the dead may have come back to cast their ballots. As a result, a democratic, pro-Western coalition won, the PCI was prevented from playing any role in the government, and Italy remained free.<sup>45</sup>

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35. NSC 4-A (Dec. 9, 1947).

36. DAUGHERTY, *supra* note 5, at 117.

37. Cline, *supra* note 21, at 363 (citing RAY CLINE, *THE CIA UNDER REAGAN, BUSH, AND CASEY* 102 (1981)).

38. See WILLIAM E. COLBY, *HONORABLE MEN: MY LIFE IN THE CIA* 109, 115 (1978).

39. See *id.* at 115–20.

40. *Id.* at 119 (noting as an example, Washington wanted the ability to match Communist media abilities).

41. See Cline, *supra* note 21, at 362.

42. DAUGHERTY, *supra* note 5, at 120.

43. Cline, *supra* note 21, at 362.

44. *Id.* at 363 (citing CLINE, *supra* note 37, at 102).

45. *Id.*

Basking in America's success, George Kennan, as Director of the State Department's Policy Planning Staff, pushed for a political action unit, separate from the CIA's collection and analysis units.<sup>46</sup> Rather than rely on ad hoc efforts, he sought a permanent structure for covert action. The Italian victory had convinced American policymakers that covert actions, no matter what agency or sub-group performed them, "were both practical and necessary to thwart Communism."<sup>47</sup> But neither the Defense Department nor the State Department wanted to be in charge of dirty tricks. So, through National Security Directive 10/2, the Office of Special Projects was created on June 18, 1948.<sup>48</sup> The Office of Special Projects, renamed the Office of Policy Coordination (OPC) a few months later, was separate from the CIA's espionage group, the Office of Special Operations (OSO).<sup>49</sup> In fact, OPC received offices from the CIA but took direction from the State Department.<sup>50</sup> In this way, the split between covert action (OPC) and espionage (OSO) was accentuated by separate units.

After the 1948 elections, the CIA extended its Italian political action to the 1953 and the 1958 elections.<sup>51</sup> While the CIA was instrumental in achieving wins in these elections, America's successes in Italy depended more on Italian contributions than on American ones. As Bill Colby described his role in the 1958 election, years before he became DCI: "[T]his sort of influence could not be exerted just because we thought so and were supporting the effort. It would have to depend on a close and cooperative working relationship with the Italians actually involved in the fray."<sup>52</sup> In a most positive version, the CIA helped harvest the seeds of democracy. To Colby, it was very important that the covert action had this positive aspect. As he summarized: "The underlying philosophy of the CIA was to be *for* a democratic Italy, not just *against* a Communist one."<sup>53</sup> Colby, in other words, strongly believed we needed to be fertilizers rather than spoilers.

In the new century, while the Communists are in check, political action continues as an option against terrorists. American policymakers are probably still tempted to fix some foreign elections so that our friends come out on top.

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46. *Id.* (citing CLINE, *supra* note 37, at 102). In 1951, the OPC was dissolved and its staff transferred to the CIA's Directorate of Plans. *Id.*

47. DAUGHERTY, *supra* note 5, at 120 (quoting G.J.A. O'TOOLE, HONORABLE TREACHERY: A HISTORY OF U.S. INTELLIGENCE, ESPIONAGE, AND COVERT ACTION FROM THE AMERICAN REVOLUTION TO THE CIA 437 (1991)).

48. *Id.* at 122.

49. *Id.* at 123.

50. See PRADOS, *supra* note 5, at 81.

51. See COLBY, *supra* note 38, at 108-40.

52. *Id.* at 140.

53. *Id.* at 115.

When they submit to this temptation, they should try to be *for* the rule of law as much as they are *against* the terrorists and the regimes that support them.

*B. Cold War Propaganda: Radio Free Europe and Radio Liberty*

Building on its success in Italy, the CIA extended covert action to Eastern Europe and the Soviet Union. Two programs, Radio Free Europe (RFE) and Radio Liberty (RL), part of what CIA manager Frank Wisner called his “Mighty Wurlitzer,” are famous.<sup>54</sup> It is not clear from the historical record whether these programs were conceived at the White House or the CIA.<sup>55</sup> Whatever their source, the CIA cultivated RFE and RL for many years. Eventually, when the American support became too transparent, these programs were shifted to an overt status.<sup>56</sup>

Before the shift, the CIA did what it could to hide its support for RFE and RL.<sup>57</sup> The hidden support increased legitimacy with audiences and prevented RFE/RL employees from being branded spies.<sup>58</sup> For cover, RFE and RL pretended they were funded by private sources.<sup>59</sup> Thus, in the war of ideas with the Soviet Union, the CIA relied on RFE and RL to broadcast behind the Iron Curtain, past the Communist censors.<sup>60</sup> Otherwise, the Communist governments were presenting an official—and distorted—version of events in the region and the rest of the world.<sup>61</sup>

RFE and RL, to keep their audience’s attention, mixed in music with the news as well as segments that strived to preserve non-Russian cultures within

54. See RANELAGH, *supra* note 5, at 216; Cline, *supra* note 21, at 363–64 & n.29 (noting that the CIA implemented RFE in 1950, and a year later created the companion broadcasting service RL).

55. See, e.g., SIG MICKELSON, AMERICA’S OTHER VOICE: THE STORY OF RADIO FREE EUROPE AND RADIO LIBERTY 4, 11 (1983) (noting that RFE and RL, while having “carefully concealed origins,” were likely “conceived by senior officials of the Department of State, the Department of Defense, and the intelligence community”); see also GENE SOSIN, SPARKS OF LIBERTY: AN INSIDER’S MEMOIR OF RADIO LIBERTY 1–2 (1999) (attributing RL to “[v]isionary American statesmen under President Harry Truman in the State and Defense Departments” along with the initiative of George F. Kennan, the policy planning advisor to the Secretary of State after the war).

56. See Cline, *supra* note 21, at 364.

57. *Id.* at 364–65.

58. *Id.*

59. *Cf.* DAUGHERTY, *supra* note 5, at 74 (“Although funded and run covertly by the CIA for a number of years before being overtly managed by the United States Information Service, there was never much doubt among listeners as to the sponsoring government.”).

60. Cline, *supra* note 21, at 364; DAUGHERTY, *supra* note 5, at 73–74. Propaganda that disseminates accurate information is called “white” propaganda and is “used to present to foreign audiences the originating government’s positions on issues, to explain policy decisions, to provide news unavailable from the local media, and generally to put a human face on the country and its people to the world.” *Id.* at 75.

61. DAUGHERTY, *supra* note 5, at 73–74.

the Soviet Union.<sup>62</sup> The bulk of RFE and RL employees were political refugees from the Soviet bloc.<sup>63</sup> Not only could these people speak the languages of the region, but they also understood the nuances of their listeners back home. Their broadcasts, from studios safely outside the Iron Curtain, overcame jamming and other technical obstacles.<sup>64</sup>

Since RFE and RL developed many loyal listeners, the CIA considered these two programs a success.<sup>65</sup> But, unlike the results of an Italian election, marked by winners and losers at the polls, it was difficult to measure the effects of these broadcasts.<sup>66</sup> Further, it was next to impossible to analyze how propaganda compared to other types of covert action.

The stakes in propaganda are not as high as other forms of covert action, such as support to insurgents, because propaganda is less likely to trigger violence from our adversaries. That is an obvious upside. The downside, commensurate with propaganda's low risk, is its limited effect. On balance, both RFE and RL served in the psychological war against the Soviets: disseminating accurate information, neutralizing Soviet disinformation, and pressuring Communist regimes.<sup>67</sup>

It is clear, in retrospect, that RFE and RL deserve some credit for helping win the Cold War. Indeed, many leaders in newly independent states credited these two CIA programs.<sup>68</sup> Today, in a variation on a Cold War theme, American propaganda has probably turned to winning the hearts and minds of the Islamic world.

### C. Cold War Coups

In the Cold War's early days, the CIA concentrated on political action and propaganda, a modesty that made sense for an agency that worked in temporary offices in Washington.<sup>69</sup> In the first battles against the Soviets, the CIA's work was decidedly less violent (and less expensive) than countermeasures from the Department of Defense. Later, CIA forays into Iran

62. SOSIN, *supra* note 55, at 6.

63. Cline, *supra* note 21, at 364.

64. *Id.*

65. *Id.*

66. *See id.*

67. *Id.*

68. *See, e.g.*, Valdas Adamkus, President of Lithuania, Address to the Broadcasting Board of Governors (July 18, 2002), available at <http://adamkus.president.lt/en/one.phtml?id=3059> (stating that "[e]ach message from Radio Free Europe . . . contributed to breaking the blockade of information," which "[n]o doubt . . . helped Lithuania and other enslaved nations of Europe win independence and freedom"). President Adamkus went on to suggest that RFE and RL contributed instrumentally to "[t]he collapse of the Soviet empire, restoration of independent states and development of democracy. . . ." *Id.*

69. COLBY, *supra* note 38, at 71–72, 79–80.

and Guatemala changed the division of labor between the CIA and the military as American policymakers became more fearful about the Soviet threat.

### 1. Operation Ajax

By 1952, the covert action unit (OPC) and the espionage unit (OSO) were combined into a Directorate of Plans at the CIA.<sup>70</sup> In that year, Mohammed Mossadegh's election as Prime Minister of Iran alarmed those opposed to the Soviets.<sup>71</sup> Although historians will forever debate how far Mossadegh really tilted to the left, the British, and later the Americans, considered his ties to the Iranian Tudeh (or Communist) Party and his nationalizing of the British oil concession to have gone too far.<sup>72</sup> The British convinced many countries to join them in a boycott of Iranian oil, and the British intelligence services reached out to the CIA.<sup>73</sup> Step by step, the Americans and the British moved toward a decision that Mossadegh had to go.<sup>74</sup> Because political action and propaganda, by themselves, were insufficient for the task, President Eisenhower soon gave the green light for a coup.<sup>75</sup>

The CIA took the lead on the coup, encouraged and aided by the British, who were fixed on regaining their Iranian oil assets.<sup>76</sup> But the stakes were not only financial. Doing nothing risked Mossadegh going Communist.<sup>77</sup> Doing something, as with most conflicts during the Cold War, risked conflict with the Russians. Despite these risks, there is little evidence that the American

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70. DAUGHERTY, *supra* note 5, at 123.

71. PRADOS, *supra* note 5, at 93–97.

72. W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 49–50 (1992); *see also* Iran: *Whose Ox is Nationalized?*, TIME, Mar. 26, 1951, available at <http://www.time.com/time/magazine/article/0,9171,805925-1,00.html>.

73. PRADOS, *supra* note 5, at 93.

74. *See* Cline, *supra* note 21, at 365; Mark J. Gasiorowski, *The 1953 Coup D'etat in Iran*, 19 INT'L J. MIDDLE E. STUD. 261, 262 (1987).

75. DAUGHERTY, *supra* note 5, at 137.

76. *See* JAMES A. BILL, THE EAGLE AND THE LION: THE TRAGEDY OF AMERICAN-IRANIAN RELATIONS 87 (1988); PRADOS, *supra* note 5, at 92; *see also* Cline, *supra* note 21, at 365. In May of 2000, the New York Times published a previously classified CIA history. *See* James Risen, *Secrets of History: The CIA in Iran*, N.Y. TIMES ON THE WEB, Apr. 16, 2000, <http://www.nytimes.com/library/world/mideast/041600iran-cia-index.html>. This history revealed that the CIA “worked directly with Iranian royalist military officers to pick Mossadegh’s [the Prime Minister] successor, directed a campaign of bombings by Iranians posing as members of the Communist Party, and planted articles and editorial cartoons in newspapers, then provided funding for the new government.” Stephen Dycus & Barry Kellman, *International Law and National Security*, 35 INT’L LAW 811, 836 (2001).

77. *See* REISMAN & BAKER, *supra* note 72, at 49. *But see* PRADOS, *supra* note 5, at 96; WEINER, *supra* note 5, at 84–86.

Executive Branch consulted with Congress on the Iranian covert action.<sup>78</sup> That was a sign of the times.

Kermit Roosevelt, the grandson of Teddy Roosevelt and an operative with Middle East experience, made several trips to Iran to foment a coup.<sup>79</sup> (The Americans and British expected that the Shah of Iran, more aligned with Western interests, could reassert power once the Prime Minister was ousted from office.) At first, things did not go so well for Kermit Roosevelt and the rest of his CIA team. After the original plan for the coup leaked to the Prime Minister, the Shah took exile in Iraq.<sup>80</sup> Undeterred, Roosevelt conceived another plan, coined "Operation Ajax," with two prongs. First, Roosevelt paid hundreds of Iranians to intimidate Mossadegh's supporters through demonstrations and other street tactics.<sup>81</sup> Second, having identified Iranian military leaders with strong loyalties to the Shah, Roosevelt trained and directed them to take over local radio stations that, in turn, transmitted attacks on the Prime Minister.<sup>82</sup> The coup, the second time around, was an easy success. In exchange for a modest American investment,<sup>83</sup> the Iranian people turned on Mossadegh.<sup>84</sup> Very few lives were lost, Mossadegh was ousted, and the Shah returned to his throne.<sup>85</sup>

Operation Ajax, no doubt, was a short-term success. The coup stifled Soviet expansion into Iran and preserved Western control over Iran's oil and gas.<sup>86</sup> Thus, Kermit Roosevelt, in creating his own legend, looked back on Iran with pride. Yet, Roosevelt understood, even if his superiors did not, that the Iranian success stemmed as much from good luck as it did from the CIA's

78. See Gasiorowski, *supra* note 74, at 270–74 (describing the Executive Branch's approvals for CIA action).

79. See Winston P. Nagan & Craig Hammer, *Patriotism, Nationalism, and the War on Terror: A Mild Plea in Avoidance*, 56 FLA. L. REV. 933, 969 (2004) (citing KERMIT ROOSEVELT, COUNTERCOUP: THE STRUGGLE FOR THE CONTROL OF IRAN (1979)).

80. Gasiorowski, *supra* note 74, at 273 (1987); see generally Moyara de Moraes Ruehsen, *Operation 'Ajax' Revisited: Iran, 1953*, 29 MIDDLE E. STUD. 467 (1993) (recounting American involvement in the 1953 coup).

81. Cline, *supra* note 21, at 365.

82. *Id.*

83. In a conversation with Allen Dulles, Kermit Roosevelt said, "On the cost, sir, we really feel that it will be minimal—at least minimal for anything of such vital significance. One, or perhaps two, hundred thousand dollars is the most I can see us being required to spend." ROOSEVELT, *supra* note 79, at 14; cf. WEINER, *supra* note 5, at 89 (estimating the Iranian covert action cost the United States over \$5 million).

84. See ROOSEVELT, *supra* note 79, at 210 ("We believed—and we were proven right—that if the people and the armed forces [of Iran] were shown that they must choose, that Mossadegh was forcing them to choose, between their monarch and a revolutionary figure backed by the Soviet Union, they could, and would, make only one choice.").

85. See PRADOS, *supra* note 5, at 94–97.

86. *Id.*

mastery.<sup>87</sup> For this reason, Roosevelt, when asked to apply Ajax to other countries, warned that coups could not solve all American problems.<sup>88</sup> Notwithstanding Roosevelt, the White House was more inclined to credit “the Agency’s role as far more determinative and decisive than it was.”<sup>89</sup>

Closer to the present, Iranians still remember the coup in their country. Many argue that American meddling in 1953 contributed to the Iranian Revolution and to the taking of American hostages from 1979 until 1981.<sup>90</sup> In fairness, it may be too much to expect policymakers and their operators to foresee all the ripples to their actions. Yes, covert action must complement other aspects of American foreign policy. But strategic planning, on coups or foreign policy, is a luxury for those who deal with constant crisis.

## 2. Operation SUCCESS

After Mossadegh, CIA-sponsored coups became a generic export of sorts. A year after the Iranian coup, the CIA flexed its paramilitary muscle on Operation SUCCESS.<sup>91</sup> This time, President Eisenhower set his sights on the Guatemalan President, Jacobo Arbenz Guzmán.<sup>92</sup> Since his election, Arbenz had pursued ambitious agrarian reform, attempting to reduce the influence of United States corporations including the United Fruit Company.<sup>93</sup> Apparently Arbenz had not learned the Mossadegh lesson: a Third-World leader who expropriated Western holdings was asking for trouble. Even more menacing than President Arbenz’s expropriations were his links to the Guatemalan

87. DAUGHERTY, *supra* note 5, at 137 (“The success of [Ajax] stemmed from just the right amount of pressure on the right people, at the right time and place.”).

88. *Id.* In a final report, Roosevelt explained that if “we, the CIA, are ever going to try something like this again, we must be absolutely sure that people and the army want what we want. If not, you’d better give the job to the Marines.” *Id.* at 138.

89. *Id.* at 137.

90. Daniel R. Williams, *After the Gold Rush—Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment*, 112 PENN. ST. L. REV. 341, 401 n.215 (2007).

91. See STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA 109 (1982). Under President Truman, a coup called Operation Fortune had been aborted in Guatemala, which hardened President Eisenhower’s attitude toward the country. *Id.* at 102–03. Operation Success was so named to reflect the renewed optimism of its creators. *Id.* at 109.

92. *Id.* at 138–39; Cline, *supra* note 21, at 365–66.

93. SCHLESINGER & KINZER, *supra* note 91, at 53. Arbenz, according to one account, was determined “to wrest control of the economy from the U.S. corporations controlling it.” *Id.* Alfonso Bauer Paiz, Minister of Labor and Economy under Arbenz, expressed that “[a]ll the achievements of the [United Fruit Company] were made at the expense of the impoverishment of the country and by acquisitive practices. . . . The United Fruit Company is the principal enemy of the progress of Guatemala, of its democracy and of every effort directed at its economic liberation.” *Id.* at 72–73.



Communist Party.<sup>94</sup> So Eisenhower, unwilling to risk a “Soviet beachhead in our hemisphere,”<sup>95</sup> called on the CIA, cheaper and seemingly more effective than the military.

For the Guatemala project, the CIA established an operations center in Florida.<sup>96</sup> This center helped arm and train a “Liberation Army” under the command of Colonel Carlos Castillo Armas, exiled from the Guatemalan Army.<sup>97</sup> The Guatemala project was not limited to paramilitary assistance, however. American businessmen were convinced to exert economic pressure.<sup>98</sup> Radio propaganda and leaflets stirred up trouble.<sup>99</sup> And military aid was distributed to other countries in the region,<sup>100</sup> creating a comparative disadvantage for Guatemala.<sup>101</sup>

After a back-and-forth string of events, the rebel army deployed itself into Guatemala in 1954.<sup>102</sup> But they did not take the capital in a snap. When they bogged down, the CIA provided them with six Thunderbolt P-47 fighter planes and three P-51 fighter-bombers.<sup>103</sup> The CIA also recruited pilots to fly from a staging ground in Nicaragua.<sup>104</sup> The supplies and the recruitment were much more than the CIA had provided during the Iranian coup. Air support turned the situation to the rebels’ advantage, and the CIA-sponsored broadcasts

94. See JOHN LEWIS GADDIS, *WE NOW KNOW: RETHINKING COLD WAR HISTORY* 177–78 (1997).

95. DAUGHERTY, *supra* note 5, at 139 (quoting Eisenhower’s characterization of the risk that Guzman’s presidency posed).

96. SCHLESINGER & KINZER, *supra* note 91, at 113.

97. See *id.* at 126, 160. Armas, a longtime enemy of Arbenz, plotted from neighboring Honduras, declaring that “90 percent of the people of Guatemala [were] thoroughly ready to rise up and fight against the government.” *Id.* at 8.

98. See NICK CULLATHER, *SECRET HISTORY: THE CIA’S CLASSIFIED ACCOUNT OF ITS OPERATIONS IN GUATEMALA, 1952–1954*, at 41 (1999).

99. SCHLESINGER & KINZER, *supra* note 91, at 111, 167.

100. See *id.* at 103. John Moors Cabot, Assistant Secretary of State for Inter-American Affairs, asked the State Department to assess U.S. arms sales to countries near Guatemala. *Id.* The study illustrated that “providing arms to nearby countries hostile to Arbenz would be a clear enough threat to the Guatemalan military to induce it to withdraw support for Arbenz.” *Id.*

101. See CIA AND ASSASSINATIONS: THE GUATEMALA 1954 DOCUMENTS, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 4 (Kate Doyle & Peter Kornbluh eds., 1997), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB4/index.html> (stating that Eisenhower authorized \$2.7 million in August of 1953 for “psychological warfare and political action” among other components of paramilitary war).

102. RANELAGH, *supra* note 5, at 264–69; see also Cline, *supra* note 21, at 365.

103. See SCHLESINGER & KINZER, *supra* note 91, at 115 (stating that neither of these planes had ever been seen in Latin air forces).

104. SCHLESINGER & KINZER, *supra* note 91, at 21 (discussing that on the third day of the rebels’ invasion, the Mexican Government rescued two American crewmen from a P-47 that had crash-landed just past Guatemala’s northwestern border); see also Cline, *supra* note 21, at 365–66.

created the impression of a much larger rebel army.<sup>105</sup> Some in the Guatemalan military, wavering in their support for President Arbenz, lost their nerve. After an entire garrison surrendered to the rebels, President Arbenz rushed into exile.<sup>106</sup>

Once again, the CIA had gotten its way. Arbenz was out of Guatemala, and an American puppet was in. Although the coup was a short-term success, it exacerbated anti-American sentiment in Latin America, confirming that the Americans would do anything to protect their profits.<sup>107</sup> Further, it set the foundation for forty years of Guatemalan dictatorship and unleashed the dark forces of Guatemalan society, not easily managed or controlled from afar.<sup>108</sup> Even so, it led the Eisenhower Administration (and future administrations) to see covert action as an easy solution.<sup>109</sup>

Covert action, rather than complementing diplomacy and other instruments of American power, became a cheap substitute for policy. In short, the Iranian and Guatemalan experiences spoiled American leaders. As William Daugherty aptly notes, "these two successes left in their wake an attitude of hubris within the Agency . . . ."<sup>110</sup>

### 3. Nicaragua and the Iran-Contra Affair

More than twenty years later, in a variation on the Guatemalan theme, the Reagan Administration returned to Central America. Restoring Cold War lines, Reagan backed a rebel army against the leftist government in Nicaragua.<sup>111</sup> But Reagan's Contras, unlike Armas in Guatemala, could not trick themselves into victory since the Sandinistas maintained better control of their forces.<sup>112</sup> Stubborn, and in the face of congressional restrictions, Reagan continued to back the Contras.<sup>113</sup> The friction between the President and

105. See SCHLESINGER & KINZER, *supra* note 91, at 111, 169–70. The radio broadcasts were so effective that Arbenz's Minister of Communication, Colonel Carlos Aldana Sandoval, told acquaintances "he was convinced that Arbenz was sinking because the rebel forces 'were being swelled by thousands of volunteers.'" *Id.* at 185. In reality, Armas never commanded more than 400 men. *Id.*

106. See Cline, *supra* note 21, at 365–66.

107. See SCHLESINGER & KINZER, *supra* note 91, at 229.

108. See *id.* at 250–54. ("[D]eath squads linked to the [Guatemalan armed forces] reached into every sector of national life. Street-corner murders of lawyers, schoolteachers, journalists, peasant leaders, priests and religious workers, politicians, trade union organizers, students, professors and others continued on a daily basis.")

109. DAUGHERTY, *supra* note 5, at 139–40. The Eisenhower Administration viewed covert action as a "'silver bullet' that could slay Communist-dominated puppet governments easily and almost with impunity." *Id.* at 140.

110. *Id.*

111. See PRADOS, *supra* note 5, at 396–98.

112. *Id.* at 462–63.

113. *Id.* at 409–18.

Congress at home led to investigations, hearings, and indictments, events which prompted reforms that now serve as foundation for Congress's expanded role on covert action.<sup>114</sup>

Today, fomenting coups is not an attractive option for countering terrorists. The international community is not keen on a superpower meddling in other countries. And in places such as Egypt, Jordan, Pakistan, and Saudi Arabia, America's problems have less to do with the governments than with the people there. In a basic sense, the Iran-Contra affair showed that successful coups in Iran and Guatemala were relics of the past.

Back in the 1950s, the decade ended with perceived successes on covert action. The CIA was proud of what it had accomplished, sometimes behind the scenes, sometimes on center stage, in Italy, Iran, and Guatemala. (A failed coup in 1957 against President Sukarno of Indonesia did not seem to trouble policymakers or the public.<sup>115</sup>) The 1960s, however, did not start off so well. At the beginning of the decade, just before a planned summit between President Dwight Eisenhower and Soviet leader Nikita Khrushchev, the Soviets shot Francis Gary Powers from his U-2 surveillance plane.<sup>116</sup> Soon, things got much worse in a different part of the world.

#### D. *Anti-Castro Plots: Bay of Pigs and Operation MONGOOSE*

In Iran and Guatemala, the CIA established theme and variation: if the Americans did not like the leader of a Third World country—if he were too close to the Soviets or might cozy up to the Soviets—then he was pushed from power. When overt measures were too costly or too dangerous, covert action

114. See Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721, 753–54 (2007). Ford writes that:

These revelations, collectively known as the Iran-Contra Affair, sparked a significant public and congressional response, which focused largely on the executive's conduct in relation to congressional oversight and guidance. The findings of independent counsel during this time focused on the actions of members of the executive acting under guidance from the President in contravention of congressional guidance. In his concluding remarks, the independent counsel found:

The lesson of the Iran/contra is that if our system of government is to function properly, the branches of government must deal with one another honestly and cooperatively. When disputes arise between the Executive and Legislative branches, as they surely will, the laws that emerge from such disputes must be obeyed. . . . Congress has the duty and the power under our system of checks and balances to ensure that the President and his Cabinet officers are faithful to their oaths.

*Id.* (citations omitted) (quoting 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, 566 (Aug. 4, 1993)).

115. PRADOS, *supra* note 5, at 130–44.

116. *Id.* at 165–66.

could take care of a problem.<sup>117</sup> Going into the 1960s, a big problem for American policymakers was Fidel Castro, riding high from his military victory over Cuban dictator, Fulgencio Batista.<sup>118</sup>

Almost as soon as Castro took power in 1959, the Eisenhower Administration plotted his demise. The CIA's main project, Operation ZAPATA, armed and trained Cuban exiles in Guatemala.<sup>119</sup> (Since the leftists had been removed in Guatemala, the new Guatemalan leaders could repay their debt to the CIA by allowing their territory to serve as a staging point.) On top of the paramilitary project, the CIA added sabotage, political action, and anti-Castro propaganda.<sup>120</sup> Richard Helms, looking back on his CIA career, summarizes the audacity of the Cuban operation:

President Eisenhower approved the Agency plan involving propaganda, the creation of a unified Cuban opposition to Castro, and the formation of a cadre of some twenty exiles trained in guerrilla tactics—infiltration, sabotage, and communications. This group was, in turn, to develop a hundred or more Cuban agents who were to be infiltrated into Cuba.<sup>121</sup>

Although Eisenhower did not necessarily articulate his fears through a “domino theory,” he did believe that Castro could cause other countries to go Communist.<sup>122</sup> Back then, most everything was considered through a binary lens: a loss for us was a gain for them, and vice versa.

During Operation ZAPATA, Allen Dulles was the DCI, Richard Bissell, the director of operations.<sup>123</sup> Dulles, a legendary case officer, had served in the Office of Strategic Services, the precursor to the CIA, during World War II.<sup>124</sup> Bissell's claim to fame was developing the U-2 spy plane.<sup>125</sup> Between Dulles and Bissell, preparations for the Cuban invasion moved forward during the Eisenhower Administration and continued into the next administration.<sup>126</sup> Again, Richard Helms, who favored foreign intelligence for the CIA over

117. See PETER WYDEN, *BAY OF PIGS: THE UNTOLD STORY* 323–24 (1979) (“[T]he success in overturning governments in places like Guatemala . . . insinuated the notion into the heads of policy-makers, even the genial Ike, that the CIA could secretly perform ‘with baling wire’ what generals could no longer be allowed to do openly with armies . . .”).

118. See PRADOS, *supra* note 5, at 171–75.

119. See DAUGHERTY, *supra* note 5, at 146, 154.

120. See, e.g., SUBJECT TO SOLUTION: PROBLEMS IN CUBAN-U.S. RELATIONS 145–46 (Wayne S. Smith & Esteban Morales Dominguez eds., 1988) (discussing “Radio Swan,” the anti-Castro propaganda that aired at the end of the Eisenhower administration).

121. HELMS, *supra* note †, at 173.

122. See PRADOS, *supra* note 5, at 173–75.

123. DAUGHERTY, *supra* note 5, at 146–48.

124. *Id.* at 154.

125. See RANELAGH, *supra* note 5, at 311.

126. DAUGHERTY, *supra* note 5, at 153–55.

covert action, was not very kind in assessing his peers: "The only venue for a plan of this scope is a Hollywood motion picture studio."<sup>127</sup>

The new president, John F. Kennedy, briefed by Dulles and Bissell during the transition, did have an opportunity to call off the Cuban operation.<sup>128</sup> Refusing to approve a covert action, of course, is one thing. Canceling something approved by a prior president who had been a supreme allied commander during a world war was quite another. Dulles and Bissell, much like a later DCI who spoke of "slam dunks" concerning Iraqi weapons of mass destruction,<sup>129</sup> assured the new president the invasion would succeed.<sup>130</sup> So President Kennedy, clinging to his own notion of plausible denial, did not stop the Cuban operation.<sup>131</sup>

Nothing at the time, neither a statute nor an executive order, required the NSC or any other body to deliberate on the matter. Further, President Kennedy tended toward more centralized, informal decisionmaking.<sup>132</sup> As a result of this preference and the CIA's secrecy, people who could have spoken out about flaws to the operation—experts at the State Department, the Defense Department, and the CIA—were kept out of the loop.<sup>133</sup> These people should have questioned the change in the proposed landing site to a swampy part of Cuba's coastline as well as the assumption that the Cuban people would join the insurrection.<sup>134</sup> Even so, an irony to the CIA's secrecy is that Castro may have known about the attack well in advance because the Cuban intelligence services may have picked up the bits and pieces about an invasion in the open

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127. HELMS, *supra* note †, at 174.

128. See DAUGHERTY, *supra* note 5, at 153–56.

129. See BOB WOODWARD, PLAN OF ATTACK 247–50 (2004). After hearing an unconvincing presentation about weapons of mass destruction in Iraq, President Bush pressed DCI George Tenet:

Bush turned to Tenet. "I've been told all this intelligence about having [weapons of mass destruction] and this is the best we've got?"

From the end of one of the couches in the Oval Office, Tenet rose up, threw his arms in the air. "It's a slam dunk case!" the DCI said.

Bush pressed. "George, how confident are you?"

Tenet, a basketball fan who attended as many home games of his alma mater Georgetown as possible, leaned forward and threw his arms up again. "Don't worry, it's a slam dunk!"

*Id.* at 249; but see GEORGE TENET WITH BILL HARLOW, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 359–67 (2007) (arguing the phrase was taken out of context).

130. DAUGHERTY, *supra* note 5, at 155.

131. *Id.* at 154. But see *id.* at 152–53 (noting that Kennedy's involvement was direct enough to erode the idea of plausible deniability).

132. See Catherine F. Sheehan, *Opening the Government's Electronic Mail: Public Access to National Security Council Records*, 35 B.C. L. REV. 1145, 1158 (1994).

133. DAUGHERTY, *supra* note 5, at 98, 154.

134. *Id.*

sources of the American press.<sup>135</sup> Plus, they may have had secret sources in a brothel where the Cuban exiles made frequent visits from their Guatemalan training ground.

On April 17, 1961, despite the flaws to the operation, over 1400 Cuban rebels landed on the beach at the Bay of Pigs.<sup>136</sup> Armed with American weapons, they expected to wade through the swamps, hike over the mountains, and plant their flag in Havana. Although greatly outnumbered by Castro's forces, they hoped the news of their landing would cause Castro's forces to switch to their side or to let them be. Either way, that was wishful thinking. The rebels were confronted by heavy opposition, armed with Soviet weapons.<sup>137</sup> The rebels were shelled and bombed from land and air.<sup>138</sup> Castro, unlike Mossadegh, kept the lid on his country. Castro, unlike Arbenz, did not lose his nerve.<sup>139</sup>

For the Cuban rebels, pinned on the beach, something else needed to be done. The intelligence community, in a rush, informed President Kennedy of the brutal beating the rebels were taking.<sup>140</sup> Some of Kennedy's advisers, in a late night cabinet meeting, expected American air strikes to save them.<sup>141</sup> Such an attack would have shown, despite official denials, that the United States was behind the rebels. For this reason, President Kennedy, still opposed to an outright military attack against Cuba and fearful of escalation, refused the recommended air strikes from an American carrier.<sup>142</sup> All that he permitted were some limited strikes by rebel pilots, flying planes out of Nicaragua.<sup>143</sup> In effect, the rebels on the ground in Cuba were left to go it alone. Two days after their ill-fated landing, more than one hundred were dead.<sup>144</sup> The rest, shortly thereafter, were captured and imprisoned.<sup>145</sup>

In hindsight, as much as the rebels hated Kennedy for betrayal, his fear that the Bay of Pigs could escalate into a larger conflict with the Soviet Union was

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135. See THOMAS, *supra* note 5, at 243.

136. See ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY* 361 (2003).

137. *Id.* at 364–65.

138. CHRISTOPHER ANDREW, *FOR THE PRESIDENT'S EYES ONLY: SECRET INTELLIGENCE AND THE AMERICAN PRESIDENCY FROM WASHINGTON TO BUSH* 264 (1995).

139. See DALLEK, *supra* note 136, at 318 (“If the CIA could tame the Guatemala ant, this said nothing about the Cuba elephant.”).

140. ANDREW, *supra* note 138, at 264–65.

141. THOMAS, *supra* note 5, at 263.

142. See DALLEK, *supra* note 136, at 365.

143. THOMAS, *supra* note 5, at 263.

144. DALLEK, *supra* note 136, at 366.

145. *Id.* at 365. Eventually the prisoners were released in exchange for a large payment from the United States. *Id.*

not farfetched.<sup>146</sup> The Cuban Missile Crisis, later in his administration, proved that Cuba had the potential to take the United States to nuclear war.<sup>147</sup>

The Bay of Pigs balanced away the CIA's ledger of success on coups in Iran and Guatemala. Though President Eisenhower had started the project, President Kennedy accepted the embarrassment.<sup>148</sup> Soon after, President Kennedy is reported to have said that he wanted to splinter the CIA into a thousand pieces.<sup>149</sup> Splintered or not, Operation ZAPATA, in a few ugly days, marked the "end of the golden age of covert action."<sup>150</sup> Even today, as shown in Robert DeNiro's movie *The Good Shepherd*, the Bay of Pigs stands for the failure of American covert action and the limits of American power.

President Kennedy took the Bay of Pigs personally.<sup>151</sup> As he recovered between rounds, Allen Dulles and Richard Bissell took the fall for him, and the rest of the CIA stayed in the President's corner.<sup>152</sup> Kennedy battled Castro in the later rounds, and Operation MONGOOSE was a new punch to take down the Cuban menace.<sup>153</sup> For the new covert action, Brigadier General Edward G. Lansdale replaced Bissell as Chief of Operations.<sup>154</sup> Against Castro, Lansdale drew on his counter-insurgency experience in Asia to manage a multi-faceted program of paramilitary activity, economic sabotage, and propaganda.<sup>155</sup> That was not all, though.

The United States also tried the direct measure of killing Castro.<sup>156</sup> Some plots had taken place before the Bay of Pigs, some after.<sup>157</sup> Whatever the time frame, all of the plots were crazy. Thus, in less than two decades, from Italy to

146. See ANDREW, *supra* note 138, at 265–70.

147. See *id.* at 286–302.

148. See WYDEN, *supra* note 117, at 305 ("Facing the reporters, Kennedy brushed aside the stories about who was to blame: 'There's an old saying that victory has a hundred fathers and defeat is an orphan.'").

149. Scott P. Johnson, *The Prosecution of Lee Harvey Oswald*, 48 S. TEX. L. REV. 667, 668 n.6 (2007) (citing MARK LANE, *PLAUSIBLE DENIAL: WAS THE CIA INVOLVED IN THE ASSASSINATION OF JFK?* 98–99 (1991)).

150. DAUGHERTY, *supra* note 5, at 154 (quoting one intelligence veteran and scholar).

151. See DALLEK, *supra* note 136, at 366–67 (stating that Pierre Salinger, the spokesman for the Kennedy White House, found the President "crying in his bedroom" the following morning and that "[f]or days after the defeat Kennedy's anguish and dejection were evident to people around him. . . . He would talk to himself and interrupt conversations with the non sequitur 'How could I have been so stupid?'").

152. ANDREW, *supra* note 138, at 265–66.

153. *Id.* at 275.

154. *Id.*

155. See PRADOS, *supra* note 5, at 211–14; see also GlobalSecurity.org, *Operation Mongoose*, <http://www.globalsecurity.org/intell/ops/mongoose.htm> (last visited Feb. 15, 2009).

156. See ANDREW, *supra* note 138, at 274–77; see also PRADOS, *supra* note 5, at 212.

157. See PRADOS, *supra* note 5, at 211–14.

Cuba, the CIA's covert action devolved from non-violent measures such as political action and propaganda to the most violent measures.

To this day, it is not clear whether President Kennedy specifically ordered any hits.<sup>158</sup> It is also not clear how widely the hits were discussed at the CIA's senior levels. The paper trail at the White House or at CIA headquarters is just not there. What is clear, however, is that in the absence of written orders from the President, there were many winks and nods from the Oval Office all the way down to the operatives in the field.

For the Cuban operations, President Kennedy trusted his brother as liaison between the White House and the CIA.<sup>159</sup> After the Bay of Pigs, Bobby immersed himself in the dirty details of American intelligence activities, and he must have been at least aware of some assassination plots.<sup>160</sup> Such work by an Attorney General challenges those who view the Justice Department as a general check on illegality and imprudence in covert action. President Carter, reacting to abuses revealed in the 1970s, formally included the Attorney General in the process.<sup>161</sup> President Reagan, reacting to the perception of Carter's fecklessness and legalistic style, did not include the Attorney General as a rule.<sup>162</sup> But back in the Kennedy Administration, as a part of a "Special Group Augmented" at the NSC, the Attorney General actually approved and ran intelligence activities.<sup>163</sup> Bobby, all in all, did very different things from oversight.<sup>164</sup>

While Bobby Kennedy insisted the FBI do more to combat organized crime, the CIA, deeper in the shadows, reached out to the mob on assassination plots against Castro.<sup>165</sup> The Kennedy brothers, whether they were aware of it or not, were handing mobsters an argument that they should not be investigated or prosecuted, because of their assistance to American foreign policy. Rife was the potential for blackmail.

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158. See ANDREW, *supra* note 138, at 275–76.

159. THOMAS, *supra* note 5, at 271.

160. *Id.* at 287.

161. DAUGHERTY, *supra* note 5, at 184.

162. *Id.* at 194.

163. THOMAS, *supra* note 5, at 287.

164. *Id.*

165. See S. REP. NO. 94-465, at 71 (1975) (providing evidence that from 1960 to 1965, the United States Government used "underworld figures" and anti-Castro exiles in a plot to assassinate Castro); see also WYDEN, *supra* note 117, at 40–41 (noting that Colonel Sheffield Edwards, director of the Agency's Office of Security, proposed that the "assassins be hand-picked by the American underworld, specifically syndicate interests who had been driven out of their Havana gambling casinos by the Castro regime . . . . Bissell attributed high standards of efficiency to the Mafia. Its reputation for silence would be an asset. Its experience with successful 'hits' was unquestioned").



From 1960–1965, the CIA took at least eight different steps toward assassinating the Cuban leader.<sup>166</sup> The most conventional plots depended on rifles, tainted cigars, and pens that injected poisons.<sup>167</sup> The least conventional plots relied on contaminated wet suits and seashells filled with explosives to interfere with Castro’s scuba-diving.<sup>168</sup>

In other aspects of MONGOOSE, the CIA coordinated with Cuban exiles in Florida to discredit Castro’s regime.<sup>169</sup> Further, the CIA considered a biological attack on Cuban crops and spreading word to Cuba’s large Catholic population that Christ would return as soon as Castro was gone.<sup>170</sup> But, no matter how much money the Kennedy Administration spent, no matter the ingenuity and depravity of the schemes, the CIA failed to take care of the Cuban problem.<sup>171</sup> Eventually, the Kennedy brothers were themselves assassinated. And Fidel, whose beard grew long and gray, stayed for decades in the American backyard, a Communist still walking—even after the Soviet Union’s demise.<sup>172</sup>

Despite the lack of success against Fidel Castro, the CIA today may actually be back in the business of targeted killing. As the 2002 Predator strike in Yemen showed, the targets may now be suspected terrorists instead of heads of state.<sup>173</sup> And the battlefield may have shifted from Cuba to Asia. While the technology has been updated, the expected results are just as violent as they were in the 1960s: kill them before they kill us.

#### E. *Anti-Allende Operations in Chile*

Cuba was not the only problem in Latin America. During the Kennedy Administration, the CIA conducted political action in Chile that facilitated the Alliance for Progress, an initiative in Latin America “to promote the growth of democratic institutions.”<sup>174</sup> The CIA, trying to keep its role hidden, provided

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166. S. REP. NO. 94-465, at 71 (1975); DAUGHERTY, *supra* note 5, at 155. This was not the first time a President tried to eliminate a threat by assassination. S. REP. NO. 94-465, at 19 (1975). In 1960, Eisenhower ordered the CIA to “eliminate” former Prime Minister Lumumba in the Congo. *Id.* The Church Committee stated that in the Fall of 1960, two CIA officials were asked by superiors to assassinate Lumumba. *Id.* Poisons were sent to the Congo and some exploratory steps were taken toward gaining access to Lumumba. *Id.* In early 1961, Lumumba was killed by Congolese rivals. *Id.*

167. S. REP. NO. 94-465, at 71–73 (1975).

168. *Id.* at 85.

169. *Id.* at 115.

170. *Id.* at 72; *see also* RANELAGH, *supra* note 5, at 386.

171. DAUGHERTY, *supra* note 5, at 155.

172. As of February 19, 2008, Fidel stepped down as Cuba’s President. Anthony DePalma, *Castro Quits One Role, but May Not Be Done Yet*, N.Y. TIMES, Feb. 20, 2008, at A1.

173. Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike*, WASH. POST, Nov. 8, 2002, at A1.

174. DAUGHERTY, *supra* note 5, at 156.

financial support to the Chilean right-wing party, to the Christian Democrats, and to the Chilean Radical Party (PR).<sup>175</sup> The goal, a variation on the one attained in Italy, was to keep the Communists in check.<sup>176</sup> In that regard, the Chilean covert action was quite successful initially.<sup>177</sup> Following the 1963 elections, the PR was the largest political party in Chile—keeping Socialists and Communists out of power.<sup>178</sup>

The CIA's political action in Chile continued, essentially unchanged through the Johnson Administration.<sup>179</sup> Next, the Nixon Administration expanded the covert action in Chile after American intelligence reported that the Soviets were maneuvering to tip the 1970 presidential election their way.<sup>180</sup> President Nixon, hoping against hope, sought to prevent the National Party and the Christian Democrats, both acceptable to him, from splitting their votes and handing victory to the leftist, Salvador Allende.<sup>181</sup> Some quick political action, overt and covert, was conducted, but by the time of the Chilean election, the White House's fears came true: Jorge Alessandri and Radomiro Tomic split their votes and Allende came out on top.<sup>182</sup> Allende, however, was short of a majority necessary for an outright victory.<sup>183</sup>

Upon Allende's victory in the first round, President Nixon decided to do what he could to undermine him.<sup>184</sup> Because the President himself had taken the initiative, there was no need for extensive consultation or debate within the government. The NSC and Congress were of marginal importance to Nixon as he summoned the DCI, Richard Helms, to the White House for orders.<sup>185</sup> According to Helms's notes from the meeting, the President, as a part of a two-track covert action, wanted the Chilean economy to "scream."<sup>186</sup> To do so, Nixon expected the CIA to put its best people on the job.<sup>187</sup> In response,

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175. *Id.*

176. *Id.* at 157.

177. *Id.*

178. *Id.* at 156.

179. DAUGHERTY, *supra* note 5, at 171.

180. *See id.*

181. *Id.*

182. Juan de Onis, *Leftist Leading as Chileans Vote for a President*, N.Y. TIMES, Sept. 5, 1970, at A1.

183. *Id.*

184. U.S. DEP'T. OF STATE, HINCHEY REPORT: CIA ACTIVITIES IN CHILE (Sept. 18, 2000) [hereinafter HINCHEY REPORT], <http://foia.state.gov/Reports/HincheysReport.asp#1> (providing an overview of the pre-1970 election covert actions—including "sustained propaganda efforts . . . [and] financial support for major news media against Allende and other Marxists").

185. HELMS, *supra* note †, at 404.

186. *Id.*

187. *Id.*

Helms and his CIA, under great pressure, did what they could in two months to put off Allende's assumption of power in the second round of the election.<sup>188</sup>

Track I of the covert action, through propaganda and political action, attempted to block the Chilean Congress from confirming Allende as President.<sup>189</sup> If possible, the CIA would bribe members of the Chilean Senate.<sup>190</sup> Track II, kept secret from the State Department as well as the American Ambassador in Santiago, tried to foster a military coup before Allende's inauguration.<sup>191</sup> The CIA, mixing foreign intelligence activities with covert action, deepened contacts with three groups opposed to Allende within the Chilean military.<sup>192</sup> Everybody, friend or foe, was scrambling in Chile. One group, to the CIA's shame, actually used American weapons provided by the CIA to kidnap Rene Schneider, an influential army chief of staff opposed to a coup.<sup>193</sup> Schneider died from wounds he took defending himself from the attackers—but the coup did not materialize.<sup>194</sup>

Despite Tracks I and II, Allende assumed power by a lopsided vote in the Chilean Senate.<sup>195</sup> Nixon, refusing to be the president who "lost" Chile to the Communists, continued the efforts against Allende. Again, he ordered the CIA to "disrupt the Chilean economy."<sup>196</sup> The goal of this disruption was to create enough unrest and pain so that the Chilean military would step in and oust Allende.<sup>197</sup>

Sure enough, by 1973, Chile was in an economic crisis. The middle class was shrinking, labor strikes in the copper and transportation sectors were

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188. *Id.* at 404–07.

189. HINCHEY REPORT, *supra* note 184. The CIA sought to prevent Allende—who had not won an absolute majority—from winning the congressional run-off as the Chilean Constitution required. *Id.*

190. S. REP. NO. 94-465, at 229 (1975).

191. See HINCHEY REPORT, *supra* note 184; see also Peter Kornbluh, *Still Hidden: A Full Record of What the U.S. Did in Chile*, WASH. POST, Oct. 24, 1999, at B1.

192. HINCHEY REPORT, *supra* note 184.

193. *Id.* All three groups made it clear that a successful coup required Schneider—a loyal constitutionalist—to be kidnapped. *Id.*

194. *Id.* The CIA withdrew its support four days before the planned coup because an internal assessment concluded the group could not succeed. *Id.*

195. *Id.*

196. See STAFF OF S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., 1ST SESS., REPORT ON COVERT ACTION IN CHILE 1963–1973, at 28 (Comm. Print 1975) [hereinafter COVERT ACTION IN CHILE], available at <http://foia.state.gov/reports/ChurchReport.asp> (stating that the United States, using "both overt and covert" means, "cut off economic aid, denied credits, and made efforts—partially successful—to enlist the cooperation of international financial institutions and private firms in tightening the economic 'squeeze' on Chile" which "intensified the effect of the economic measures taken by opposition groups within Chile, particularly the crippling strikes in the mining and transportation sectors"); see also DAUGHERTY, *supra* note 5, at 172.

197. DAUGHERTY, *supra* note 5, at 172.

crippling the economy,<sup>198</sup> and, to the dismay of many in the Chilean military, Allende was getting cozy with Castro.<sup>199</sup> As a result, General Augusto Pinochet, apparently without any prodding from the CIA, organized a coup against Allende.<sup>200</sup> With tanks in the street, the coup plotters stormed the presidential palace, and Allende was killed, either by his own hand or by a bomb that was dropped on him.<sup>201</sup> On balance, although the CIA played no direct role in the coup,<sup>202</sup> having no blood on its hands, earlier CIA activities likely “created the conditions” that led to Allende’s demise.<sup>203</sup>

The aftermath of the coup was not too good for the Chilean people. Under Pinochet, the country went through a long period of dictatorship in which many people disappeared.<sup>204</sup> But, unlike what happened in Iran after the CIA coup there, the end of the Chilean story was a transition to democracy along with positive U.S.-Chilean relations.<sup>205</sup> Pinochet’s assumption of power ended the American justification for further covert action in Chile.

Overall, between 1963 and 1974, separate from what the White House did on its own, the NSC approved thirty-three covert actions in Chile.<sup>206</sup> Of these, only eight were briefed to Congress in any way.<sup>207</sup> Those were the good old days for the CIA, before the Church Committee dug into abuses in Chile, Cuba, and other places. However, before the rules for covert action changed to

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198. NUTTER, *supra* note 5, at 233–34.

199. See MARK M. LOWENTHAL, *INTELLIGENCE: FROM SECRETS TO POLICY* 114 (2006).

200. HELMS, *supra* note †, at 407.

201. COVERT ACTION IN CHILE, *supra* note 196, at 39; HINCHEY REPORT, *supra* note 184.

202. See COVERT ACTION IN CHILE, *supra* note 196, at 28; see also HINCHEY REPORT, *supra* note 184. The report concluded the CIA “was aware of the coup-plotting by the military, had ongoing intelligence collection relationships with some plotters, and because the CIA did not discourage the takeover and had sought to instigate a coup in 1970, probably appeared to condone it.” *Id.* Then and now, mixing intelligence assets between foreign intelligence gathering and covert action goes counter to basic tradecraft.

203. *Kissinger Telecons on Chile*, in THE KISSINGER TELECONS, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 123 (Peter Kornbluh ed., 2004), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB123/chile.htm>. After learning of Allende’s demise, Nixon exclaimed that “our hand doesn’t show on this one though.” *Id.* Kissinger responded that “[w]e didn’t do it. I mean we helped them . . . created the conditions as great as possible.” *Id.*

204. See CAROLS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 33–37 (1986); see also Roseann M. Latore, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 B.C. INT’L & COMP. L. REV. 419, 423 (2002); *Derechos Chile, Human Rights in Chile—The Legacy*, [http://www.chipsites.com/derechos/index\\_eng.html](http://www.chipsites.com/derechos/index_eng.html) (last visited Feb. 15, 2009).

205. See Rafael X. Zahralddin-Aravena, *Chile and Singapore: the Individual and the Collective, a Comparison*, 12 EMORY INT’L L. REV. 739, 795–800 (1998).

206. COVERT ACTION IN CHILE, *supra* note 196, at 49.

207. *Id.*

address the Iran-Contra scandal, the Carter and Reagan Administrations had one last hurrah in Afghanistan.

F. *Supporting the Mujahedin in Afghanistan*<sup>208</sup>

For centuries, Afghanistan was the grand prize in a great game between the British and the Russians, and even after the leading players changed, Afghanistan remained important to the Cold War struggle. For the Soviets, Afghanistan put them one country away from the warm water ports and the vast petroleum reserves in Iran. To counter the Soviets, President Carter approved a covert action on July 3, 1979, for “a small scale propaganda campaign publicizing Soviet activities in Afghanistan; indirect financial assistance to the insurgents; direct financial assistance to Afghan émigré groups to support their anti-Soviet, anti-regime activities; non-lethal material assistance; weapons support; and a range of training and support options.”<sup>209</sup> Funded at a low level, this covert action was a means of “harassing”<sup>210</sup> the Marxist government in Kabul and of aiding the Mujahedin, a loose collection of Afghan groups opposed to Soviet rule.<sup>211</sup>

As the CIA became involved in Afghanistan, it was no stranger to fighting pseudo-wars through proxies. During the Vietnam War, for example, the CIA responded to North Vietnamese operations in southeastern Laos by training and arming a force of over twenty thousand Laotians.<sup>212</sup> Although this was labeled covert action, not direct military confrontation, the differences between the two were measured in degrees more than in kind. In charge of CIA operations in Laos was Bill Colby, the future DCI, who was proud that the CIA was leaner and meaner than the American military in Vietnam.<sup>213</sup> Some CIA officers, not keeping any distance from the battle, may have actually fought on the side of their local allies in Laos. The CIA even ran an airline in the region, Air America, as a covert means of providing assistance to its proxies.<sup>214</sup> Years later, through an approved covert action, the Americans tried to maintain a thin

208. A recent covert action that is just as compelling as Afghan operations was support in the 1980s to Solidarity and other groups opposed to Communist rule in Poland. ANDREW, *supra* note 138, at 468–69. Eventually, the Iron Curtain dropped from the stage.

209. DAUGHERTY, *supra* note 5, at 188–89.

210. *Id.* at 206. This is how Robert Gates described Carter’s objective in Afghanistan, compared to Reagan’s bigger ambitions. *Id.*

211. *Id.* at 189.

212. See William M. Leary, *Supporting the “Secret War”: CIA Air Operations in Laos, 1955–1974*, STUDIES IN INTELLIGENCE, Winter 1999–2000, at 71, 79, available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art7.html>.

213. See COLBY, *supra* note 38, at 191–202.

214. See *id.*

and dangerous line between the intelligence function and the military function in Afghanistan.

A few months after President Carter ordered limited covert action in Afghanistan, the Soviets, emboldened by America's trouble in Iran, invaded Afghanistan to prop up their puppet.<sup>215</sup> This invasion radically altered the American view of the world and, in turn, prompted President Carter to authorize \$100 million in weapons for the Mujahedin.<sup>216</sup> Even so, President Carter insisted that this assistance stay as secret as possible to avoid drawing the United States and our Pakistani allies into a larger conflict with the Soviets.

After President Carter, President Reagan increased covert action in Afghanistan. Along with Bill Casey, Reagan's campaign manager turned DCI, President Reagan saw the Afghan program "as a way to deeply, if not fatally, wound the Soviet Union."<sup>217</sup> To that end, the United States channeled more than a billion dollars in assistance to the Mujahedin between 1986 and 1989, providing them with training and, later in the conflict, with several hundred shoulder-held, laser-guided Stinger anti-aircraft missiles.<sup>218</sup> The Stingers, which were lethal in taking down Soviet helicopters, were significant in turning the situation to the Mujahedin's advantage.<sup>219</sup>

Eventually, the Soviets, wounded by a thousand bites, withdrew their troops from Afghanistan. After years of conflict, the human toll amounted to fifty thousand dead Soviets, and close to two million dead Afghans.<sup>220</sup> Since the Soviet defeat in Afghanistan was a key factor in the Soviet Union's downward spiral, President Reagan, DCI Casey, and other American leaders looked back on the Afghan covert action with great satisfaction.<sup>221</sup> Sometimes

215. DAUGHERTY, *supra* note 5, at 189.

216. *Id.*

217. *Id.* at 206.

218. AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* 129 (2000); *see also* Milton Bearden, *Afghanistan, Graveyard of Empires*, FOREIGN AFF., Nov. 2001, at 17, 20–21; Ahmed Rashid, *Accord on Afghanistan Overtaken by Events*, THE INDEPENDENT (London), May 28, 1990, at 6; David Rogers, *Aid to Afghan Rebels Wins Approval of a House Panel*, WALL ST. J., Sept. 27, 1990, at A20.

219. ANDREW, *supra* note 138, at 365–67.

220. *See* JASON ELLIOT, *AN UNEXPECTED LIGHT: TRAVELS IN AFGHANISTAN* 30 (2001).

221. MILTON BEARDEN & JAMES RISEN, *THE MAIN ENEMY: THE INSIDE STORY OF THE CIA'S FINAL SHOWDOWN WITH THE KGB* 358 (2003) ("In the almost ten years of war, the Soviet Union admitted to having lost around fifteen thousand troops killed in action, with several hundred thousand wounded or disabled from disease. General Gromov's brilliantly staged exit from Afghanistan would grow rapidly into a national disaster for the USSR . . . . The Soviet adventure ended as it began, with fantasy and make believe."). Bearden and Risen went on to describe the Soviet Union's fate following its march out of Afghanistan on February 15, 1989:

The troika of Gorbachev, Shevardnadze, and Aleksandr Yakovlev, the old Party propagandist who'd gone liberal and was now glued to Gorbachev's side, had in a few short years undermined the foundation of socialist unity that had been so carefully

the CIA worked, they said. The Cold War, after all, had started and stopped with American successes in covert action.

Against the Soviets in Afghanistan, the CIA had worked directly or indirectly with an array of Islamic fundamentalists, including Osama bin Laden.<sup>222</sup> The CIA, as a part of its covert action, helped build tunnels outside of Kabul for storing weapons and for protecting Islamic troops.<sup>223</sup> Years later, in a historical twist after 9/11, bin Laden and his forces used those tunnels and troops against the Americans. And some of those Stingers may still be in bad hands.

Hindsight, of course, provides the best vision. From a perfect perspective, it was a mistake for the United States to cut support to the Mujahedin as soon as they defeated the Soviets.<sup>224</sup> The Afghans felt betrayed, and our “withdrawal created a power vacuum that various clashing factions of Mujahedin sought to fill, the result of which was ‘banditry and lawlessness.’”<sup>225</sup> In short, the aftermath was civil war, followed by vicious Taliban rule.

Today, even after American successes against al Qaeda and the Taliban, even after significant American assistance, Afghanistan remains unstable. The work there is far from done. American policymakers, whether through open or covert means, are still inclined to aid their proxies and allies.

### G. *Escape from Iran*

This chronology of covert action ends with a return to Iran. By 1979, after months of protests and demonstrations, the Shah of Iran was in exile and the groups opposed to him were in power.<sup>226</sup> On November 4, 1979, a group of

reinforced over the previous forty years. Gorbachev and his cohorts had almost flippantly declared that the USSR should abandon its paternalistic responsibility for the socialist countries of Eastern Europe. From now on, they'd have to stand on their own. It was every man for himself . . . and it didn't take long for things to start coming apart at the seams.

*Id.* at 381. “The stage was set for a total [Soviet] breakdown . . .” *Id.* at 382.

222. RASHID, *supra* note 218, at 129–30; *see also* Rod Nordland & Jeffrey Bartholet, *The Mesmerizer*, NEWSWEEK, Sept. 24, 2001, at 44, 45.

223. Nordland & Bartholet, *supra* note 222, at 45.

224. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Final Report on the Situation of Human Rights in Afghanistan*, U.N. Doc. E/CN.4/1996/64 (Feb. 27, 1996) (*prepared by Choong-Hyun Paik*) (describing the humanitarian plight of the Afghan civilians after the Soviet withdrawal); *see also* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report on the Situation of Human Rights in Afghanistan*, U.N. Doc. E/CN.4/1985/21 (Feb. 19, 1985) (*prepared by the Special Rapporteur, Felix Ermacora*) (detailing political, economic, and human rights in Afghanistan after the Soviet withdrawal).

225. Nagan & Hammer, *supra* note 79, at 965 (citing ELLIOT, *supra* note 220, at 22).

226. *See generally* MARK BOWDEN, *GUESTS OF THE AYATOLLAH* (2006) (describing the takeover and the 444 days of captivity for most of the hostages).

militants took over the United States embassy in Tehran.<sup>227</sup> Radical clerics, including Ayatollah Khomeini, supported the takeover as a part of their strategy for consolidating power after the revolution.<sup>228</sup> With Khomeini's blessing, they held sixty-three diplomats and three additional Americans hostage.<sup>229</sup>

During the takeover, six would-be hostages fled to the Canadian embassy.<sup>230</sup> For their safety, the Canadians hid them while the American and Canadian governments, in secret, settled on a plan to extract them from Iran.<sup>231</sup> The Canadians, however, made their cooperation contingent on keeping the American Congress in the dark.<sup>232</sup> Notice to Congress, the Canadians figured, greatly increased the chances that the rescue would leak to the public, something dangerous not only to the Americans but to all the personnel in the Canadian embassy.<sup>233</sup>

President Carter, without any apparent reservation, accepted the Canadian condition.<sup>234</sup> To carry out the mission, he called on the CIA.<sup>235</sup> With presidential authorization, Antonio Mendez, an expert in disguises at the CIA, took charge of the covert action.<sup>236</sup> For anybody, sneaking six Americans out of revolutionary Iran was not easy. As Mendez later recounted, "[w]e needed to find a way to rescue six Americans with no intelligence background, and we would have to coordinate a sensitive plan of action with another US government department and with senior policymakers in the US and Canadian administrations."<sup>237</sup> Indeed, a full account of the Iranian covert action was not disclosed until the Agency's fiftieth anniversary in 1997.<sup>238</sup>

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227. *Id.*

228. *Id.* at 14.

229. *Id.* at 198–99. After two weeks of captivity, thirteen of the hostages, mainly African Americans and women, were released. Charles G. Cogan, *Desert One and Its Disorders*, 67 J. MIL. HIST. 201, 208 (2003).

230. *Canadian Caper Helps Americans Escape Tehran*, (CBC television broadcast Jan. 28, 1980), available at [http://archives.cbc.ca/on\\_this\\_day/01/28/](http://archives.cbc.ca/on_this_day/01/28/).

231. *Id.*

232. See *Oversight Legislation, 1987: Hearings on S. 1721 and S. 1818 Before the Senate Select Comm. on Intelligence*, 100th Cong. 209 (1988) [hereinafter *Hearings*] (testimony of Secretary of Defense Frank Carlucci, former DDCI under Stansfield Turner) (“[T]he Canadians indicated that if the Congress was to be informed, they wouldn’t cooperate.”). Senator Jim McClure also stated that “[t]he Canadians said they would not help unless the administration promised not to notify Congress.” See Jim McClure, Letter to the Editor, *A 48-Hour Rule For Covert Operations? No*, WASH. POST, Sept. 26, 1988, at A14.

233. *Hearings*, *supra* note 232.

234. See PRADOS, *supra* note 5, at 352.

235. *Id.* at 353.

236. See Mendez, *supra* note 24, at 2.

237. *Id.*

238. *Id.* at 2 (providing a thorough discussion of the operational planning).



The rescue required three months of planning.<sup>239</sup> First, the CIA obtained Canadian passports for the six Americans and forged Iranian visas for them.<sup>240</sup> Next, Mendez devised “a cover so exotic that no one would imagine it was being used for operational purposes.”<sup>241</sup> Mendez’s plan was to disguise himself and his six compatriots as a Hollywood production team that had been in Iran scouting a movie site.<sup>242</sup> To be as authentic as possible, the CIA, with the help of a makeup consultant called “Jerome Calloway,” set up a motion picture company,<sup>243</sup> leased a production suite,<sup>244</sup> took out full-page ads in key trade papers,<sup>245</sup> and purchased “a script with ‘sci-fi,’ Middle Eastern, and mythological elements.”<sup>246</sup> With full attention to detail, Mendez arranged appropriate “pocket litter” for the six Americans.<sup>247</sup> Mendez, who himself played the production manager, carried a “portfolio [that] had everything needed to sell even the most sophisticated investment banker on our movie.”<sup>248</sup>

The “backstopping” all arranged, Mendez flew to Tehran.<sup>249</sup> There, in secret, he met the six at the Canadian embassy, explained the plan, and described how to be “more ‘Hollywood.’”<sup>250</sup> The transformations were dramatic.<sup>251</sup> The otherwise conservative Bob Anders, for example, took on a new persona:

Now, his snow-white hair was a “mod” blow dry. He was wearing tight trousers with no pockets and a blue silk shirt unbuttoned down the front with

239. *Id.* at 14.

240. *See id.* at 4, 9.

241. Mendez, *supra* note 24, at 4. Such an approach, although quite creative, was risky, because “legends hold up best when their details closely follow the actual experience or background of the user . . . [and] should be sufficiently dull so that [they do] not pique undue interest.” *Id.* That was not the case here.

242. *See id.* at 4–6. Production companies from Hollywood often “travel around the world looking for the right street or hillside to shoot a particular scene.” *Id.* at 5. A production team usually consists of “a production manager, a cameraman, an art director, a transportation manager, a script consultant, an associate producer, a business manager, and a director.” *Id.* at 4.

243. *Id.* at 5. The production company was appropriately titled “Studio Six Productions.” *Id.*

244. *Id.* at 5–6. CIA contractors established Studio Six Productions in an old Columbia Studios lot in Hollywood. *Id.* Michael Douglas had just used this lot to produce the film *The China Syndrome*. *Id.* at 5–6.

245. *Id.* Full-page ads were taken out in *Variety* and *The Hollywood Reporter*. *Id.* at 6.

246. Mendez, *supra* note 24, at 5–6. “The script was based on an award-winning sci-fi novel with a complicated story line” and themes “about the glory of Islam.” *Id.* Calloway and Mendez chose the title “Argo” because it was the punch line of a profane knock-knock joke familiar to the group and because it had origins in mythology. *Id.*

247. *Id.* at 7. This included business cards, briefing papers, airline tickets, lapel pins, baggage stickers, and matchbooks from the Brown Derby Restaurant in Hollywood. *Id.*

248. *Id.* at 8.

249. *Id.* at 10.

250. *Id.* at 12–13.

251. Mendez, *supra* note 24, at 12–13.

his chest hair cradling a gold chain and medallion. With his topcoat resting across his shoulders like a cape, he strolled around the room with the flair of a Hollywood dandy.<sup>252</sup>

The briefings complete, Mendez and the group were ready to leave.<sup>253</sup> Through an inside contact at the airport, they were provided with forged embarkation cards which made it seem as if they all had entered Iran as part of the production team.<sup>254</sup> Though "traveling a bit light for Hollywood types," they proceeded through the emigration checkpoint, boarded the flight, and flew away from Iran.<sup>255</sup> As Mendez describes, reminiscent of Kermit Roosevelt's earlier glory in Iran, the operation was "[a]s [s]mooth as [s]ilk."<sup>256</sup>

The Carter Administration did not consider informing Congress of the covert action—even in closed session—until the Americans returned home.<sup>257</sup> Even then, the Carter Administration hesitated.<sup>258</sup> For the safety of the other Americans still hostage in Tehran, the Carter Administration did not want the rescue operation to go public.<sup>259</sup> By accepting the Canadian condition for the rescue mission, President Carter arguably violated the express terms of the Hughes-Ryan Act,<sup>260</sup> an important piece of legislation on covert action. Here, the Iranian rescue mission is a final illustration of the tensions between the President's power to get things done and Congress's power to be informed of matters that could take the country to war.<sup>261</sup> Back and forth, sometimes policy stretches the law, and sometimes the law stretches policy.

252. *Id.* at 13.

253. *Id.* at 13–14.

254. *Id.* at 12.

255. *Id.* at 14–15.

256. Mendez, *supra* note 24, at 14. In fact, one airline manager approached Mendez to ask why he had not booked another airline—which would have arranged for red-carpet treatment. *Id.*

257. See *Hearings*, *supra* note 232, at 220. Then-Secretary of Defense Frank Carlucci stated, "Now we did inform after the fact." *Id.* He noted however, that "I was one of the decision-makers [to withhold notification to Congress] and I would not have [given prior notice], in retrospect. Because I think those people would still be there had we not agreed to withhold information." *Id.*

258. See PRADOS, *supra* note 5, at 353–54.

259. See *Hearings*, *supra* note 232, at 220.

260. See Hughes-Ryan Amendment to the 1961 Foreign Assistance Act, Pub. L. No. 93–559, sec. 32, § 662, 88 Stat. 1795, 1804 (1974) (codified as amended at 22 U.S.C. § 2422 (1976)) (requiring "timely" notice to the appropriate committees of Congress), *repealed by* Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102–88, 103 Stat. 429.

261. For example, as one commentator notes:

Foreign powers or operatives, knowing that participation with the United States in a special activity requires rigid congressional notification procedures, may well refuse to extend their assistance. In this way, rigid notification requirements interfere with the President's ability to conduct foreign affairs, since they deny him the ability to receive such assistance.

## II. LEGAL FRAMEWORK

Although the historical frame to this Article started after World War II, it remains true that Presidents as far back as George Washington conducted covert action.<sup>262</sup> Throughout American history, the legal justifications for covert action have varied. Under a separation-of-powers analysis, three broad periods to American covert action can thus be identified.

First, before the National Security Act of 1947,<sup>263</sup> Presidents conducted covert actions based on Article II powers while Congress deferred.<sup>264</sup> And the courts were nowhere close to the action.<sup>265</sup> Although there is nothing explicit about covert action in the Constitution, Presidents inferred authority from such places as the Vesting Clause, the Commander-in-Chief Clause, the Treaty Clause, and from an implied executive privilege.<sup>266</sup> As a result, covert actions

David Everett Colton, *Speaking Truth to Power: Intelligence Oversight in an Imperfect World*, 137 U. PA. L. REV. 571, 601 (1988) (citation omitted).

262. See ANDREW, *supra* note 138, at 6–12.

263. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended in scattered sections of 10 & 50 U.S.C.).

264. See BRUCE D. BERKOWITZ & ALLEN E. GOODMAN, STRATEGIC INTELLIGENCE FOR AMERICAN NATIONAL SECURITY 25–26 (3d ed. 1989); CECIL V. CRABB, JR. & PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 169–91 (1989); DAUGHERTY, *supra* note 5, at 91–92; LOCH K. JOHNSON, AMERICA'S SECRET POWER: THE CIA IN A DEMOCRATIC SOCIETY 8–9 (1989). While these scholars generally agree that Congress rarely intruded into covert actions and other intelligence matters before the Cold War, recent scholarship challenges the consensus that Congress was uninvolved during this period. See DAVID M. BARRETT, THE CIA AND CONGRESS: THE UNTOLD STORY FROM TRUMAN TO KENNEDY (2005).

265. See William S. Cohen, *Congressional Oversight of Covert Actions: The Public's Stake in the Forty-Eight Hour Rule*, 12 HARV. J.L. & PUB. POL'Y 285, 291 (1989) (“[T]he courts have refused to draw hard and fast lines between the prerogatives of the two branches in this area.”).

266. U.S. CONST. art. II, §§ 1, 2 (“[T]he executive Power shall be vested in a President of the United States of America. . . . The President shall be Commander in Chief of the Army and Navy of the United States, and . . . He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .”). Executive privilege refers to the President’s ability to keep internal debates secret and is often defended as important to protect national security and diplomacy. See *United States v. Nixon*, 418 U.S. 683, 707–08 (1974) (stating that the President has a constitutionally based presumptive privilege to withhold certain information relating to confidential conversations and correspondence necessary to protect the public interest). The Constitution does not mention such authority, and the Supreme Court did not expressly consider the constitutionality and scope of the executive privilege until 1974. *Id.*; see also DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS 4 (1981) (explaining that the Framers were very aware of, and relied on the vitality of, the executive privilege).

during the first period were subject to very little congressional or judicial oversight, if any.<sup>267</sup>

During the second period, starting with Congress's enactment of the National Security Act of 1947, it was argued—especially by those who did not completely accept inherent powers—that Congress had given the President authority to conduct covert action. This argument rested on the “fifth function” to the CIA’s charter,<sup>268</sup> on the authority for secret transfers of funds laid out in the Central Intelligence Agency Act of 1949,<sup>269</sup> and on appropriations from Congress.<sup>270</sup> Not everyone agreed, however, that Congress had given the President such authority.<sup>271</sup> The wording to the CIA’s

267. See BARRY M. BLECHMAN, *THE POLITICS OF NATIONAL SECURITY: CONGRESS AND U.S. DEFENSE POLICY* 139 (1990). This period has been referred to as the era of “Congressional ‘undersight.’” *Id.*

268. National Security Act of 1947, Pub. L. No. 80-253, § 102(d)(5), 61 Stat. 495, 498 (codified as amended at 50 U.S.C. § 403-3(d)(5) (2000)). A fifth clause of the original NSA of 1947 called for the CIA “to perform such other functions and duties related to intelligence affecting the national security as the [NSC] may from time to time direct.” *Id.*

269. Central Intelligence Agency Act of 1949, Pub. L. No. 81-110, 63 Stat. 208 (codified as amended at 50 U.S.C. §§ 403a-403w (2000 & Supp. V 2001-2006)). Specifically, 50 U.S.C. § 403f(a) (2000) provides that:

In the performance of its functions, the Central Intelligence Agency is authorized to—(1) [t]ransfer to and receive from other Government agencies such sums as may be approved by the Office of Management and Budget . . . and any other Government agency is authorized to transfer to or receive from the Agency such sums *without regard to any provisions of law limiting or prohibiting transfers between appropriations*. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a to 403s of this title without regard to limitations of appropriations from which transferred . . .

*Id.* (emphasis added). 50 U.S.C. § 403j(b) (2000) further provides that:

The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified.

*Id.*

270. See CLARK CLIFFORD WITH RICHARD HOLBROOKE, *COUNSEL TO THE PRESIDENT*, 169-70 (1991) (stating that the fifth function was intended to be a “catchall” for future contingencies, including covert actions). Clark Clifford, one of the principal drafters of the National Security Act of 1947, testified that, “We did not mention [covert actions] by name because we felt it would be injurious to our national interest to advertise the fact that we might engage in such activities.” *Id.* at 170.

271. See Robert L. Borosage, *Para-Legal Authority and Its Perils*, *LAW & CONTEMP. PROBS.*, Summer 1976, at 166, 175-77 (“The language of the fifth function clause itself, as well as the entire public legislative record[,] may be taken at least as easily against, as for, the notion that Congress intended to authorize covert action in 1947.”). Borosage noted further that “[t]he first director of the CIA, Admiral Roscoe Hillenkoetter[,] stated he had no interest in covert action, and intended the CIA to be purely an ‘intelligence outfit.’” *Id.* at 177. For more commentary that

charter and the legislative history were shrouded in some ambiguity.<sup>272</sup> And the Executive offered few details in the requests for appropriations.<sup>273</sup> Whether or not statutory authority existed for covert action, Congress was not too involved in the second period, giving broad deference to the President's prerogative on intelligence activities.

During the third period, starting with the Hughes-Ryan Amendment,<sup>274</sup> covert action received explicit statutory support. Yet, because of abuses that had been revealed in the covert-action process, the relationship between the two elected branches changed. The third period was thus quite different from the first two. No matter from which branch, those around the President became less willing to trust his intelligence decisions. Congress got more involved.

This Article, to put a modest frame to best use, presents legal references to the second and third periods of American covert action. For those interested in the first period, that is, everything from the Declaration of Independence through World War II, the Constitution stands as a basic reference. In the third period, the long-term trend on covert action is toward more participation from Congress and more transparency to the public.

#### A. *The National Security Act of 1947*

The National Security Act of 1947 established the CIA and the NSC within the Executive Office of the President.<sup>275</sup> The formal members of the NSC include the President as chairman, the Vice President, the Secretary of State, and the Secretary of Defense.<sup>276</sup> In practice, many other officials participate in NSC meetings, and the NSC has a large staff that serves the President through the National Security Advisor.<sup>277</sup> From the beginning, the 1947 Act cast the CIA as an executive instrument that reported straight to the President or the NSC.<sup>278</sup> Many people, as noted, interpreted the Act as authority for covert actions at the President's discretion.<sup>279</sup>

covert action was not raised during enactment of the 1947 Act, see RANELAGH, *supra* note 5, at 104–11; THOMAS F. TROY, DONOVAN AND THE CIA: A HISTORY OF THE ESTABLISHMENT OF THE CENTRAL INTELLIGENCE AGENCY 377–410 (1981).

272. See PRADOS, *supra* note 5, at 20–21; WEINER, *supra* note 5, at 327–28.

273. See PRADOS, *supra* note 5, at 20–21; WEINER, *supra* note 5, at 327–28.

274. Hughes-Ryan Amendment to the 1961 Foreign Assistance Act, Pub. L. No. 93–559, sec. 32, § 662, 88 Stat. 1795, 1804 (1974) (codified as amended at 22 U.S.C. § 2422 (1976)), *repealed* by Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102–88, 103 Stat. 429.

275. 50 U.S.C. §§ 403-1, 403-3 (2000).

276. *Id.* § 402 (a).

277. *Id.* § 402 (c).

278. Pub. L. No. 80-253, § 102(a), 61-Stat. 495, 497; see also Cline, *supra* note 21, at 359 (stating that the CIA, as “an executive instrument of the President . . . is implicitly empowered to

After the 1947 Act passed, not many legislators expressed an interest in or requested any briefings about covert action.<sup>280</sup> Congress's lack of interest was accentuated by a bipartisan consensus during the Cold War that covert action was largely a matter of presidential discretion.<sup>281</sup> In view of the Soviet menace, covert actions during this period, whether in Italy or Iran, sought to prevent the spread of Communism.<sup>282</sup> Congress, with faith in the Executive, assumed the CIA's activities were conducted in a manner that maximized benefits and minimized risks.<sup>283</sup>

This period of covert action became known as the age of "plausible deniability."<sup>284</sup> Often, the President's approval of covert action was implied, not explicit.<sup>285</sup> This lack of explicitness, especially on assassination, created political buffers between the President and those who conducted the covert action on his behalf. If a particular covert action led to a flap, the officers took the blame instead of the President. For example, President Kennedy is said to have remarked, after the Bay of Pigs debacle, that in other systems he would be resigning, not the Director of Central Intelligence.<sup>286</sup> Further, given gaps in record keeping, Kennedy did not leave any fingerprints on assassination plots against Castro.

carry out any missions that come within the authority of the chief executive of the United States" under the NSA of 1947).

279. REISMAN & BAKER, *supra* note 72, at 118.

280. LOCH K. JOHNSON, BOMBS, BUGS, DRUGS, AND THUGS: INTELLIGENCE AND AMERICA'S QUEST FOR SECURITY 202 (2000) (quoting John Stennis, who, after being offered a CIA briefing on a covert action, responded "[n]o, no, my boy, don't tell me. Just go ahead and do it—but I don't want to know!"); FRANK J. SMIST, CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 5 (2d ed. 1994) (quoting Clark Clifford, advisor to President Truman, who commented that "Congress chose not to be involved and preferred to be uninformed"). Similarly, CIA general counsel Walter Pforzheimer stated that "[w]e allowed Congress to set the pace. We briefed in whatever detail they wanted. But one of the problems was you couldn't get Congress to get interested." *Id.*; see also Gregory F. Treverton, *Intelligence: Welcome to the American Government*, in A QUESTION OF BALANCE: THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY 74 (Thomas E. Mann ed., 1990).

281. DAUGHERTY, *supra* note 5, at 91–92.

282. *Id.* at 92.

283. *Id.*

284. *Id.* The doctrine of "plausible deniability" hinges on restricted congressional notice, or no notice at all, allowing the President, when necessary, to disclaim any knowledge of a covert action. See M.E. Bowman, *Secrets in Plain View: Covert Action the U.S. Way*, in 72 INTERNATIONAL LAW STUDIES: THE LAW OF MILITARY OPERATIONS 1, 9 (Michael N. Schmitt ed., 1998) (citation omitted) (stating that the goal is to conduct activities in secret and avoid the disclosure of United States involvement).

285. See PRADOS, *supra* note 5, at 108–12, 193.

286. DALLEK, *supra* note 136, at 365–66 ("Under a parliamentary system of government it is I who would be leaving office,' Kennedy told Dulles. 'But under our system it is you who must go.'"). After a six-month secret review by the Agency's Inspector General Lyman Kirkpatrick, Kennedy's conviction that both Dulles and Bissell would have to resign was confirmed. *Id.*

### B. *The Hughes-Ryan Amendment*

Congress increased its interest in oversight because several foreign policy and intelligence blunders eroded its trust in the Executive. The mishandling of the Vietnam War, compounded by the CIA's domestic spying,<sup>287</sup> excesses in Chile,<sup>288</sup> the Watergate scandal,<sup>289</sup> and covert intervention in the Angolan Civil War,<sup>290</sup> among other issues in the 1960s and 1970s, prompted Congress to take on a more active role on covert action.<sup>291</sup>

In 1974, the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961 was passed.<sup>292</sup> Hughes-Ryan was intended as the first of many measures to rein in the CIA.<sup>293</sup> Hughes-Ryan prohibited funds from being expended on a CIA covert action unless the President: (1) found that the operation was "important to the national security of the United States" and (2) provided a finding "to the appropriate committees of the Congress."<sup>294</sup> The finding—usually a written document signed by the President describing a contemplated

287. THE INTELLIGENCE COMMUNITY: HISTORY, ORGANIZATION, AND ISSUES 622 (Tyrus G. Fain et al. eds., 1977) (stating that on January 15, 1975, DCI William Colby testified to the Senate Appropriations Committee that, from 1962 to 1972, under operation CHAOS, "officers of the CIA had spied on American journalists and political dissidents, placed informants within domestic protest groups, opened the mail of U.S. citizens, and assembled secret files on more than 10,000 American citizens").

288. See COVERT ACTION IN CHILE, *supra* note 196, at 144–209 (1975); see also RANELAGH, *supra* note 5, at 513–20.

289. See COLBY, *supra* note 38, at 338; see also RANELAGH, *supra* note 5, at 520–30 (explaining that although the Watergate investigations did not directly implicate the CIA, Howard Hunt, a former CIA employee, was one of the burglars, and the Nixon Administration did attempt, through a trumped up notion of national security, to use the CIA to take the FBI off the investigative trail).

290. See HENRY F. JACKSON, FROM THE CONGO TO SOWETO: U.S. FOREIGN POLICY TOWARD AFRICA SINCE 1960, at 65–74 (1982).

291. See Elizabeth Rindskopf, *Intelligence Oversight in a Democracy*, 11 HOUS. J. INT'L L. 21, 23 (1988) ("In particular, the involvement of the CIA in various covert activities received considerable attention. Congressional reaction was an attempt to assert control.").

292. Hughes-Ryan Amendment to the 1961 Foreign Assistance Act, Pub. L. No. 93–559, sec. 32, § 662, 88 Stat. 1795, 1804 (1974) (codified as amended at 22 U.S.C. § 2422 (1976)), *repealed* by Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102–88, 103 Stat. 429.

293. See Rindskopf, *supra* note 291, at 23.

294. 22 U.S.C. § 2422 (1976). The Hughes-Ryan Amendment states in pertinent part:

No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, *unless and until* the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives.

*Id.* (emphasis added).

action and listing all governmental agencies and third parties to be involved<sup>295</sup>—was apparently to be reported *before* implementation of the covert action.<sup>296</sup> Nothing in Hughes-Ryan said, however, that findings had to be in writing.

Congress, by receiving notice of covert actions, could try to block an action it deemed inappropriate by denying funds to carry out the action.<sup>297</sup> Through Hughes-Ryan, Congress heightened its power of the purse. Those supporting presidential prerogative interpreted the Hughes-Ryan phrase, “in a timely fashion,” to allow the President to give notice *after* a covert action had started.<sup>298</sup> The counter-argument from those siding with Congress was that for notice to be “timely” it had to be *prior* to the covert action.<sup>299</sup> The sequence of notice and action, of course, was significant to the scope of oversight. In a basic sense, Congress could not cut off funds for something that already happened.

All in all, Hughes-Ryan added controls to covert action, but it did not provide total clarity in this process. Of particular concern to the CIA was the breadth of activities that required a finding because Hughes-Ryan avoided the term “covert action.” Rather, any “operations in foreign countries” that were *not* “intended solely for obtaining necessary intelligence” were drawn into the statute’s provisions.<sup>300</sup> By the plain language, even the CIA’s routine support to other American agencies required a finding. If the statute had been drafted better, it would have provided a definition of “operations.” So the ambiguity about what required a finding was left to executive-congressional dialogue and to a resolution, years later, in a different statute.<sup>301</sup>

Hughes-Ryan ended plausible deniability, that is, the President’s ability to deny knowledge of a covert action.<sup>302</sup> Further, Hughes-Ryan, by incorporating the phrase “to the appropriate committees of the Congress,” suggested that any congressional committee with jurisdiction over some aspect of intelligence activities could request a finding.<sup>303</sup> Back then, before congressional oversight

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295. See 50 U.S.C. § 413b(a) (2000) (defining a Presidential finding).

296. See 22 U.S.C. § 2422 (1976).

297. DAUGHERTY, *supra* note 5, at 94–95 (noting that the reporting requirement gave members of Congress a meaningful opportunity to consult with the President about a covert action (or to cut off funds) before it was too late).

298. *Id.*

299. See *id.* at 97.

300. 22 U.S.C. § 2422 (1976).

301. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, 94 Stat. 1975 (1980) (current version as amended at 50 U.S.C. § 413 (2000)).

302. S. REP. NO. 94-465, at 58 (1975) (stating that “[t]he concept of plausible denial . . . is dead” and explaining that the clear purpose of Hughes-Ryan was to ensure accountability for covert operations).

303. See 22 U.S.C. § 2422 (1976); see also BERKOWITZ & GOODMAN, *supra* note 264, at 26 (stating that “[a]t its peak” the Hughes-Ryan Amendment required the reporting of significant



was consolidated into fewer committees, Hughes-Ryan called for the President to report a finding, arguably, to eight different congressional committees.<sup>304</sup> For the first time, “plausible deniability” gave way to “executive accountability.”<sup>305</sup> And Congress took a big step into the arena, marking a new era in covert action.

### C. *The Church Committee Report*

Soon after Congress proposed Hughes-Ryan, it created two legislative bodies to examine alleged wrongdoing by American intelligence agencies. Politics played its usual role as Democrats in Congress asserted themselves against a Republican President. In 1975, the Senate created the Select Committee to Study Governmental Operations with respect to Intelligence Activities, known as the “Church Committee” after its chairman Senator Frank Church from Idaho.<sup>306</sup> That same year, the House created the Select Committee on Intelligence, known as the “Pike Committee” after its chairman Congressman Otis Pike from New York.<sup>307</sup> In the end the Church Committee was far more influential than the Pike Committee.

Around the country, the mood was against covert action of any sort. The Church Committee, in its final report in 1976, stated that it had given very serious thought to “proposing a total ban on *all* forms of covert action.”<sup>308</sup> The pendulum did not swing that far, however. Instead, the Committee concluded that covert action should be available for “grave, unforeseen threat[s] to United

covert operations to several congressional committees comprising over 250 members and their senior staffs); William E. Conner, *Reforming Oversight of Covert Actions After the Iran-Contra Affair: A Legislative History of the Intelligence Authorization Act for FY 1991*, 32 VA. J. INT’L L. 871, 887–88 & n.63 (1992) (commenting on the “alarming” number of people who were cleared for classified information after Hughes-Ryan was adopted). In reality, however, those who were privy to classified details formed a much shorter list. See SMIST, *supra* note 280, at 119 (claiming that although Hughes-Ryan, in theory, provided access to 57 senators, 143 representatives, and their staff, “very few members or staff were informed.”).

304. See DAUGHERTY, *supra* note 5, at 94. These committees included the Appropriations, Armed Services, and Foreign Affairs Committees in both the House and Senate, as well as the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI). *Id.*

305. See *id.* Senator Hughes and many of his colleagues viewed the Amendment as the beginning of a reform process. *Id.* Once Congress obtained information about covert actions, Hughes believed Congress could then determine what controls to impose on the relevant agencies. 120 CONG. REC. 33,488–91 (1974); see also S. REP. NO. 94-465, at 58 (1975); see generally Americo R. Cinquegrana, *Dancing in the Dark: Accepting the Invitation to Struggle in the Context of “Covert Action,” the Iran-Contra Affair and the Intelligence Oversight Process*, 11 HOUS. J. INT’L L. 177, 182–87 (1988) (tracing arguments by Senators and Congressmen on various forms of improved oversight).

306. S. Res. 21, 94th Cong., 121 CONG. REC. 1416–33 (1975).

307. H.R. Res. 591, 94th Cong., 121 CONG. REC. 23,241–56 (1975).

308. S. REP. NO. 94-465, at 159 (1975).

States national security.”<sup>309</sup> Even so, the Committee qualified its conclusion by explaining that covert actions: (1) must be construed as “an exceptional act” to be used only “when overt means will not suffice”; (2) must not be used as “a vehicle for clandestinely undertaking actions incompatible with American principles”; (3) must be established “on a careful and systematic analysis of a given situation” including the “consequence of an attempt to intervene”; and (4) must be initiated only after “the appropriate oversight committee[s] [are] . . . informed of all significant covert operations . . .”<sup>310</sup> Congress, in so many ways, strived to prevent a repeat of the Bay of Pigs and other failures from the era of plausible denial.

As a result of the Church Committee’s findings and a weakened presidency after Watergate, the Executive Branch scaled back on covert action.<sup>311</sup> Hence, the Ford Administration, atoning for other presidential sins or the perceptions of prior abuses, pursued very few covert actions.<sup>312</sup> In all, the Church Committee, combined with Hughes-Ryan, paved the way for stronger congressional checks.<sup>313</sup> As a result, the two prior models of covert action, one before the 1947 National Security Act and the other after, became relics of the past.

#### D. *The Intelligence Authorization Act of 1979*

Following the Church Committee and the Pike Committee, Congress enacted the Intelligence Authorization Act of 1979.<sup>314</sup> This Act removed much of the intelligence community’s fiscal autonomy.<sup>315</sup> In effect, off-the-books practices ceased and intelligence agencies were placed on the same annual authorization and appropriations terms as other executive agencies.<sup>316</sup> By reinforcing its power of the purse,<sup>317</sup> Congress, through annual authorization, got into the specifics of how the intelligence community spent its funds.

Congress struggled toward supremacy over the President on intelligence activities. If Congress disapproved of a covert action, it could cut off funding,

309. *Id.*

310. *See id.* at 159–61.

311. DAUGHERTY, *supra* note 5, at 178.

312. *Id.*

313. *See* Peter Raven-Hansen & William C. Banks, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 710–11 (2003).

314. Intelligence and Intelligence-Related Activities Authorization Act for Fiscal Year 1979, Pub. L. No. 95-370, 92 Stat. 626 (1978).

315. *See* Marshall Silverberg, *The Separation of Powers and Control of the CIA’s Covert Operations*, 68 TEX. L. REV. 575, 596 (1990).

316. *See* AMERICAN BAR ASSOCIATION, TASK FORCE ON INTELLIGENCE AND COUNTERINTELLIGENCE, THE WORKING GROUP ON INTELLIGENCE OVERSIGHT AND ACCOUNTABILITY OF THE U.S. INTELLIGENCE AGENCIES—AN EVALUATION 8 (1985).

317. *See supra* Part II.B.

which would halt current operations and prevent new ones from beginning.<sup>318</sup> Although aggressive, this assertion of congressional power was less underhanded than the perennial ploy of leaking classified details about operations to the media.

#### E. *The Intelligence Oversight Act of 1980*

As the facts and findings of the Church Committee settled into public awareness, Congress started to tinker with the procedures on covert action. Sensing the new mood concerning covert action, President Ford—and then President Carter—put into effect many reforms through executive order.<sup>319</sup> Thus, executive self-regulating took some of the steam out of statutory reforms.

By the end of the 1970s, the political climate had changed. As noted, Islamic extremists had toppled the Shah of Iran, a staunch American ally.<sup>320</sup> The new Iranian regime, led by Ayatollah Khomeini, had taken American diplomats hostage.<sup>321</sup> And the Soviet Union, taking advantage of America's distraction, had invaded Afghanistan.<sup>322</sup> These setbacks, along with others on the international scene, cried out for a reassertion of American power. One aspect to that power was covert action, a return of Cold War ghosts to the scene.

So Congress, rather than pass a comprehensive charter for the CIA, scaled back. Congress limited itself to a few changes in Hughes-Ryan by way of the Intelligence Oversight Act of 1980.<sup>323</sup> That Act consolidated the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI) as the oversight committees for the intelligence community.<sup>324</sup> By reducing the relevant committees from eight to two, Congress streamlined the notification process and increased the chances of maintaining secrecy on covert actions.

The new Act codified reporting and oversight procedures, many of which the intelligence community had already adopted on its own. In particular,

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318. See William S. Cohen, *Congressional Oversight of Covert Actions*, 2 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 155, 157 (1988); Robert R. Simmons, *Intelligence Policy and Performance in Reagan's First Term: A Good Record or Bad?*, 4 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 1, 15 (1990).

319. See Exec. Order No. 11,905, 3 C.F.R. 90 (1977), reprinted in 50 U.S.C. § 401 (Supp. I 1977); Exec. Order No. 12,036, 3 C.F.R. 112 (1978), reprinted in 50 U.S.C. § 401 (Supp. II 1978).

320. BOWDEN, *supra* note 226, at 163–67.

321. *Id.*

322. *Id.* at 286.

323. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, sec. 407(a), 94 Stat. 1975 (1980) (current version as amended at 50 U.S.C. § 413 (2000)).

324. *Id.* at sec. 407(b)(1), § 501(a)(1).

section (a) of the new Act required the DCI and “the heads of all departments, agencies, and other entities of the United States involved in intelligence activities”<sup>325</sup> to keep the intelligence committees “fully and currently informed of all intelligence activities.”<sup>326</sup> Of particular importance, the new Act spoke of “prior notice,” not specifying whether notification should be oral, written, or both.<sup>327</sup> Unlike Hughes-Ryan, the Intelligence Oversight Act of 1980 covered more than the CIA.

The new Act clarified that keeping the intelligence committees fully and currently informed of all intelligence activities did not entail “approval of the intelligence committees as a condition precedent” to undertaking the activity.<sup>328</sup> Therefore, for some intelligence activities, after-the-fact notice seemed acceptable. The new Act also required the DCI and the intelligence heads to furnish any information necessary for the committees to carry out their responsibilities and to report “any illegal intelligence activity or significant intelligence failure” in a “timely fashion.”<sup>329</sup>

The new Act, creating as much confusion as it resolved, added section (b) to cover cases in which prior notice had not been given under section (a). Under section (b), the reasons for not providing prior notice needed to be disclosed.<sup>330</sup> Most important, section (b) stated that the intelligence committees needed to be fully informed “in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence.”<sup>331</sup> As with Hughes-Ryan, the term “operations” was not defined, and Congress did not attempt to define anything called “covert action.” Presumably, the CIA needed to notify Congress of a covert action under either section (a) or (b).<sup>332</sup>

When prior notice was given, the new Act allowed the President to limit the number of people in Congress who received notice of a covert action. Under “extraordinary circumstances affecting vital interests of the United States,” the President could restrict notification to “the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.”<sup>333</sup> Added up, this was limited notice to eight people, rather than to full committees.

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325. *Id.* § 501(a).

326. *Id.*

327. *Id.*

328. Intelligence Authorization Act for Fiscal Year 1981, sec. 407(b)(1), § 501(a)(1).

329. *Id.* § 501(a)(3).

330. *Id.* § 501(b).

331. *Id.*

332. *Id.* § 501(a)–(b).

333. Intelligence Authorization Act for Fiscal Year 1981, sec. 407(b)(1), § 501(a)(1).

The Reagan Administration, strutting executive stuff, argued later in its term that the new Act gave the President unfettered discretion to determine when to report a covert action to the intelligence committees.<sup>334</sup> Some members of Congress, however, interpreted “timely fashion” to mean days, not weeks or months.<sup>335</sup> Such differences between the President and Congress led to new calls for intelligence reform in the aftermath of Iran-Contra.<sup>336</sup>

For the President, the preamble to the Intelligence Oversight Act of 1980 did contain something that could be used to restrain Congress’s role on covert action. The preamble stated that its requirements applied “[t]o the extent consistent with all applicable authorities and duties, including those conferred by the Constitution.”<sup>337</sup> Therefore, a president who believed Congress had no constitutional role on covert action could interpret the rest of the statute as void.<sup>338</sup> That bold interpretation, in the swing of a presidential baton, could silence those who demanded findings and other forms of notice. Eventually, this baton was passed from President Reagan to President George W. Bush.

#### F. *Executive Orders 12,036 and 12,333*

Neither Hughes-Ryan nor the Intelligence Oversight Act of 1980 used the term “covert action” explicitly. In those two pieces of legislation, Congress defined covert action as something other than gathering foreign intelligence.<sup>339</sup> Such definitions, by negative implication, were a throwback to the early days of covert action after World War II. Unsurprisingly, as presidents added details to the covert-action process, they continued to use euphemisms. For a while, their favorite euphemism for covert action was “special activities.”<sup>340</sup>

In 1978, President Carter issued Executive Order 12,036 that provided a better definition of the role United States agencies played in intelligence activities.<sup>341</sup> Section 1-302 of the Order continued the tradition of using the

334. DAUGHERTY, *supra* note 5, at 97.

335. *Id.*

336. *See infra* Part II.G.

337. Intelligence Authorization Act for Fiscal Year 1981, sec. 407(b)(1), § 501(a).

338. For two articles that present the case for a limited congressional role on covert action, see Lawrence J. Block & David B. Rivkin, Jr., *The Battle to Control the Conduct of Foreign Intelligence and Covert Operations: The Ultra-Whig Counterrevolution Revisited*, 12 HARV. J.L. & PUB. POL’Y 303 (1989), and Robert F. Turner, *The Constitution and the Iran-Contra Affair: Was Congress the Real Lawbreaker?*, 11 HOUS. J. INT’L L. 83 (1988).

339. Hughes-Ryan Amendment to the 1961 Foreign Assistance Act, Pub. L. No. 93-559, sec. 32, § 662, 88 Stat. 1795, 1804 (1974) (codified as amended at 22 U.S.C. § 2422 (1976)), *repealed* by Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 103 Stat. 429; Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, sec. 407(b)(1), 94 Stat. 1975 (1980) (current version as amended at 50 U.S.C. § 413 (2000)).

340. *See* Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401 (2000); Exec. Order No. 12,036, 3 C.F.R. 112, 114 (1978), *reprinted in* 50 U.S.C. § 401 (Supp. II 1978).

341. Exec. Order No. 12,036, 3 C.F.R. at 114-15.

National Security Council as the intermediary between the CIA and the President on covert action.<sup>342</sup> Plus, it listed those members of a Special Coordination Committee (SCC) at the NSC who needed to be involved in the approval of special activities.<sup>343</sup>

President Carter's Order was repealed in 1981 when the Reagan Administration issued Executive Order 12,333.<sup>344</sup> Of special importance, Executive Order 12,333 eliminated the list of executive officials who needed to be involved in approvals (and denials) of special activities.<sup>345</sup> In a turn toward more obscurity on the published process for covert action, the Reagan Administration gave the NSC the basic power to "establish such committees as may be necessary to carry out its functions and responsibilities."<sup>346</sup> No longer was the Attorney General, for example, guaranteed a place at the table by the unclassified language of the Executive Order. The NSC, on behalf of the President, could pick and choose those people it wanted to participate in the process of reviewing covert action.<sup>347</sup> In this regard, Reagan's Executive Order can be interpreted as a challenge to congressional oversight and other forms of public scrutiny regarding covert action. In essence, President Reagan was the role model for President George W. Bush. Breaking with the tradition of the Hughes-Ryan Amendment, the Church Committee, and the Intelligence Oversight Act of 1980, the Reagan Administration softened the spotlight on covert action.

An important aspect to Executive Order 12,333, a bit of light in the darkness, is its definition of covert action.<sup>348</sup> This definition has carried forward, in large part, to the present day.<sup>349</sup> Executive Order 12,333 describes covert action as:

[Special activities] conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinions, policies, or media and do not

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342. *Id.* at 114.

343. *Id.* at 114–15 (including in the list of committee members "the Secretary of State, the Secretary of Defense, the Attorney General, the Director of the Office of Management and Budget, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff, and the director of Central Intelligence").

344. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401 (2000).

345. REISMAN & BAKER, *supra* note 72, at 120.

346. Exec. Order No. 12,333, § 1.2, 3 C.F.R. 200, 201 (1981), *reprinted in* 50 U.S.C. § 401 (2000).

347. *See id.*

348. *Id.* at 215.

349. *See* 50 U.S.C. § 413(b)(e) (2000); *see also infra* Part II.H.

include diplomatic activities or the collection or production of intelligence or related support functions.<sup>350</sup>

This definition reflects three basic propositions about covert action. First, it agrees that “[c]overt activity is not fundamentally an intelligence activity; rather, it is a foreign policy option” for the White House.<sup>351</sup> That is, the Order excludes traditional intelligence activities—foreign intelligence and counter-intelligence—which constitute the CIA’s primary mission.<sup>352</sup> Second, emphasizing the need for secrecy to protect intelligence sources and methods, the Order establishes the CIA as the appropriate American agency to conduct covert action during peacetime.<sup>353</sup> During a declared war or a period covered by the War Powers Resolution, the Armed Forces are acknowledged for their role in special activities.<sup>354</sup> Otherwise, the CIA is in charge “unless the President determines that another agency” is better suited.<sup>355</sup> Although this part of the Executive Order seems to call for deliberation in switching to another agency, nothing in the Order suggests that the President would have to do more than make an oral statement, during an unrelated meeting in the Oval Office or while chairing an NSC meeting, to make the switch. The NSC and the CIA, after all, serve at his direction. Third, the Order makes clear that the details of any special activity should be kept from the public.<sup>356</sup> Indeed, if the President had used the term covert action, instead of special activity, the need for secrecy would have been even more obvious. Covert action is the opposite of acknowledged activity.

### G. *Iran-Contra*

In the wake of Iran-Contra,<sup>357</sup> both the President and Congress created entities to study the scandal and recommended remedial measures to the

350. Exec. Order No. 12,333, § 3.4(h), 3 C.F.R. at 215.

351. DAUGHERTY, *supra* note 5, at 13 (quoting Thompson J. Strong, *Covert Activities and Intelligence Operations: Congressional and Executive Roles Defined*, 1 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 63, 64 (1986)).

352. *See id.* Collecting foreign intelligence (whether through technical or human sources) plus analyzing what has been collected has accounted for about ninety-five percent of the national intelligence budget. *See id.* at 10–11; *see also* Robert M. Gates, *The CIA and Foreign Policy*, 66 FOREIGN AFF. 215, 216 (1987–88) (acknowledging that over ninety-five percent of the national intelligence budget is for the collection and analysis of intelligence information). Yet, more of the intelligence budget may now go to covert action after 9/11.

353. DAUGHERTY, *supra* note 5, at 14.

354. Exec. Order No. 12,333, § 1.8(e), 3 C.F.R. at 206.

355. *Id.*

356. DAUGHERTY, *supra* note 5, at 13.

357. Iran-Contra connected two clandestine projects. On the one hand, the Reagan Administration negotiated with Iran to obtain assistance in freeing American hostages in Lebanon. *See* THEODORE DRAPER, *A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS* 120–27, 171–202 (1991). On the other hand, the Reagan Administration skirted congressional limits for

intelligence community.<sup>358</sup> The public renewed its interest in the third option of American foreign policy.<sup>359</sup> And not since the Church Committee was so much about the CIA and the NSC revealed.

One study determined that although “[c]overt operations are a necessary component of our Nation’s foreign policy,” the “Administration’s conduct in the Iran-Contra Affair was inconsistent” with the Intelligence Oversight Act of 1980.<sup>360</sup> Very troubling to most observers was that the President kept the SSCI and the HPSCI in the dark for ten months about the Iranian arms sales and the supplies to the Contras.<sup>361</sup> The Reagan Administration had justified its ten-month delay in notification by a broad interpretation of the phrase “timely fashion” in the Intelligence Oversight Act of 1980.<sup>362</sup> These justifications were frustrating to Congress. Sure, Congress could be more specific about

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support to the Contras in Nicaragua, a paramilitary group opposed to the Soviet-assisted Sandinista Government in Nicaragua. See REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN CONTRA AFFAIR WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 25–27, 31–34 (1st Sess. 1987) [hereinafter IRAN-CONTRA REPORT]; see also National Security Archive, THE CHRONOLOGY: THE DOCUMENTED DAY-BY-DAY ACCOUNT OF THE SECRET MILITARY ASSISTANCE TO IRAN AND THE CONTRAS 7 (1987) [hereinafter THE CHRONOLOGY]. With assistance from the Israelis, TOW and HAWK missiles were sold to the Iranian government at a mark-up. See IRAN CONTRA REPORT, *supra*, at 335–38, 415–17. Some profits from this sale were diverted to the Contras. *Id.* at 197. The “arms for hostages” deal violated American export restrictions, ran counter to the administration’s public position against negotiating with terrorists, and did not comply with requirements for notice on covert actions. See 22 U.S.C. § 2753(a) 1989; see also IRAN-CONTRA REPORT, *supra*, at 418–19.

358. See REPORT OF THE PRESIDENT’S SPECIAL REVIEW BOARD B-19-20 (1987). President Reagan established a three-member board, chaired by former Senator John Tower, to “conduct a comprehensive study of the future role and procedures of the National Security Council staff in the development, coordination, oversight, and conduct of foreign and national security policy.” Exec. Order No. 12,575, 3 C.F.R. 241, 242 (1986).

359. See Jodie Morse, *Managing the News: The History and Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. REV. 843, 855 (2006).

360. IRAN-CONTRA REPORT, *supra* note 357, at 383, 415. The Report concluded that “the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance.” *Id.* at 423.

361. *Id.* at 415. The Contra Affair was exposed when a commercial C-123 cargo plane, piloted by a “private” American crew and loaded with 50,000 rounds of ammunition, automatic rifles, grenades, and military gear, was shot down over Nicaragua by the Sandinistas. See IRAN-CONTRA REPORT, *supra* note 357, at 144; see also Richard Halloran, *American Is Captured After Plane Is Downed in Nicaraguan Territory*, N.Y. TIMES, Oct. 8, 1986, at A1. The Sandinistas obtained documents from the plane and a statement from the crew’s lone survivor, proving the U.S. Government was secretly arming the Contras. THE CHRONOLOGY, *supra* note 357, at 144. The “arms for hostages” deal with Iran was exposed a month later by a story in *Al-Shiraa*, a Lebanese magazine. *Id.* at 537. Only after U.S. involvement became publicly known did Congress receive notice of the findings. *Id.* at 228.

362. See DAUGHERTY, *supra* note 5, at 97.



what it expected. But how could oversight be conducted when the Executive blatantly ignored the law?

#### H. *The Intelligence Authorization Act of 1991*

The SSCI and the HPSCI, armed with recommendations from the Iran-Contra committees, drafted new legislation for better oversight.<sup>363</sup> Clearly, the new legislation was a remedy for past abuses, whether from Iran-Contra or earlier eras. Indeed, at the beginning of a report on the new legislation, the Senate noted:

Under current law . . . the Congressional mandate is ambiguous, confusing and incomplete. There is no express recognition in statute of the President's authority to conduct covert actions . . . [,] Presidential approval procedures are not specified . . . [,] [t]he statutory requirement for informing the intelligence committees of covert actions are subject to misinterpretation, and the scope of activities covered by the law is undefined.<sup>364</sup>

Such efforts to set the comprehensive rules of the covert-action game resulted in the Intelligence Authorization Act of 1991,<sup>365</sup> the last piece of major legislation on the process for authorizing and conducting covert actions. This framework was in place on 9/11 and continues to the present day. Overall, Title VI of the 1991 Act repealed the Hughes-Ryan Amendment,<sup>366</sup> replaced Section 501 of the National Security Act of 1947,<sup>367</sup> provided a statutory definition of covert action for the first time,<sup>368</sup> and established more comprehensive reporting requirements.<sup>369</sup> In explicit terms, Congress recognized the President's authority to conduct covert action. Thus, covert

363. S. REP. NO. 102-85, § 503 (1991).

364. *Id.*

365. See Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429 (1991) (codified in scattered sections of 10 and 50 U.S.C.).

366. *Id.* at sec. 601.

367. *Id.* at sec. 602(a)(2). This section was redrafted to make clear that the President "shall ensure" that the intelligence committees are kept "fully and currently informed" of any "significant anticipated intelligence activity," including "all covert action." See *id.* at sec. 602(a)(2), §§ 501(a)(1), 503(b)(1) (codified at 50 U.S.C. §§ 413(a)(1), 413(f) (2000)). In addition, the redrafted section requires that "any illegal intelligence activity is reported promptly to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity." *Id.* § 501(b) (responding to Recommendation No. 18 of the IRAN-CONTRA REPORT, *supra* note 357, at 426).

368. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), § 503(e).

369. See 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, 177-78 (1993). The Iran-Contra committee attributed abuses of the covert-action process to personal indiscretions, not to any deficiency in existing law. See IRAN-CONTRA REPORT, *supra* note 357, at 423.

action became a normal part of the American legal landscape. The remaining questions were on the details.

The Intelligence Authorization Act of 1991, like the Hughes-Ryan Amendment, rested on a basic premise that the President, not some delegate, should be the one who authorizes covert action. The President should do so upon a finding that the action is necessary to an “identifiable” objective of American foreign policy important to the national security.<sup>370</sup> Reacting to Iran-Contra, the 1991 legislation enacted a number of new requirements: (1) a finding must be in writing;<sup>371</sup> (2) the finding must be reported to Congress “as soon as possible” and “before the initiation of the covert action;”<sup>372</sup> (3) if time does not permit the preparation of a written finding, a written record of the President’s decision must be made “contemporaneously” and reduced to a written finding *within forty-eight hours*;<sup>373</sup> (4) other than in exceptional cases, the finding may not authorize activities that have already occurred;<sup>374</sup> (5) the finding must specify each U.S. entity or third party which will fund or participate significantly in the action;<sup>375</sup> and finally (6) no finding may authorize “any action that would violate the Constitution or any statute of the United States.”<sup>376</sup>

Despite all the changes, the 1991 Act did not completely intrude on the President’s power. It made clear that nothing in its title “shall be construed” as requiring approval from the intelligence committees “as a condition precedent to the initiation of any significant anticipated intelligence activity.”<sup>377</sup> (Covert action, it seems, would be a significant anticipated intelligence activity, not requiring congressional approval.) Further, Section 503(c) spelled out two exceptions to the rule that a written finding must be fully reported to Congress.<sup>378</sup> First, in situations where the President determines that it is “essential to limit access to the finding to meet *extraordinary* circumstances affecting *vital interests* of the United States” disclosure may be limited to eight people—specifically the chairpersons and ranking minority members of the two intelligence committees and the majority and minority leaders of both the House and the Senate.<sup>379</sup> Second, in situations where a covert action has begun without providing Congress with a finding, “the President shall fully inform

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370. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), § 503(a).

371. *Id.* § 503(a)(1).

372. *Id.* § 503(c)(1).

373. *Id.* § 503(a)(1) (emphasis added).

374. *Id.* § 503(a)(2).

375. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), § 503(a)(3).

376. *Id.* § 503(a)(5).

377. *Id.* § 501(a)(3).

378. *See id.* §§ 503(c)(2), 503(c)(3).

379. *Id.* § 503(c)(2) (emphasis added). President George W. Bush probably relied on this exception in the limited notices provided to Congress on covert actions in the post-9/11 era.

the intelligence committees in a timely fashion.”<sup>380</sup> In those situations, the President must also “provide a statement of the reasons for not giving prior notice.”<sup>381</sup> This exception, drawing on past practices, might be used in extraordinary circumstances similar to President Carter’s decision not to inform Congress of Canadian assistance in freeing U.S. hostages from Iran.<sup>382</sup>

In sum, President George H.W. Bush’s lobbying and veto of an earlier bill prevented Congress from imposing an across-the-board requirement of notice to the oversight committees within forty-eight hours of a finding. As a form of conciliation, President Bush stated in his November 30, 1989 signing statement for the 1991 Act:

The statute requires prior notice or, when no prior notice is given, timely notice. I anticipate that in almost all instances, prior notice will be possible. In those rare instances where prior notice is not provided, I anticipate that notice will be provided within a few days. Any withholding beyond this period would be based upon my assertion of the authorities granted this office by the Constitution.<sup>383</sup>

Thus, President Bush’s tenor was sufficient to atone for Iran-Contra sins, perceived or real, which occurred when Reagan was President (and Bush was Vice President).

Under the 1991 Act, not only must covert actions be reported to Congress, but so must “any significant undertaking pursuant to a previously approved finding.”<sup>384</sup> The changes are made in a Memorandum of Notification (MON), which is technically different from an original finding.<sup>385</sup> Of course, the line between a change and new action is not always clear. Yet, either as an MON or a finding, something must be provided to Congress.

President Bush, as he noted when signing the new legislation, did not believe a statutory definition of “covert action” was necessary.<sup>386</sup> Congress disagreed. To a great extent, the 1991 Act borrowed from President Reagan’s Executive Order 12,333.<sup>387</sup> Thus, the new Act defined covert action as:

[A]n activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the

380. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), § 503(c)(3).

381. *Id.*

382. *See supra* Part I.F.

383. Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990, 2 PUB. PAPERS 1611 (Nov. 30, 1989).

384. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), § 503(d).

385. *See* David E. Colton, *Speaking Truth to Power: Intelligence Oversight in an Imperfect World*, 137 U. PA. L. REV. 571, 606 (1988).

386. Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991, 2 PUB. PAPERS 1044 (Aug. 14, 1991).

387. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), § 503(e) (defining “covert action”); *see generally supra* Part II.F.

role of the United States Government will not be apparent or acknowledged publicly, but does not include—

(1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;

(2) traditional diplomatic or military activities or routine support to such activities;

(3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or

(4) activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad.<sup>388</sup>

This definition turns on the government's ability to maintain plausible deniability of the activity to the outside world: "[t]his deniability would not, of course, apply to those within the United States Government who have a need to know about such activities . . . ."<sup>389</sup> In other words, the buffers and filters to covert action exist between the President and the domestic and international public, not between the President and the implementers in the Executive Branch. The attribute of "deniability," however, does not mean that the activities that underlie a covert action will be invisible to the public.<sup>390</sup> Rather, "covert actions may involve activities which are visible or public, but the role of the United States in carrying out such activities is itself not apparent or acknowledged."<sup>391</sup> Under the new statute, the relevant inquiry is whether the United States government intends for its participation in an action to remain undisclosed.<sup>392</sup> Note the Predator strike in Yemen in 2002.<sup>393</sup> By contrast, as the Senate Report explained, "[a]ctivities which may be undertaken in secret but where the role of the United States will be disclosed or acknowledged once such activities take place are *not* covert actions."<sup>394</sup> This excludes actions whose planning and preparation are secret but whose secrecy disappears as soon as American boots, complemented by American uniforms, hit the ground.<sup>395</sup>

388. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), § 503(e).

389. S. REP. NO. 102-85, § 503, at 236 (1991).

390. *Id.*

391. *Id.*; see also *supra* Part II.C.

392. *Id.*

393. See Priest, *supra* note 1.

394. S. REP. NO. 102-85, § 503, at 236 (1991) (emphasis added).

395. See *id.*

As a sort of negative definition of covert action, the new statute rules out some activities.<sup>396</sup> For example, “[c]oncealment or misrepresentation of the true nature of an acknowledged United States activity does not make it a ‘covert action,’ even if the concealment or misrepresentation is intended to influence political, economic, or military conditions abroad.”<sup>397</sup> In short, something is not a covert action just because its specific objectives are concealed.<sup>398</sup> The essence of covert action lies in hiding the American hand behind an operation, not simply covering up some of the fingers. As the Senate summarized, “the definition encompasses activities to influence conditions—be they political, economic, or military—overseas and focuses on the objective features of the activity, rather than on a formal relationship to foreign policy purposes, as the controlling test in determining which activities constitute covert action.”<sup>399</sup>

The new statute, borrowing from Executive Order 12,333, also carved out various activities from the general definition by category.<sup>400</sup> Foreign intelligence, counter-intelligence, counter-espionage, traditional diplomatic and military activities, traditional law enforcement activities, and routine support for all such activities are *not* covert actions.<sup>401</sup> Therefore, another way of defining covert action is by contradistinction to other activities. These activities, however, do not lend themselves to precise definition. Defining what is “routine” may be just as difficult as defining what is “covert.”

The continuity between Executive Order 12,333 and the statutory definition created some confusion.<sup>402</sup> In reconciling the two definitions of covert action, the new Act’s drafters intended that “the core [statutory] definition of covert action . . . be interpreted broadly.”<sup>403</sup> More precisely, the definition from the 1991 Act has greater application than the term “special

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396. *See id.* at 237.

397. *Id.* at 237.

398. *Id.*

399. S. REP. NO. 102-85, § 503, at 236 (1991).

400. *Id.* at 237–40.

401. *Id.*

402. *See, e.g.,* JOHNSON, *supra* note 280, at 2, 48 (referring to “disruptive economic covert action” as “special activities.”); Loch K. Johnson, *Covert Action and Accountability: Decision-Making for America’s Secret Foreign Policy*, 33 INT’L STUDIES Q. 81, 82 (1989); Thompson J. Strong, *Covert Activities and Intelligence Operations: Congressional and Executive Roles Defined*, 1 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 63, 64–65 (1986) (calling special activities a “euphemistic term” that has now been “substituted” for covert action); Andrew C. Tuttle, *Secrecy, Covert Action, and Counterespionage: Intelligence Challenges for the 1990s*, 12 HARV. J.L. & PUB. POL’Y 523, 530 n.52 (1989) (stating that the term “special activities” is a “generally accepted euphemism for covert action”).

403. S. REP. NO. 102-85, § 503, at 235 (1991) (to broaden the definition, the drafters did not retain the requirement “that [special activities] be ‘in support of national foreign policy objectives abroad’” (enumerated under Exec. Order 12,333)).

activities” from the Executive Order.<sup>404</sup> For this reason, the new statute applies not only to classic covert actions (i.e. propaganda, paramilitary action, and political action), but also to some activities that do not fit the traditional rubric of foreign intelligence and counter-intelligence.<sup>405</sup> In response to Iran-Contra, Congress drew more activities within the framework of written findings and prior notice to the intelligence committees.<sup>406</sup> For example, even if the “exfiltration” of a blown intelligence asset from a foreign country was not a classic covert action, Congress expected the covert action rules to apply. Indeed, the CIA might actually use personnel and resources from the covert action part of its house on such a special activity.

On covert action, the President and Congress must get things right. The statutory definitions are very important. How well the President and Congress do on covert action will have huge ripples, affecting other areas of foreign policy and domestic policy. From George Washington to George W. Bush to our new President, so much depends on the trust between the President and Congress.

For any President, another way to define covert action is by the potential damage of a failed operation. In general, a failed covert action has more profound repercussions than a failed foreign intelligence operation. The fallout to the botched Bay of Pigs operation could have been war with Cuba; the looming threat of Iran-Contra was impeachment. By contrast, a mistake in gathering foreign intelligence might result in the imprisonment or death of a human asset, most significant to that person and her family, but not so significant to the United States. Because of such differences in potential damage, it makes sense that covert action requires specific presidential authorization and congressional oversight.<sup>407</sup> When the stakes are higher, there should be more process, and the decisions should be made at senior levels. For covert action, more checks are needed on executive power.<sup>408</sup> Covert action, no matter what, is different in kind from the Federal Communications Commission distributing frequencies to American radio stations.

Those activities that escape the covert action label, either through error or by design, are subject only to routine decisionmaking; they do not require “special authorization” or a written finding.<sup>409</sup> On such activities, as with so much else that falls within executive discretion, the President may choose to

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404. *Id.*

405. See DAUGHERTY, *supra* note 5, at 15.

406. See *supra* Part II.G.

407. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602, 105 Stat. 429, 441-44 (codified at 50 U.S.C. §§ 413-413b) (2000)).

408. See DAUGHERTY, *supra* note 5, at 18 (“[A] range of potential political dangers exists for the government engaging in covert action that does not inhere in the more traditional intelligence disciplines.”).

409. *Id.* at 13.

keep Congress in the dark and to rely on underlings to take care of details.<sup>410</sup> This kind of discretion takes the matter from national security law to administrative law.

Not everything that falls outside the category of covert action, however, evades congressional oversight. Congress, perhaps aware of the imprecision to any definition of covert action, created an additional layer of oversight through section 602 of the 1991 Act, which amended Title V of the National Security Act of 1947.<sup>411</sup> In pertinent part, the added section 502 provides:

To the extent consistent with due regard for the protection from unauthorized disclosure of classified information . . . , the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall (1) keep the intelligence committees fully and currently informed of all intelligence activities, other than a covert action . . . , including any significant anticipated intelligence activity and any significant intelligence failure . . . .<sup>412</sup>

According to the drafters, “[t]he requirement to report significant anticipated activities means, in practice, that the committees should be advised of important new program initiatives and specific activities that have major foreign policy implications.”<sup>413</sup> By adding “significant anticipated intelligence activity,” Congress expanded the areas in which the Executive needed to provide information.<sup>414</sup> Even if the requirement of a written finding did not apply, Congress made it clear that the President and the spymasters were expected to communicate with the oversight committees.<sup>415</sup> By this arrangement, the clear preference was light over darkness, information over stone-walling.

Under the new statutory framework, the CIA does not have many excuses for keeping the intelligence committees in the dark. The CIA might believe an activity is “insignificant” and not a “covert action.” But that excuse might go contrary to keeping the committees informed “of all intelligence activities.”

However the new Act is parsed, most would agree that the CIA does not have to tell the intelligence committees everything. The CIA should not be expected to spend more time reporting on activities than conducting them; an appropriate balance is still necessary. For example, consistent with the 1991 Act, the CIA might tell the committees that a senior Russian intelligence officer has defected to the United States—without giving his name. By way of compartments for operational security, very few within the CIA itself need to

410. *Id.*

411. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), §§ 501–503.

412. *Id.* § 502(1).

413. S. REP. NO. 102-85, § 503, at 225 (1991).

414. *See id.*

415. *See id.*

know the defector's full identity; even CIA analysts with top-secret clearances might not be told. Similarly, a generic notice, stripped of the most sensitive information, might be a fair compromise between "fully" informing the committees and protecting the defector's life.

So on balance, the Intelligence Authorization Act of 1991 expanded the connections between the President and Congress on intelligence activities, a shared arrangement laid out in the original National Security Act of 1947 and the amendments that followed.<sup>416</sup> As the Cold War came to an end, Congress reasserted its will that a second branch represent the public in reviewing covert actions. Rather than have things done by winks, nods, and other oral understandings, the President's signature was required for covert action. Backdating was for the past; full notice was for the future. One now wonders whether the revelation of new abuses from President Bush's term will cause another round of changes to the covert action framework—or whether things will remain the same.

### III. DELEGATION

President George W. Bush said 9/11 changed everything for the United States,<sup>417</sup> which later became his reason to tune out the past and to reduce Congress's role in keeping us safe. Even so, a comprehensive, one-size-fits-all, covert-action program within a so-called global struggle on terror defeats the purpose of having the President deliberate on each significant foreign policy decision. Not everyone in our democracy trusts the CIA to fill in all the blanks for the President.

Our desire to keep the President in contact with the dark side is a recent phenomenon. Until the 1970s, before Congress charged into the realm of covert action, the CIA often took care of "routine" covert actions, without seeking the President's prior approval, and without informing the President after the action was taken.<sup>418</sup> On those actions that the CIA took to the White House, sometimes the President suggested his approval more by winks and nods.<sup>419</sup> Often, to maintain plausible denial, the President did not put anything in writing.<sup>420</sup> For example, the CIA clearly believed it had the authority to assassinate Fidel Castro, although it seems neither President Kennedy nor his

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416. Gumina, *supra* note 369, at 183.

417. See The President's News Conference with Prime Minister Ayad Allawi of Iraq, 40 WEEKLY COMP. PRES. DOC. 2116 (Sept. 23, 2004).

418. See DAUGHERTY, *supra* note 5, at 98.

419. See *id.* at 93–94.

420. See *id.*



brother put anything in writing for the CIA taskmasters.<sup>421</sup> Years later, Hughes-Ryan and other acts of Congress put an end to such a loose chain of command.<sup>422</sup> Plausible denial ended.<sup>423</sup>

Although the President is now required to approve covert actions in writing, Congress, it still seems, accepts that those findings may be short and general. The change from the era of plausible denial may be as much about form as substance. Congress has not required (and probably could not) a certain number of pages for something to satisfy a written requirement. As a result, those outside the inner sanctum are left to speculate on the forms—and the number of pages—to covert action.<sup>424</sup> Very few people are involved in the process of conceiving and approving covert action.<sup>425</sup> Those without security clearances are excluded, and many with top-secret clearances do not have a need to know.<sup>426</sup> By design and by necessity, the texts to presidential findings are not shared with the public.<sup>427</sup> The secrecy, however, has not been complete.<sup>428</sup> Some clues have leaked to the public through articles and books, and these clues are sufficient for some scholarship into the dark side of American foreign policy.<sup>429</sup>

Soon after 9/11, the DCI, George Tenet, went to President Bush and his advisers with a wish list of aggressive measures against the Taliban and al Qaeda.<sup>430</sup> These measures fit into what the President declared as a new form

421. See Matthew C. Wiebe, *Assassination in Domestic and International Law: The Central Intelligence Agency, State-Sponsored Terrorism, and the Right of Self-Defense*, 11 *TULSA J. COMP. & INT'L L.* 363, 379 (2003).

422. See *supra* Part II.B.

423. See *supra* Part II.B.

424. Bob Woodward reported that the comprehensive order against al Qaeda after 9/11 was a ten-page MON with two appendices which modified President Reagan's May 12, 1986 finding on counterterrorist operations. Bob Woodward & Dan Balz, *Combating Terrorism: 'It Starts Today'*, *WASH. POST*, Feb. 1, 2002, at A1.

425. See Gumina, *supra* note 369, at 187.

426. See *id.*

427. See *id.* at 188.

428. See *id.* at 192.

429. See *id.*

430. See TENET, *supra* note 129, at 175, 208 (“The President approved our recommendations on Monday, September 17, and provided us broad authorities to engage al Qa’ida. As Cofer Black later told Congress, ‘the gloves came off’ that day.”). Tenet, to rebut any charges that the CIA did not take the terrorism threat seriously enough during the transition between the Clinton and Bush administrations, states that most of these measures had been prepared before 9/11. *Id.* at 178 (“We were going to strangle their safe haven in Afghanistan, seal the borders, go after the leadership, shut off their money, and pursue al-Qa’ida terrorists in ninety-two countries around the world. *We were ready to carry out all these actions immediately, because we had been preparing for this moment for years. We were ready because our plan allowed us to be.*”).

of war to “smoke [the terrorists] out of their caves.”<sup>431</sup> Tenet asked. Tenet received. Very few restraints were placed on him or the CIA. Vice President Cheney, talking about the things that needed to be done in the shadows against terrorists, said as much during a television interview within a week of 9/11.<sup>432</sup>

The White House authorization that Tenet received probably hinged on a list of “high-value” terrorism targets. These targets, subject to the most extreme measures in a “lethal” finding, may have been designated by name or by a collection of factors. However the finding was worded, Osama bin Laden, still at large, must have been at the top of the list. As time went on, assuming that the finding depended more on names than on factors, the list may have been revised to delete those who were captured or killed, and to add those identified as new threats. This process of revision took place more at the Agency level than the White House level—although President Bush is reported to have kept a sort of al Qaeda scorecard at his desk.<sup>433</sup> For the sake of speed and to keep the President’s hands relatively clean, Tenet may have retained broad authority to decide whether and when to hit those on the list.<sup>434</sup> Accordingly, Tenet, not the President, was the man pulling the trigger on some terrorists.

As deep as the country traveled into night, President George W. Bush was not the first to issue a blanket finding against terrorists.<sup>435</sup> The practice of one-size-fits-all findings against terrorists has antecedents in the covert actions of

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431. Remarks on Financial Sanctions Against Terrorists and Their Supporters and an Exchange with Reporters, 2 PUB. PAPERS 1153 (Sept. 24, 2001).

432. On September 16, 2001, Tim Russert of *Meet the Press* questioned the Vice President regarding the U.S. Government’s likely response to 9/11. Cheney answered that question as follows:

We also have to work, though, sort of the dark side, if you will. We’ve got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful. That’s the world these folks operate in, and so it’s going to be vital for us to use any means at our disposal, basically, to achieve our objective.

*NBC News’ Meet the Press*, Interview by Tim Russert with Vice President Richard Cheney (NBC television broadcast Sept. 16, 2001), transcript available at <http://www.fromthewilderness.com/timeline/2001/meetthepress091601.html>.

433. WOODWARD, *supra* note 7, at 224 (“Bush took a classified version [of the 22 Most Wanted List] for himself that had photos, brief biographies and personality sketches of the 22 men. When he returned to his desk in the Oval Office, he slipped the list of names and faces into a drawer, ready at hand, his own personal scorecard for the war.”). When one of the twenty-two al Qaeda leaders was reported killed or captured, President Bush would “put a big ‘X’ through the photo.” *Id.*

434. Tenet, in turn, may have delegated his authority to senior officials in the CIA’s Clandestine Service.

435. See TREVERTON, *supra* note 5, at 249

the Ford and Carter Administrations.<sup>436</sup> Those findings serve as reminders that other presidents have been concerned about terrorist attacks. For us, focused on the present, the stakes could not be higher. Images of a smoldering pit at Ground Zero, a severed chunk from the Pentagon, and a crumpled plane in a Pennsylvania field are part of the collective consciousness.

Compared to President George W. Bush, Presidents Ford and Carter did not make covert action a central part of their foreign policies.<sup>437</sup> Under the Ford Administration and the early part of the Carter Administration, covert action almost came to a close.<sup>438</sup> The scandals under the Nixon Administration caused an extreme caution about intelligence activities.<sup>439</sup> President Carter's DCI, Stansfield Turner, described the moment well: "When I took over in 1977 the covert action cupboard was bare and sentiment within the CIA itself was against stocking it."<sup>440</sup> Later in the Carter Administration, after the fall of the Shah in Iran and the Soviet invasion of Afghanistan, covert action picked up pace.<sup>441</sup> President Carter, putting aside some of his idealism about a foreign policy based on human rights, issued several findings to counter the Communist threat.<sup>442</sup> The findings themselves, although in writing, were short and broad.<sup>443</sup> Eventually, responding to congressional complaints about this generality, President Carter added some detail.<sup>444</sup> By the end of the Carter Administration, the findings fit within two categories: either generic findings on "transnational issues," or tailored findings for a "single country/single issue."<sup>445</sup> Under either category, the findings were more like an investment banker's deal sheet than a corporate issuer's indenture. It seems that both President and Congress trusted the CIA to fill in details.

Broad findings have advantages and disadvantages. One advantage is that they give the specialists, usually at the CIA, the discretion to interpret the President's wishes. The President just does not have the time or the expertise to spell out everything for the covert action crew. A disadvantage is that the CIA may end up implementing its own wishes rather than the President's. Recreated is the potential for sloppiness and abuse from the old days of plausible denial.

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436. *Id.*

437. *See* DAUGHERTY, *supra* note 5, at 178.

438. *Id.*

439. *See* STANSFIELD TURNER, *SECRECY AND DEMOCRACY: THE CIA IN TRANSITION* 84 (1985).

440. *Id.*

441. *See* DAUGHERTY, *supra* note 5, at 183–84.

442. *See id.* at 185.

443. *Id.*

444. *See id.* at 184–85.

445. *Id.* at 185.

Problems with delegations of power are not unique to covert action or to the CIA. Even so, the fall-out from a covert action gone bad (lost lives and the potential for escalation into open war) is higher than that from the Federal Communications Commission issuing a radio license to a party less deserving than another. Moreover, the FCC's actions are subject to public checks such as notice and comment rulemaking, not applicable to the CIA.

Stansfield Turner observed an inherent tension between the CIA and Congress on covert action: the CIA, as implementer, has a tendency to prefer broad findings whereas Congress, as overseer, tends toward the specific. As Turner notes:

Under a broad finding, an operation can be expanded considerably; with a narrow one, the CIA has to go back to the President to obtain a revised finding if there is any change of scope. The Congress is wary of broad findings; they can easily be abused. The CIA is afraid of narrow findings; they can be a nuisance.<sup>446</sup>

That tension may prevail today for Predator strikes and other measures against terrorists. The preferences between the CIA and Congress may have remained the same. For Turner's observations to be accurate, however, one must assume that the CIA is willing to take risks in the gray area not covered by explicit instructions. That may no longer be true.

As a result of the new formalism to covert action, the lessons learned from Cuba, Chile, Iran-Contra, and other experiences, the CIA may be pushing for findings more akin to SEC registration statements to protect its officers against civil and criminal liability. Congress, on the other hand, may have shifted toward the general. Through notification, Congress takes on an implicit role of approving presidential proposals for covert action.<sup>447</sup> Congress, of course, does not have the explicit authority to approve the actions, an approval which remains a core presidential prerogative, but the collective decision by the oversight committees not to leak a particular plan and not to cut off funding brings Congress into the circle of responsibility. For this reason, members of the oversight committees who are averse to risk might prefer broad findings, paralleling Congress's blissful ignorance during the era of plausible denial. If something goes wrong with a broad finding, Congress can disclaim responsibility and blame those who filled in the blanks. That said, Turner's general description is not necessarily incorrect. So much depends on context. So much depends on first principles.

Under the Constitution, the President may not delegate certain powers. The power to veto bills<sup>448</sup> and the power to pardon criminal offenses<sup>449</sup> come

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446. TURNER, *supra* note 439, at 169.

447. See Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602(a)(2), § 501, 105 Stat. 429, 441 (codified at 50 U.S.C. § 413 (2000)).

448. U.S. CONST. art. I, § 7, cl. 3.

to mind. Although the President could seek advice on what to veto and whom to pardon, the ultimate decision should come from the Oval Office. Delegating those powers would go against the checks and balances of our system. If the President entrusted the veto power or the pardon power to the Vice President, that could be construed as a sign that the President is no longer capable of carrying out his duties. On the other hand, the President should not be expected to carry out all Article II powers by himself. Although he personifies the executive power, he is not the only person in the Executive Branch. The Constitution provides for consultation with other people in the Executive Branch to run the national government.<sup>450</sup>

When it comes to covert action, the commander-in-chief power differs from the veto and pardon powers. The veto and pardon are more binary: either a bill is vetoed or not; either someone is pardoned or not. The commander-in-chief power has a broader range. The President could be called to make strategic decisions such as reacting to attacks from other nations or launching anticipatory defenses against other nations. Depending on his preferences, he could leave the tactical decisions to the generals or, like President Lyndon Johnson during the Vietnam War, could involve himself in selecting the sites to be bombed.<sup>451</sup> No matter the management style, there still seems to be a core to the commander-in-chief power that only the President should exercise. For example, President Bush may not have been allowed to delegate the decision to invade Iraq in 2003 to Vice President Cheney. In a further extrapolation, if President Bush had delegated this decision to his wife Laura, other problems would arise. The First Lady was neither elected, as Cheney was, nor confirmed by the Senate, as were other executive officers.<sup>452</sup>

At the statutory level, the Intelligence Authorization Act of 1991 also goes against oblique delegations. Under that Act, the President must issue a written finding that demonstrates the importance of each covert action to American national security.<sup>453</sup> In practice, the finding is shared with the oversight committees, but not with the full Congress. In the spirit of the Act, a one-time, one-sentence finding that “the national security requires comprehensive covert action against al Qaeda” does not suffice. The President would not be playing by the rules. Neither President Ford nor President Carter was that broad in any finding.

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449. U.S. CONST. art. II, § 2, cl. 1.

450. *See id.*

451. *See* John H. Messing, *American Actions in Vietnam: Justifiable in International Law?*, 19 STAN. L. REV. 1307, 1317 (1967).

452. *See* Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205, 234 (2001).

453. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602(a)(2), § 503(a), 105 Stat. 429, 442 (codified at 50 U.S.C. § 413b(a) (2000)).

American presidents retain great discretion in determining how to cut and serve the covert action bread. One President might present something in one slice that another President might present in two slices. Such discretion, within reason, is entirely permissible within the scope of a statute that does not legislate to the detail of the Internal Revenue Code. But a piece can be too thin, contrary to Congress's express purpose—from Hughes-Ryan to the Intelligence Authorization Act of 1991—to perform oversight. Information, we all know, nourishes oversight. The thinnest finding would be a return to the proposition that Congress cannot play any role in covert action. Even if the oversight committees do not object to a thin slice on covert action, the problem remains for the rest of our government. It is not for two intelligence committees to overrule what two houses of Congress and the President agreed to in the Intelligence Authorization Act of 1991. The legislative veto is dead.<sup>454</sup> Congress deserves more than wafers on the table.

Vague or blank findings present the dangers of what preceded Hughes-Ryan. If Congress has manifested any intent about covert action it is that presidential findings and the instructions to the operators must contain some detail.<sup>455</sup> The foreign country's importance must be explained.<sup>456</sup> The type or types of covert action must be designated.<sup>457</sup> And the connections to other aspects of American policy toward that country must be made. These things could fit on a page, but not in a line.

Times have changed, and covert action has become another area for compromise between Congress and the President on American foreign policy. Yet, by using statutes to set the boundaries on covert action, one buries a deeper debate about inherent powers. The ambiguities are thus sorted out through statutory interpretation rather than constitutional dialogue.<sup>458</sup> Some actions are clearly in bounds, some clearly out of bounds. Between the two clear markers, in a twilight zone, there is so much room for disagreement—and for the reasoned application of facts to standards.

#### IV. LIMITED NOTICES

President George W. Bush, failing to heed the lessons of Watergate and Iran-Contra, may have returned to “off-the-books” covert action in the struggle

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454. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

455. *See supra* Part II.H.

456. *See supra* Part II.H.

457. *See supra* Part II.H.

458. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 516–19 (2004) (providing a poignant example showing how six members of the Court interpreted two congressional actions, the Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001), and the Non-Detention Act, 18 U.S.C. § 4001(a) (2000), to decide whether the President had the authority to designate a United States citizen as an enemy combatant).

against terrorism. This may have been as simple as notifying fewer members of Congress than the statutory minimum. Or this may have been as brazen as disregarding all statutory requirements, keeping Congress in the dark through a very expansive view of commander-in-chief powers.

The statutory framework allows limited notice to Congress if “the President determines that it is essential . . . to meet extraordinary circumstances affecting the vital interests of the United States.”<sup>459</sup> Thus, limited notice depends on the President’s initiative.<sup>460</sup> If the process of covert action is seen as a game of tennis, the Executive serves first. The term “extraordinary,” however, suggests that limited notice is an exception, not a rule.<sup>461</sup>

That the Intelligence Authorization Act of 1991 allows for limited notice to Congress in some circumstances is a concession to the Executive Branch that the odds of a leak or an inadvertent disclosure are reduced when fewer people know about the secret activity.<sup>462</sup> While Congress is involved in covert action, it watches over the process but does not approve or disapprove of a covert action.<sup>463</sup> The Executive decides whether to conduct covert action—and the details to any covert action.<sup>464</sup>

Members of Congress and their staffs, when notified about covert action, can meet with the President and his staff to argue against a covert action. Less fair, Congress can use selective leaks. Even the threat of a leak, implied or express, can cause the Executive to modify or abandon a covert action. Those who leak, of course, are betting that the Executive, out of respect for another branch of government or for fear of a public backlash, will not investigate the leak, complete with subpoenas and polygraphs.

Not only do leaks compromise covert action, they complicate the CIA’s collection of intelligence. The CIA’s sources include persons who commit espionage on our behalf and foreign intelligence services that share information with us through liaison channels.<sup>465</sup> The CIA, like any other intelligence service, cannot function unless it shows that it can be trusted to keep the secrets. It is faint consolation to the blown source or to the exposed liaison service that the source of the leak was Congress, not the CIA. When those sources or liaison services make deals, they expect the CIA to enforce those deals across our government. If those deals are not enforced, the CIA’s sources, necessary for both covert action and foreign intelligence, clam up.

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459. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602(a)(2), § 503(c)(2), 105 Stat. 429, 443 (codified at 50 U.S.C. 413b(c)(2) (2000)).

460. *See id.*

461. *See id.*

462. *Id.*

463. *Id.* §§ 501(a)(1), 503(c)(2).

464. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), §§ 501(a)(3), 503(a).

465. *See* John A. Radsan, *Second-Guessing the Spymasters with a Judicial Role in Espionage Deals*, 91 IOWA L. REV. 1259, 1260 (2006).

The intelligence community believes the potential for leaks rises in geometric proportion to the number of people “read into a program.” Adding three people to the list of a covert action, for example, increases the odds of leaks and unauthorized disclosures on the order of eight. This belief leads to “compartmenting,” by which classified information is only shared with those who have a “need to know.”<sup>466</sup> This belief also leads to limited notice to Congress in exceptional cases. In those cases, the risks of a leak outweigh the benefits—more process, more participation—of full notification to the oversight committees. Here, the Executive holds the key to limited notice.<sup>467</sup> In deciding whether to use that key, the Executive weighs the interests: the importance of the covert action and the potential damage from leaks and disclosure. The Executive, whether consciously or not, tends to overvalue the importance of the covert action to national security as well as the damage from an unauthorized disclosure and the likelihood that Congress will leak. On the other hand, the Executive tends to undervalue the benefits of broader participation from Congress. Those are facts of our system of divided government.

Congress is not just a source of leaks, however. One benefit to involving Congress is a reality check on what the American people will support if—and usually when—a covert action becomes known to the public. Despite the CIA’s best efforts, history shows that very few covert actions, whether in Italy, Iran, Guatemala, Cuba, Chile, or Afghanistan, stay forever in the shadows. Politicians serve constituents while executive-branch bureaucrats serve their agency and the President. Members of Congress, unlike a sole president, are a better approximation for the mood all over the country. Perhaps the disaster at the Bay of Pigs, for example, could have been averted if President Kennedy had consulted members of Congress—beyond Senator William Fulbright—who were not part of the executive groupthink. If so, many lives would have been saved.

An acute burden of limited notice, besides reducing the number of views among members of Congress, is that even those who do receive notice (the so-called “Gang of Eight”) are often not allowed to consult their staffs, the national security experts and lawyers, to assist them in dealing with intelligence community officials who give the briefings.<sup>468</sup> The gaps in knowledge between the Executive and Congress are thus accentuated.<sup>469</sup>

On limited notice, it is difficult to prevent exceptions from becoming the rule. Congress has only provided a short and general standard about notices.

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466. *Id.*

467. Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), § 503(c)(2).

468. See Tung Yin, *Structural Objections to the Inherent Commander-in-Chief Power Thesis*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 966, 985–86 (2007).

469. *Id.*



So much depends on the good faith and the common understanding of those interpreting the rules and participating in the process—the White House, the CIA, and Congress. To continue the tennis analogy, the President and Congress are players who are calling their own lines; for covert action, the courts do not serve as outside umpires. If Congress concludes that the President has abused the process by limiting notice in routine cases, the remedy will come, most likely, from inter-branch negotiation and, less likely, by new legislation.<sup>470</sup>

The statutory framework, after all, does not put a cap on how many times the exception to full notice can be invoked, nor does it spell out how to distinguish the exceptional covert action from the routine.<sup>471</sup> As in so many other areas of the law, the fairness and the appropriateness of the result are in the eyes of the beholder. The same thing may appear ordinary to one person and extraordinary to another; the perspectives on the object are different. In any event, if words are to have any fixed meaning, something will have to be ordinary for other things to be extraordinary.

Paramount is an understanding that limited notice is an exception within another exception. The statutory framework already accepts that ordinary covert action, by definition, should not be briefed to the full Congress and should not be discussed in open hearings.<sup>472</sup> The question is not whether to have secrecy. The question is how much is appropriate and safe for a democracy. A question of this sort does not lend itself to easy answers. Applied to Predator strikes in Yemen, it is clear that some sort of presidential finding was necessary because, consistent with plausible deniability, the Executive Branch still does not admit its role. Much less clear is whether notice of the impending Predator strike could have been delayed or limited in Congress.<sup>473</sup>

## V. TRANSPARENCY

The process for approving covert action and for notifying the congressional committees should become more transparent to the public. This can be done through an Executive Order or by statute. While secrecy is necessary for effective covert action, the internal decision-making process, as a relic from the Cold War days, is still too opaque to the public. For greater

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470. Open questions are whether and how the courts would get involved in any challenge to the constitutionality of legislation on the covert-action process.

471. See Intelligence Authorization Act, Fiscal Year 1991, sec. 602(a)(2), § 502.

472. *Id.*

473. Another troubling possibility is that President George W. Bush assigned traditional CIA tasks to the Pentagon. By viewing counterterrorism on a battlefield rather than in the intelligence sphere, the President and his advisers may have convinced themselves that congressional notice was unnecessary. After 9/11, black ops may have spread beyond the Agency.

accountability and increased public support, the President should spell out more of the decision-making process.

The President could supplement the current Executive Order on intelligence activities. More of the internal process at the CIA, particularly the interaction between the CIA and the NSC, should be declassified. The advantage of the President doing this on his own initiative is that some constitutional questions concerning how far Congress can go in this core area of national security and foreign policy are avoided.

From American history, the public knows that sometimes the White House may initiate a covert action. At other times, the CIA, either through contacts in the White House or the NSC, may initiate the program.<sup>474</sup> And, at other times, another agency such as the State Department or the Defense Department may put forward the covert action.<sup>475</sup> In providing more transparency about the process, the President should clarify the usual mode for initiation, namely whether it is “top down” from the White House or “bottom up” from the CIA. This usual mode can be shared with the public without tying the President’s hands and without any damage to national security. By taking away some of the unnecessary mystery to the process on Predator strikes and other covert actions, the new Executive Order will increase public support for this third option between diplomacy and combat.

No matter what, a crafty and perseverant member of the public can gather clues about the American procedures for approving covert action. Some of those clues come from articles by newspaper reporters on the CIA beat and from pieces by retired CIA officers. William Daugherty’s book is especially useful. Daugherty, a liaison officer between the CIA and the NSC, describes the various committees, all with lawyers involved, which worked up proposals for covert action during his tenure at the CIA.<sup>476</sup> There is a Covert Action Planning Group (CAPG), chaired by the head or the deputy head of the Directorate of Operations.<sup>477</sup> If the CAPG approves, the proposal goes to the Covert Action Review Group (CARG), chaired by the CIA’s executive director.<sup>478</sup> If the CARG approves the proposal, it goes to the Director of the Central Intelligence Agency or the Deputy Director.<sup>479</sup> If the DCIA or the DD CIA approves, the proposal goes to the Interagency Working Group for Covert Action (IWG).<sup>480</sup>

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474. See ANDREW, *supra* note 138, at 206–07, 481–82.

475. *Id.* at 271–73.

476. See DAUGHERTY, *supra* note 5, at 104.

477. *Id.* The Directorate of Operations (DO) has been renamed the National Clandestine Service.

478. *Id.*

479. *Id.*

480. *Id.*

Thus, in the typical case, the proposal goes through internal committees at the CIA and an interagency group before it is presented to the NSC. At the NSC, the proposal typically passes through two tiers before reaching the President for his signature.<sup>481</sup> First, the deputies committee at NSC will discuss and revise the proposal.<sup>482</sup> Next, the principals committee, which includes the relevant cabinet secretaries, will decide whether to recommend the covert action to the President.<sup>483</sup>

For the most part, President George W. Bush continued to use the covert action procedures, changing the name of the IWG and perhaps giving the Vice President a larger role than usual.<sup>484</sup> The new President, more explicitly than the prior one, should confirm that internal committees at the CIA are still involved in approving covert action and that the NSC still considers proposals in two tiers. Further, the President should specify what sorts of covert actions, if any, must have the DCIA's approval, rather than his deputy's, in the CIA's internal process. Finally, the President should specify in what circumstances, if any, the internal committees or the NSC meetings may be bypassed to allow the DCIA, or someone else, to go straight to the President for approval.

A special area of interest is the potential role of the Attorney General in reviewing and approving covert action. Is he a member of any formal internal groups? Or just an observer? Many commentators probably believe that the more active the Attorney General is, the less likely it is that illegal actions will take place. That is not always true, though. Bobby Kennedy, as noted, was not always the voice of reason from the Justice Department on covert actions against Fidel Castro.<sup>485</sup> But too much should not be made of Bobby Kennedy. The Attorney General, more independent from the intelligence community than lawyers at the CIA and the NSC, is well-suited within the Executive Branch to ensure that the covert-action process has complied with internal guidelines, statutes, and the Constitution. By a new executive order or statute, the Attorney General should play a role in passing on the legality of covert action.

Another area of interest is the potential role of the Director of National Intelligence (DNI). The DNI was created in 2004 as an "intelligence czar" of sorts.<sup>486</sup> Since then, the DNI has replaced the DCIA as the person who gives the President his daily intelligence briefing.<sup>487</sup> After the intelligence

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481. DAUGHERTY, *supra* note 5, at 104–05.

482. *Id.*

483. *Id.*

484. *Id.*

485. See *supra* notes 159–64 and accompanying text.

486. See Richard A. Posner, *Important Job, Impossible Position*, N.Y. TIMES, Feb. 9, 2005, at

A23.

487. *Id.*

reorganization, the DNI “shall perform such other functions as the President may direct.”<sup>488</sup> His subordinate, however, still reports to the President and the National Security Council; in other words, the DCIA shall “perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct.”<sup>489</sup> As a result, both the DNI and the DCIA are connected to “such other functions,” the traditional codeword for covert action.

What remains unclear in practice is whether the DNI or the DCIA is the person most involved in recommending covert actions to the President. Further, no matter who makes the recommendations, it is unclear who manages the CIA’s operators in carrying out covert actions: the DNI or the DCIA. So many arrangements are possible. On such important questions, the new President owes the country a bit more clarity. The DNI, after all, may have only added a layer of bureaucracy to the intelligence community. At best, the DNI has taken the lead in coordinating analysis and collection. The DNI, by a new executive order or statute, does not need a comprehensive role on covert action. Going forward, the DCIA can continue the traditional role of briefing covert-action plans to the NSC and the President, and the covert-action machinery does not need to be moved from CIA to the Office of the Director of National Intelligence. In short, although the DNI should participate in the covert-action process by giving the President his counsel, the DNI should not manage the process or the operations.

If the President refuses to provide more transparency about the covert-action process, Congress should fill in more of the blanks by legislation that either receives his signature or overrides his veto. The public does not need to know the names of the people or countries involved in a covert action because that would take most, if not all, of the “covert” out of the action. The public, however, does deserve to know more about the process by which its government determines what to do with the third option.

Whether Congress has the constitutional power to require more specificity from the President about the internal process for deciding on covert action is a very difficult question. Unlike the current legal framework, which provides for classified briefings to the intelligence committees, my proposal would require the President to inform not only select members of Congress but the rest of the public. My proposal, as a variant on the Freedom of Information Act,<sup>490</sup> would open up more of the government’s activities to public scrutiny. Although my proposal is simple, calling for specifics along the lines of National Security Decision Directives which have trickled out to the public, its constitutionality

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488. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011(a), 118 Stat. 3638, 3650 (codified at 50 U.S.C. § 403-1(f)(7) (Supp. V 2001–2006)).

489. 50 U.S.C. § 403-4a(d)(4) (Supp. V 2001–2006).

490. 5 U.S.C. § 552 (2006).

is complex. Does Congress have an enumerated power, amplified by the Necessary and Proper Clause, to enact such a statute? Or would such a statute violate the Constitution by trespassing on executive territory?

These questions replay the debate about whether Congress can require advanced notice of covert action, a debate that was on display in the majority and minority reports from the Iran-Contra investigations.<sup>491</sup> Those who defend Congress tie the need for information and notifications to the power of the purse.<sup>492</sup> For Congress to decide whether to fund or to continue to fund a covert action, so the argument goes, Congress must know what the CIA is doing with its appropriations. The argument continues that for voters to decide on whether they approve of the Executive's foreign policy, they must have some sense, either directly or indirectly through their representatives, of what is being done on the dark side. Thus, my transparency statute could be linked to Congress's established role in conducting oversight on intelligence activities.

On the other hand, those who defend executive power stress the need for secrecy and agility in conducting American policy.<sup>493</sup> Nothing is gained, they might say, by requiring things on the public record that Congress already learns in closed session when the executive reports on findings, memoranda of notifications, and other significant intelligence activities. Further, the defenders of executive power might remind everyone that the President has the prerogative to decide what is classified and what is not. They might claim damage (or potential damage) to American national security from too much detail about covert action being shared with the public.

As far as the public knows, the Executive has not refused to explain—at least to the intelligence committees—the internal process to covert action. Even so, the two committees do not equal two branches of Congress, and two branches of Congress do not equal the American public.

A cynical response to the debate about congressional and executive power might say that it is unlikely that the courts would become involved if my transparency statute were enacted—presumably over the President's veto. The political question doctrine, to use the Supreme Court's name, would cover the argument with a constitutional mist. In a free for all, my transparency statute might replay the maneuvers around the War Powers Resolution, another battle between Congress and the President on foreign policy. For War Powers, the courts have stayed out of the way to let the two elected branches search for compromise.<sup>494</sup>

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491. See Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 857–69 (1994).

492. See, e.g., *id.* at 835.

493. See, e.g., Block & Rivkin, *supra* note 338, at 323–24.

494. See generally *Lowry v. Regan*, 676 F. Supp. 333 (D.D.C. 1987).

At the end, even with the courts on the sidelines, the two other branches should not commit constitutional errors. Members of Congress, having taken oaths to uphold the Constitution, should not pass a statute that they believe violates our charter. The President, taking care to execute all laws, should not put the unconstitutional into practice. They should do what is right.

#### CONCLUSION

From the hindsight of a new century, some historical and legal markers to American covert action are clear. We have gone from fixing elections in Italy to deposing foreign leaders in Iran and Guatemala to killing suspected terrorists in Yemen. We started with something close to congressional apathy about political action, propaganda, paramilitary actions, and economic subversion—and ended with congressional participation on such projects.

Two broad principles are also clear. First, to defend our great nation, we need some sort of covert action; the State Department and the Defense Department are not enough. But, second, to prevent shadow warriors from turning back on us, we need some measures of accountability at the CIA. The challenge is to pursue these principles at the same time. One person's legitimate oversight on intelligence activities becomes another person's micromanagement. Even to the sharpest eyes, the lines between executive prerogative and congressional power are still blurred.

My proposal, akin to legislation that supplanted the era of unchecked covert action, namely Hughes-Ryan, the Intelligence Oversight Act of 1980, and the Intelligence Authorization Act of 1991, searches for an effective arrangement between the President and Congress. For approving and conducting covert action, a bit more transparency about the process should help.

My proposal is evolution, not revolution. Besides worrying about terrorists who want to blow us up, the American people should worry about presidents who delegate too many things to their underlings and notify Congress too little about the dark side. In an age of terror, Predator strikes on vehicles in the Yemeni desert pose significant problems for those who seek that elusive balance between security and democracy.

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