

Covert Action and Clandestine Activities of the Intelligence Community: Framework for Congressional Oversight In Brief

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Introduction

This report posits a potential framework for congressional oversight of intelligence-related programs and activities using the existing committee structure and notification standards for the most sensitive intelligence activities: covert action and clandestine intelligence collection. The framework may assist Congress in assessing the premises justifying each of these activities, their impact on national security, operational viability, funding requirements, and possible long-term or unintended consequences. It accompanies two other CRS In Briefs on covert action and clandestine intelligence activities that address selected definitions (CRS Report R45175, *Covert Action and Clandestine Activities of the Intelligence Community: Selected Definitions in Brief*, by (name redacted) and (name redacted)) and congressional notification requirements (CRS Report R45191, *Covert Action and Clandestine Activities of the Intelligence Community: Selected Notification Requirements in Brief*, by (name redacted) and (name redacted)).

The formal structure and requirements for congressional oversight of the intelligence community originated with investigations by two congressional committees in the 1970s—in the Senate, chaired by Idaho Senator Frank Church, and in the House, chaired by Representative Otis Pike—that provided a basis for the establishment of today’s Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI). At its inception, congressional oversight of intelligence focused primarily on two themes: investigation of past abuses and organizational reform of the intelligence community. Those efforts have produced results. For example, the Church and Pike committees’ investigations into unlawful and unethical intelligence activities provided a precedent for Congress to institutionalize oversight to ensure intelligence activities upheld the law and American values. Similarly, congressional oversight of intelligence has resulted in reform, such as the Intelligence Reform and Terrorist Prevention Act (IRTPA) of 2004, which provided the statutory basis for implementing recommendations of the National Commission on Terrorist Attacks Upon the United States (the “9/11 Commission”).

Background

A prominent recommendation of the National Commission on Terrorist Attacks upon the United States was to strengthen intelligence oversight.¹ Although congressional oversight of intelligence since the Church and Pike committees had resulted in several periods of reform, Congress had not been able to sustain the momentum it had generated earlier. As the Final Report of the 9/11 Commission put it,

“...the oversight function of the Congress has diminished over time. In recent years, traditional review of the administration of programs and implementation of laws has been replaced by ‘a focus on personal investigations, possible scandals, and issues designed to generate media attention.’ The unglamorous but essential work of oversight has been neglected, and few members past or present believe it is performed well....[T]he executive branch needed help from Congress in addressing the questions of counterterrorism strategy and policy, looking past day-to-day concerns....Congress...often missed the big questions—as did the executive branch.”²

¹ National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington, DC: GPO, 2004), p. 419.

² *The 9/11 Commission Report*, pp. 105-106.

Since September 11, 2001, a number of factors have complicated Congress's efforts to improve oversight. Greater integration of military operations and intelligence activities has resulted in a blurring of what are known as Title 10 and Title 50 authorities of the *United States Code*.³ Congress has expressed concern that the Department of Defense (DOD) has overused terms that are not defined in statute, such as *traditional military activities* and *operational preparation of the environment* (OPE)⁴ and that this, in turn, has enabled DOD to circumvent the more stringent oversight requirements of the congressional intelligence committees placed upon activities that may bear close resemblance to covert action or clandestine intelligence collection.

Self-imposed limitations on how Congress conducts intelligence oversight may inhibit effective oversight. The congressional intelligence committees' jurisdiction is limited to intelligence authorizations; the congressional defense committees exercise sole jurisdiction over intelligence appropriations. There is also no traditional public constituency and little public involvement in intelligence matters. Intelligence programs and analytical products are classified and generally removed from the public domain. The eight-year term limits for Members of the House Permanent Committee on Intelligence may present an obstacle to the development of deep expertise.⁵

Despite these inhibiting factors, congressional oversight of intelligence remains essential to the proper functioning of the government, especially the intelligence community. Highly classified covert action and clandestine intelligence programs do not have visibility outside of Congress, with the exception of occasions that may become public after the fact, usually as a result of a failure. Congressional oversight, therefore, can provide the most meaningful checks on the President's execution of intelligence policy and programs that may have significant bearing on U.S. national security. The President may also benefit from the strategic perspective and advice that Members of Congress can offer.

A logical conceptual framework for oversight of covert action would include its statutory definition; covert action is codified as an activity of the U.S. government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States

³ See Andru E. Wall, "Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities and Covert Action," *Harvard National Security Journal*, December 2, 2011, at <http://harvardnsj.org/wp-content/uploads/2012/01/Vol-3-Wall.pdf>.

⁴ DOD defines *operational preparation of the environment* (OPE) as the "conduct of activities in likely or potential areas of operations to prepare and shape the operational environment," with *operational environment* defined as a "composite of the conditions, circumstances, and influences that affect the employment of capabilities and bear on the decisions of the commander." Joint Publication 3-05, "Special Operations," a doctrine issuance of the Joint Staff, describes *preparation of the environment* as an "umbrella term for operations and activities conducted by selectively trained special operations forces to develop an environment for potential future special operations," with "close-target reconnaissance ... reception, staging, onward movement, and integration ... of forces ... [and] infrastructure development" cited as examples of such activities. See Joint Staff, "DOD Dictionary of Military and Associated Terms," June 2017 revision, available at http://www.dtic.mil/doctrine/new_pubs/dictionary.pdf. See also Joint Staff, "Special Operations," Joint Publication 3-05, July 16, 2014, available at http://www.dtic.mil/doctrine/new_pubs/jp3_05.pdf, and Joint Staff, "Joint Operations," Joint Publication 3-0, January 17, 2017, available at http://www.dtic.mil/doctrine/new_pubs/jp3_0_20170117.pdf.

⁵ House Rule X clause 11(4): "(A) Except as permitted by subdivision (B), a Member, Delegate, or Resident Commissioner, other than the Speaker or the Minority Leader, may not serve as a member of the select committee during more than four Congresses in a period of six successive Congresses (disregarding for this purpose any service for less than a full session in a Congress). (B) In the case of a Member, Delegate, or Resident Commissioner appointed to serve as the chair or the ranking minority member of the select committee, tenure on the select committee shall not be limited."

will not be apparent or acknowledged publicly.⁶ There are a number of exceptions in the statutory definition of covert action. It does not include activities primarily intended to collect intelligence; traditional counterintelligence activities; traditional military activities, or support to traditional military activities; traditional law enforcement activities, or routine support to law enforcement; and traditional diplomatic activities.⁷ Effective oversight seems to require that Congress have a solid understanding of these exceptions. Such an understanding, however, is not as straightforward as it may seem at first glance; Congress has voiced concern with DOD's use of the term *traditional military activities* in particular to describe operations that might otherwise be hard to distinguish from covert action.⁸ From a strategic perspective, oversight requires a solid grasp of the U.S. national security interests and foreign policy objectives that each administration details in national security strategy and accompanying documentation. A national security strategy also helps define assumptions about the international environment which drive policy decisions.

Section 3093(a) of Title 50, *U.S. Code* provides the definition and statutory requirements for covert action and specifies that a presidential *finding* must determine that the covert action "is necessary to support identifiable foreign policy objectives of the United States and is important to the national security objectives of the United States."

A Framework for Oversight; Questions for Congress

Congress has no statutory prerogative to veto covert action when informed through a presidential finding. However, it can influence conduct of an operation through the exercise of congressional constitutional authority and responsibilities to authorize war, legislate, appropriate funds, and otherwise interact with the executive branch. As former CIA Inspector General L. Britt Snider put it,

If the committees do not support a particular operation or have concerns about aspects of it, an administration would have to think twice about proceeding with it as planned. If it is disclosed or ends in disaster, the administration will want to have had Congress on board. If it is going to last more than a year, the committees' support will be needed for continued funding. The committees are also likely to be better indicators of how the public would react if the program were disclosed than the administration's in-house pundits.⁹

⁶ 50 U.S.C. §3093 (e).

⁷ *Ibid.*

⁸ See U.S. Congress, House of Representatives, *Intelligence Authorization Act, Fiscal Year 1991*, conference report to accompany H.R. 1455, 102nd Cong., 1st sess., July 25, 1991, H.Rept. 102-166, pp. 29-30:

It is the intent of the conferees that 'traditional military activities' include activities by military personnel under the direction and control of a United States military commander (whether or not the U.S. sponsorship of such activities is apparent or later to be acknowledged) preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities for the activities and or operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving United States military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly. In this regard, the conferees intend to draw a line between activities that are and are not under the direction and control of the military commander. *Activities that are not under the direction and control of a military commander should not be considered as "traditional military activities."*[emphasis added].

⁹ L. Britt Snider, *The Agency and the Hill: CIA's Relationship with Congress, 1946-2004*, CIA Center for the Study of Intelligence, p. 311, posted May 9, 2008, at https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill_Book_1May2008.pdf.

As oversight committees and Congress assess each impending covert action from a strategic point of view, Congress may wish to organize its review using the following five issue areas:

1. the activity's statutory parameters;
2. U.S. national security interests;
3. U.S. foreign policy objectives;
4. funding and implementation; and
5. risk assessment.

By extension, oversight of anticipated clandestine intelligence activities that might also shape the political, economic, or military environment abroad can apply the same framework, and, like oversight of covert action, address the risk of compromise, unintended consequences, and loss of life.

Statutory Parameters of the Activity

Section 3093(a)(5) of Title 50, *U. S. Code* specifies that “a finding [for a covert action] may not authorize any action that would violate the Constitution or any statute of the United States.” Congressional oversight efforts may have the goal of ensuring covert action does not violate the law, to include any domestic law enacted to fulfill the terms of a nonself-executing treaty.¹⁰

Questions for Congress

- Does the covert action or clandestine intelligence activity violate domestic U.S. law?
- Does the activity violate any domestic law connected to a nonself-executing treaty?
- Is the activity likely to violate international law? What are the national security implications of conducting a covert action that may violate international law?¹¹
- Would Congress likely choose to provide limitations on the covert action through legislation?¹²
- Does the covert action or clandestine activity, if conducted during hostilities, comply with the laws of armed conflict in accordance with DOD policy?¹³

¹⁰ A nonself-executing treaty requires the enactment of domestic legislation for the treaty to enter into force.

¹¹ Caroline D. Krass, “Covert Action v. Traditional Military Activities,” *Prehearing Questions for the Record for Ms. Caroline D. Krass*, at <https://www.intelligence.senate.gov/sites/default/files/hearings/krasspost.pdf>. In her answers to prehearing questions related to her nomination as CIA General Counsel, Ms. Krass wrote “[T]he United States respects international law and complies with it to the extent possible in the execution of covert action activities.”

¹² During the Iran Contra Affair, the Reagan Administration, by using funds obtained from the sale of arms to Iran for the purchase of military aid for the Nicaraguan Contras, violated the Boland Amendments to the Continuing Appropriations Act of 1983 (P.L. 97-377). There were three Boland Amendments which were directed at preventing the provision of military assistance to Contra rebels who were fighting to overthrow the Sandinista government. The first Boland Amendment specified that “[n]one of the funds provided in this act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.” P.L. 97-377, FY1983 Continuing Appropriations Act (96 Stat. 1830) §793.

¹³ See Joint Publication 3-12(R), *Cyberspace Operations*, February 5, 2013. See also *Department of Defense Law of War Manual* (Washington, DC: DOD Office of the General Counsel, December 2016), pp. 50-65. DOD policy on the

National Security Interests

Congressional oversight of covert action is generally recognized to be especially important to ensuring proper checks and balances, particularly under circumstances in which no one outside of a small number of authorized intelligence professionals will know anything about the covert action or clandestine activity.¹⁴ Yet, the 9/11 Commission observed,

Congress had a distinct tendency to push questions of emerging national security threats off its own plate, leaving them for others to consider. Congress asked outside commissions to do the work that arguably was at the heart of its own oversight responsibilities.¹⁵

Oversight, in accordance with notification requirements of Title 50, enables Congress to provide a timely check on the development of a covert action or clandestine intelligence activity that might have serious flaws. Maintaining necessarily tight security surrounding planning for sensitive intelligence activities may present a challenge, because the few individuals outside the intelligence community with access may offer only limited perspective, overlook essential details, and too easily accept premises that might not bear up against broader scrutiny.¹⁶

Questions for Congress

- What are the underlying premises of the threat and the international or regional environment that justify the covert action or clandestine activity?
- Has there been any precedent for the particular covert action outlined in the presidential finding? If so, what were the similarities and differences with the covert action described in the current finding that may give perspective regarding the risk to U.S. personnel, unintended consequences, and implications for U.S. national security?
- What are the implications of involving third parties or countries in the covert action?¹⁷

conduct of hostilities, to include cyberspace operations, requires the U.S. Armed Forces adhere to the principles of the law of war, in particular, last resort, military necessity, prevention of unnecessary suffering, proportionality, and distinction.

¹⁴ “Where covert action is concerned, the two intelligence committees have, since their inception, provided the only significant check and balance outside the executive branch. The appropriations committees occasionally weigh in on the funding levels for these programs, but the intelligence committees are where the policy issues are weighed and adjudicated.” L. Britt Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004*, CIA Center for the Study of Intelligence, p. 310. Posted May 9, 2008, at https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill_Book_1May2008.pdf. See also Cohen, p. 240.

¹⁵ *The 9/11 Commission Report*, p. 107.

¹⁶ “...hard-to-detect CIA operations against suspect individuals tend to develop an organizational momentum that carries them well beyond legal and diplomatic limits—and beyond executive and congressional controls.” Stephen R. Weissman, “Accountability for CIA’s Cover Acts,” *POLITICO*, August 26, 2010.

¹⁷ See §3093(a)(4), Title 50, *U. S. Code*: “Each finding shall specify whether it is contemplated that any third party which is not an element of, or a contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the covert action concerned, or be used to undertake the covert action concerned on behalf of the United States.”

- Does the covert action or clandestine activity conform to American values,¹⁸ adhere to notions of sovereignty, and promote free and fair elections?¹⁹
- What are plausible long-term unintended consequences of the covert action? Do these possible long-term effects challenge the premises for conducting the covert action in the first place?²⁰
- What might be some plausible second/third order effects of *not* conducting the covert action?

Foreign Policy Objectives

Section 3093(a) of Title 50, *U. S. Code* specifies “[T]he President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government unless the President determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States.”

Questions for Congress

- Is the covert action being initiated as an instrument of policy in support of “identifiable” foreign policy objectives elaborated in the National Security Strategy? Is covert action a viable means of achieving these objectives? Are there other means by which the United States might achieve the same objectives involving less risk?
- Is the covert action consistent with American values to the extent that it is something the American people would support (in the event of an unanticipated disclosure)?

Funding and Implementation

Congress can provide another level of review to ensure important details for successfully implementing the activity are not overlooked. Moreover, Congress’s constitutional responsibility for appropriating funds extends to its oversight of sensitive intelligence activities like covert action.²¹ As former CIA Director and former Member of Congress Leon Panetta once remarked, “I do believe in the responsibility of the Congress not only to oversee our operations but to share in the responsibility of making sure that we have the resources and capability to help protect this country.”²²

¹⁸ Conforming to “*American values*” is a subjective standard denoting each Member’s understanding of what their constituents can tolerate in the conduct of covert action and other sensitive intelligence activities.

¹⁹ L. Britt Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004*, CIA Center for the Study of Intelligence, posted May 9, 2008, at https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill_Book_1May2008.pdf.

²⁰ For example, a short-term perspective of the benefits of CIA’s covert action that instigated the 1953 coup in Iran that overthrew the democratically elected government of Mohammad Mossadegh, failed to allow for plausible long-term scenarios that might have suggested an alternative policy.

²¹ William S. Cohen, “Congressional Oversight of Covert Actions,” *International Journal of Intelligence and Counterintelligence*, vol. 2, no. 2 (1988), pp. 239-240.

²² Amy B. Zegart, “The Domestic Politics of Irrational Intelligence Oversight,” *Political Science Quarterly*, vol. 126, no. 1 (Spring 2011), p. 5.

Questions for Congress

- Is the department or agency named in the presidential finding as the lead agency for the covert action best suited to achieve the objectives?
- Are the operational elements planned for the covert action comprehensive and developed to achieve tactical success?
- Is the covert action or clandestine activity sufficiently funded over its projected duration to achieve the objectives?

Risk Assessment

“The executive branch is chiefly concerned with achieving the objectives of the president, whatever they might be. Because of this, it is sometimes tempted to downplay the risk and accentuate the gain.”²³ Congress’s relative distance from conceiving and planning the activity may enable it to provide more dispassionate risk assessment and more accurate analysis of likely outcomes.

Questions for Congress

- Does the covert action involve an unacceptable risk of escalating into a broader conflict or war?
- In the event of an unauthorized or untimely disclosure—or a popular perception of U.S. involvement—what are the risks to U.S. national security, U.S. personnel, or relations with states in the region?
- What are the consequences of failure of the covert action or clandestine intelligence activity to U.S. lives, U.S. national security, and relations with states in the region?
- If U.S. Armed Forces are involved, is the covert action or clandestine activity being conducted such that U.S. Armed Forces retain full protection under the terms of the Geneva Conventions?
- Is it plausible for the U.S. role to remain secret and deniable? Or is there substantial or unacceptable risk of compromising U.S. sponsorship, to the detriment of U.S. national security?
- What risks does the covert action or clandestine activity pose to uninvolved American citizens who might be in the vicinity?

An Iterative Process

Iterative oversight of covert action or clandestine intelligence collection is required under the law and has proven effective. It allows Congress periodically to review changes in conditions on the ground that may suggest different outcomes, a change in strategy, a shift in U.S. interests, or the development of unintended consequences. Along these lines, §3093(d)(1) and (2) of Title 50 *U. S. Code* includes the following provision:

²³ Snider, p. 307.

The President shall ensure that the congressional intelligence committees, or, if applicable, [the Gang of Eight],²⁴ are notified in writing of any significant change in a previously approved covert action, or any significant undertaking pursuant to a previously approved finding, in the same manner as findings are reported pursuant to subsection (c).

In determining whether an activity constitutes a significant undertaking for these purposes, the President shall consider whether the activity-

- involves significant risk of loss of life;
- requires an expansion of existing authorities, including authorities relating to research, development, or operations;
- results in the expenditure of significant funds or other resources;
- requires notification;
- gives rise to a significant risk of disclosing intelligence sources or methods; or
- presents a reasonably foreseeable risk of serious damage to the diplomatic relations of the United States if such activity were disclosed without authorization.

Former CIA Inspector General L. Britt Snider has suggested that congressional oversight might be vulnerable to failure to review the premises and conditions for the covert action that may have changed, perhaps significantly, subsequent to the initial notification. “If members are satisfied with what they hear from administration witnesses [during the initial notification], not only will they acquiesce in the implementation of the operation, they are apt to devote less attention to it down the road.”²⁵ To guard against this outcome, this provision of the covert action statute underscores the importance of being alert to the possible tactical and environment changes that warrant continued oversight to ensure the activity continues to be in the U.S. national interest.

Questions for Congress

- Do the premises or environmental conditions justifying the activity initially remain valid?
- Have there been any outcomes to suggest the intelligence activity is achieving its intended result?
- Does the activity continue to have the funding necessary to be effective?
- Have there been any changes in conditions on the ground that might influence a significant change in how the activity is executed?
- Is there an increase in the risk of premature or unauthorized disclosure? Do American citizens face a greater threat of exposure? Does the risk involved continue to be acceptable?
- Does the activity continue to conform to the statutory guidelines on the conduct of covert action or significant clandestine intelligence activities?

²⁴ Section 3093(c)(2) of Title 50, *U.S. Code*, provides for limited notification to eight Members of Congress, colloquially known as the “Group of Eight”: “If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.”

²⁵ L. Britt Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004*, CIA Center for the Study of Intelligence, p. 307, posted May 9, 2008, at https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill_Book_1May2008.pdf.

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