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Secrets in Plain View: Covert Action the U.S. Way

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WE AMERICANS HAVE A UNIQUE CULTURE. We champion openness in government but implement many policies in secret. Historically, we have been quick to fight for national honor but equally quick to publicly and mercilessly criticize ourselves; a future historian might even conclude that we defined our culture by airing dirty laundry. From the very beginning, we publicly debated our national morality—from slavery to the Indian campaigns; from Mexico to the *Maine*; from Vietnam to Panama. We even exposed “secret” executive actions by televising the introspective and painful investigations of such notable events as Iran-Contra and the Church Committee hearings. Probably more than any other nation in the world, we can expect that sooner or later virtually any executive activity of the United States will be publicly scrutinized.

Executive Action

Lacking precise definition, executive action has become a term of art that describes activities designed to influence behavior. Executive action often is “secret,” but not always. If secret, it often is coercive. When practiced by the United States, it is always a tool of foreign, never domestic, policy.

Executive action may be applied directly—by military or paramilitary force, economic leverage, or political activities—or it may consist of mere persuasion. Executive action may also be applied indirectly, for example by using surrogates, propaganda, or even covert military, economic, and political activities. Each of these techniques will be a focus, from time to time, for covert action.¹

Covert action practiced by the United States shares its cultural heritage with intelligence. A scant few decades ago, nations would tacitly concede, but rarely admit, the common practice of international intelligence gathering—of spying on other nations. The United States was no exception.

Prior to World War II, the United States was, perhaps, the least experienced spy master of the developed nations.² U.S. intelligence activities had been a desultory lot, sometimes favored, sometimes vilified, rarely admitted and always in jeopardy of extinction. Yet, at the end of World War II, we not only planned to continue into peacetime the intelligence institutions conceived in war, we also codified and published the intent. More recently, we undertook a similar catharsis with covert action.

American Candor

The National Security Act of 1947 was a mold for much of contemporary U.S. Government intelligence practice. A legislative behemoth originally devoted to overhauling the military establishment, the draft Act was seized upon as a handy tool by which to create the National Security Council, a Director of Central Intelligence, and the Central Intelligence Agency. Each is an institution important enough, and certainly visible enough, to obscure what may be the most significant aspect of the Act. By this peacetime legislation, the United States officially and publicly recognized intelligence gathering as a legitimate foreign policy process.³

The Act was eloquent testimony to the belated acceptance by the United States of international intelligence gathering that included even reading other people's mail.⁴ Perhaps even more significant, however, was the world reaction—or lack thereof. Global ennui eloquently testified to international acceptance of intelligence activities.⁵

The 1947 Act did more, however. Just as the Act acknowledged a purpose to gather intelligence internationally, it also acknowledged—albeit obliquely—an acceptance of the necessity to engage in covert action. In understatement worthy of our British heritage, the Act required that the

Central Intelligence Agency perform such other functions as the National Security Council might direct.⁶

The meaning of that language in the 1947 Act might have been less than obvious at its creation, but four decades later it was clarified. By that point in history, it was probably unnecessary to clarify the fact that the U.S. engages in international covert action, but the clarification was, nevertheless, instructive. In 1991, in an era when the sovereignty of developing nations was at its emotional apex, the Congress of the United States once again did something that only a secure democracy could dare. Not unlike its 1947 legislative admission, Congress publicly confirmed its policy of peacetime covert action by amending the U.S. Code to more explicitly acknowledge covert action as U.S. policy.⁷

Congress statutorily confirmed an acceptance of covert influence on the affairs of other nations. This easily was our most profound statement on U.S. willingness to mold other nations to our liking. It was also unusual candor in an era when proliferation of new nation-States elevated sovereign emotions to new heights.⁸ Nevertheless, as with the 1947 legislation, not a ripple disturbed the surface of the nation-state system.

U.S. Covert Action

Because covert action amounts to interference with sovereign rights, nations always seek to distance themselves from the activity.⁹ The reason is axiomatic—covert actions inherently, and universally, are fractious political issues that flaunt a universal need for rules of international behavior. Nevertheless, from time to time, all nations find it necessary to cloak official processes from public view; certainly, that was never more true than during the era of the Cold War.¹⁰ Adversaries and ideology aside, the Cold War interest in avoiding nuclear conflict promoted a relatively high tolerance for covert action as well as understood “rules” for the genre. “Plausible deniability” was a key goal; indeed, in that bipolar world it became rule number one.¹¹

Our limited experience with modern covert action originates primarily in World War II.¹² Ours is a culture that easily tolerates covert actions as a daring-do adjunct to armed combat, but to surreptitiously influence (or change) other governments in peacetime is far more difficult for us to countenance. Not unlike our history of intelligence gathering, covert action has no luster in the United States—we simply don’t like secrecy. We like to consider ourselves as ingenuous, open, and honest. We prefer to regard deviousness and secrecy as the product of evil empires. More importantly, we

believe strongly in a government of shared political power. Covert action, which definitionally restricts participatory activity, seems somehow antithetical to these ideals.

Despite this cultural inhibition, covert action was “writ large” in the political environment of the post-War period. The fall of Nazism and the rise of communism ushered in an era of political tension, paranoia, economic distress—and nuclear terror. Covert actions seemed to be ideally suited to accomplish foreign policy goals without unacceptable risk of rekindling military conflict. Prodded by Cold War fears, the number of covert actions multiplied.

Communist insurgencies and communist-inspired political subversion had become ubiquitous reality during the tedious process of rebuilding, or building anew, from a war-ravaged world. Polarized political views, coupled with a tenuous peace, made traditional foreign policy slow and cumbersome in a fast-developing world. By contrast, covert action beckoned policy makers with a promise of swift, high-impact alternatives ideally suited for post-war containment policy. The result, observed Henry Kissinger, is that all Presidents since World War II “have felt a need for covert operations in the gray area between formal diplomacy and military intervention.”¹³

Shielding the United States as well as the President from public scrutiny,¹⁴ even marginal success served to breed new covert actions. Knowledge of covert operations became so commonplace that the United States was accused of being responsible for nearly all internal difficulties worldwide.¹⁵ Not surprisingly, the American political consensus of the war years that had insulated intelligence and covert action from close scrutiny did not survive the advent of peace.

Close scrutiny did not occur overnight, but when it started, it became an irresistible force. Covert actions begun under the OSS continued through the both formative and mature years of the CIA. Then, more plebeian domestic concerns related to U.S. intelligence activities focused legislative attention on covert activities as well. Our proclivity for participatory democracy prevailed; all “secret” foreign policy came up for debate, and covert action was no exception. Under the sharp scrutiny of Senator Frank Church, the intelligence community suffered the slings and arrows of what many might justifiably consider to have been righteous hindsight.

Post-war domestic abuses of intelligence resources are a matter of history. Even so, most observers today will concede that many of the “abuses” are more clearly perceived as such when seen through the eyes of the citizen of the 1970s than through the eyes of citizens of the 1930s, 40s, or 50s, when the relevant activities were initiated. The interim years had elevated personal privacy rights

to pedestal heights and sharpened the analysis of Constitutional guarantees against government intrusion. As each passing day made it less likely that communism would absorb the United States, apocalyptic post-war fears receded to focus on more personal concerns. Tolerance for “Big Brother” decreased, and government increasingly was put on a tighter leash.

In this climate, the Church Committee began its well-known probe of United States’ intelligence activity. It inquired, *inter alia*, into the scope of U.S. covert action, its value, its techniques, and its necessity.¹⁶ It questioned whether covert action had become a substitute for decision-making, whether a covert capability should be maintained, and, if so, whether it should remain in the CIA.

The Committee pointedly concluded its analysis with the observation that covert action was *not* included in the CIA charter (the National Security Act of 1947), but conceded that the Act had a savings clause to provide for contingencies. Specifically, the Act empowered the CIA to “perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.”¹⁷ Relying on this clause, the National Security Council did issue a series of directives specifying the CIA’s covert mission.¹⁸ Then came the invasion of South Korea.

As with Germany, World War II’s end left Korea divided into spheres of influence. The Soviets controlled the North and the United States the South. Unlike the European experience, however, both powers withdrew, leaving the Koreans to settle their own quarrels. The result was a conflagration that threatened bipolar stalemate. In this situation, covert operations seemed especially desirable.

With modest beginnings in Korea, covert operations quickly supplied their own justification. By 1953, moderate successes in Korea had prompted the authorization of covert operations in forty-eight countries.¹⁹ As covert capability matured and expanded, it became necessary to create within the CIA the Directorate for Plans (DDP) to absorb and make more efficient the covert action capability.²⁰ This was not merely a matter of efficiency. Organizing the DDP reflected concern for the expansive interest shown by the Soviet Union in the Third World and a felt need to combat that interest.

Covert actions of this era were extensive, varied, and expensive—and wholly Executive in origin. All were undertaken pursuant to the inherent, albeit nebulous, Constitutional authority of the President. There is room, of course, for traditional legislative/executive debate over the Constitutional authority to authorize covert action, but, at least in that period of our history, it

is quite likely that Congress wanted no part of the covert operations tar baby. Senator Leverett Saltonstall explained Congressional inactivity this way:

It is not a question of reluctance on the part of CIA officials to speak to us . . . it is a question of our reluctance . . . to seek information . . . on subjects which I personally, as a member of Congress and as a citizen, would rather not have. . . .²¹

Legislative Initiatives

Not until 1974 did Congress seriously begin to consider a role for itself in covert operations. Up to that time, the only outlet for Congressional concerns over covert action had been the traditional briefing process, but the expansive growth of covert actions soon proved this to be inadequate. According to one of the modern architects of covert action, Clark Clifford, the use of covert action had become a primary official activity which simply had "gotten out of hand."²² Congressional remediation, equally traditional, was legislation.

Frustrated generally by lack of knowledge,²³ and specifically by massive covert operations (and expenditures) in Peru, Congress amended the Foreign Assistance Act to deny expenditures for covert operations unless, a Presidential finding of importance to the national security preceded the operation.²⁴ The Hughes-Ryan Amendment also mandated a reporting requirement and increased the number of committees to be informed of covert actions. It was, to be sure, watershed legislation, but for many it was simply too little too late. In the final analysis, the Amendment was ineffective because it lacked teeth; nevertheless, Congress had thrown down a marker.

Soon thereafter, a long-smoldering conflict between Nicaragua and Honduras erupted. Politically, the United States looked with disfavor on the Nicaraguan regime and adopted a policy of supporting Honduras, or, more accurately, of opposing Nicaragua. U.S. actions in support of Contra guerrillas were both overt and covert, each prompting substantial criticism and venting emotions not unlike those of the Vietnam era. One result was an amendment to the 1983 Defense Appropriations Bill designed to end all aid to the Contras.²⁵ Originally a classified addition to the 1983 Intelligence Authorization Act, the Boland Amendment restricted the use of appropriated funds to overthrow the Sandinista government and limited CIA covert operations to the interdiction of Nicaraguan arms supplies.

Of course, the Boland Amendment accomplished neither goal. Of little more substantive effect than the Hughes-Ryan amendment, yet another spark

was required to rekindle Congressional scrutiny and to prompt an oversight role. Two were quickly forthcoming.

The first catalyst was a second legislative “fix,” dubbed Boland II. This legislation prohibited military or paramilitary support for the Contras by the CIA, DoD, “or any other agency or entity involved in intelligence activities.”²⁶ The net result, according to Bud McFarlane, National Security Advisor, was to transfer the responsibility to the National Security Council staff, because “The President had made it clear that he wanted a job done.”²⁷ The “job,” unfortunately, would include an ineptly conceived plan to interrupt commerce by mining Nicaraguan harbors. It was a covert action that quickly lost its covertness in implementation.

This “covert” action prompted an international outcry,²⁸ as well as adverse international legal opinion.²⁹ Worse, however, was the domestic controversy. The Nicaraguan mining affair resulted in truly vitriolic debates over covert action, with the predictable result of diminishing public acceptance for the tactic.

Kindling even greater consternation, however, was the second spark—the Iran-Contra affair. Executive Order 12,333 vested in the CIA exclusive jurisdiction over “special activities,” a euphemism for covert action, “unless the President determines that another agency is more likely to achieve a particular objective.”³⁰ At the time of drafting, it was generally assumed that the “other agency” would be the Department of Defense, but the vagueness of the language permitted the White House itself, through the NSC staff, to engage directly in a covert action, with disastrous results.³¹

After this disgrace, covert action acquired something of a pariah status. In the wake of “Iran-Contra” and Nicaraguan mining, covert action translated as “dirty tricks,” somehow antithetical to the “American way.” American reluctance to countenance either government secrecy or official failure was reinforced and the undesirable nature of covert action seemingly confirmed.³²

The result of national anguish over these “failures,” not necessarily wise, not necessarily unwise, was new legislation that defined covert action.³³ It was not definition that Congress sought, however, but rather a threefold means of gaining limited procedural control and limited oversight of covert action. First, it sought to gain more timely information from the President concerning Executive intent to implement covert actions. Second, Congress intended to limit the ability of the President to avoid accountability to Congress with “plausible deniability.”³⁴ Finally, Congress decided to opt for a very a limited measure of fiscal control over the broad Executive authority to authorize a covert action.

The implementation of these procedures includes oversight authority vested in the intelligence committees. Importantly, the legislation prohibits authorization of a covert action, or expenditure of appropriated funds for one, unless the President *first* makes a written finding, specifying the action arm of government, that the activity is necessary to support identifiable foreign policy objectives, *and* that it is important to the national security.³⁵ It further requires that the intelligence committees be kept fully and currently informed.³⁶

Covert Action: The Congressional View

A commonly accepted, though noninclusive, list of covert actions and, presumably, of “special activities” is propaganda,³⁷ political action,³⁸ paramilitary operations,³⁹ coup d’etat, and intelligence support.⁴⁰ Whatever it might include, the legislation clearly rejects the definition of “special activities” found in Executive Order 12333.⁴¹ The reason for the rejection, however, is marginally helpful.

The drafters intended to exclude the over-broad concept of foreign policy interests from their definition of “covert action.” The vast reach of foreign policy simply makes it necessary to negate that frame of reference. The clear intent was to create an imprecise but manageable definition that would limit reporting only to a class of activities that the drafters believed should be brought to their attention.

Neither the statute nor the statutory history cogently defines the activities included in the concept of events designed to influence political, economic, or military conditions abroad. That, however, is inherently rational. An excessively rigid statute easily could eliminate altogether any capability for covert action by levying conditions that would make secrecy implausible or by demanding too much prior definition of operations that require flexibility and decision-making in the field.

Recognizing the “easier said than done” nature of their effort, Congress set about to define by exclusion the scope of their interest in covert action. The statute, and most of the legislative history, focus on what covert action is *not*.⁴² To oversimplify, excluded from Congressional oversight are the traditional activities of the military, the intelligence community, diplomats and law enforcement officers. Remaining to be *included*, therefore, are covert paramilitary operations, propaganda, and covert political activities—and whatever the “nontraditional” counterparts to the exempted activities might be.

The statutory history makes clear that “covert action” is intended to include even nonattributable efforts in support of a noncovert activity. The *sine qua non* of a covert action, however, is not secrecy, whether in whole or in part, but rather plausible deniability. If plausible deniability is not viable, or if it is not to be claimed, the activity undertaken simply is not a covert action. Therefore, even “activities 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.”⁴³

Covert Action in Practice

The practical problem, however, is more subtle than mere secrecy and deniability. Chicken and egg issues are a natural concomitant of covert action. Frequently it is impossible logically to differentiate between covert actions and exempted activities. Payments for intelligence acquisition may strengthen the coffers of dissident groups sufficiently to mount a successful revolution. Is the purpose to gain intelligence or to influence events? The two have very different legislative consequences. Support given to local intelligence or police organizations might have the effect of neutralizing hostile intelligence services, but also of gaining valuable intelligence information. Which is the collateral effect? Does the potential for an unintended consequence trigger reporting?⁴⁴

Similarly quixotic is the distinction between forceful and non-forceful intervention. No longer defined merely by territorial integrity, international stability now rests on myriad complex and intangible features. In turn, this means that covert action, with its undercurrent of manipulation, easily can tip the fine balance of national and international perceptions and fears. A covert operation to support paramilitary forces may have the effect of influencing political programs; but just as likely, support for political programs may promote esteem for dissident paramilitary organizations. The natural effect of foreign policy, whether covert or overt, and regardless of the use of force, may be lowering the threshold for what will be perceived as unacceptable intervention.

Despite the risks, the United States’ experience in this century seems to confirm a national self-interest in maintaining a covert action capability. It is as true today as ever in history that a covert action adjunct of foreign policy remains necessary. It is also true, however, that covert operations come with an ever-increasing cost. Inaptly applied, covert action can be a damaging instrument. Unfortunately, covert action and plausible deniability can be seductive.

Secrecy gives the covert enterprise a poignant emphasis. Absent the glare of sunlight and the public impact of overt force, covert action easily can become a beguiling adventure. History indicates that policy makers sometimes find it an irresistible temptation to opt for covert action in lieu, rather than in support, of foreign policy.⁴⁵ Used as a knee-jerk substitute for policy, it is rarely effective; more importantly, the failure of a covert option puts the option at risk for the future. Used properly, covert actions may serve national and even international needs.

The Balance

Therein lies the legislative purpose. Although the precise authority for covert action is debatable, it is clear that both the Congress and the Executive believe it a necessary option. Both presume that legal authority exists to engage in covert action and each presumes to have a Constitutionally authorized, if not precisely defined, role.

The legal authorities for covert action were discussed in the Church Committee's *Final Report*, without closure, and continue to be debated today. In asserting its current role, Congress legislatively created procedural requirements precedent to the Executive authorizing covert action. The laudable intent was to ensure coherent policy, but it is a goal that requires surgical skill. The reasons for this are threefold.

1) *Secrecy*: Although covert action is generally acknowledged to be a valuable tool of statecraft, it is a limited tool, wholly dependent on an acceptable measure of secrecy. A failure of secrecy risks the foreign policy to which the covert action is dedicated, exposes national warts, and, in the extreme, may leave only the distressing options of withdrawal or overt military intervention. Painful experience demonstrates that secrecy is as perishable as it is necessary. The concomitant of secrecy likewise is threefold.

a) *Need to know*: To maintain secrecy, it follows that operational knowledge must be narrowly restricted. Removing knowledge from the effective controls of the Executive, and committing it to the less constrained legislature, puts the enterprise and those involved at additional risk. That does not mean the risk is unreasonable, merely that it exists.⁴⁶

b) *Reasonable scope*: Perhaps more important is the barnyard bromide that one shouldn't bite off more than one can chew. Covert actions must be of a sufficiently limited scope and duration that they can be accomplished within the parameters of secrecy. History demonstrates that overly ambitious undertakings are likely to lose their mantle of secrecy.

c) *Practical benefit*: There is a practical side to secrecy as well. Normally, secrecy will be required to ensure the safety of persons involved. Not infrequently, secrecy is required to preserve the covert option for a repetitive, future use. Sometimes it is even useful to take advantage of an opportunity to cast another in the role of unscrupulous actor.⁴⁷

2) *Plausible deniability*: Unlike clandestine operations, which are intended not to be known at all, covert operations generally are known, but the national actors remain invisible. The reason for this essential feature harkens to concepts of both sovereignty and diplomacy. The nation-state system that grew out of the Peace of Westphalia (1648) hinges on sovereign inviolability, for lack of which international instability historically has been the result. However, nations *do* interfere with the internal affairs of other nations; therefore, a means of preserving stability *despite* interference with sovereign rights is required.

To lessen the risk of war or political polarization of states, the ability of the actor to disclaim responsibility, and of the affected nation to disclaim knowledge, is a necessary charade. Without plausible deniability, nations would be forced into humiliating political retreat and to curtail, or even sever, diplomatic ties in the face of a sovereign affront. At the extremes, even war can result.

3) *Political Judgment*: Finally, the most subjective and least manageable problem associated with shared Constitutional powers is the exercise of shared political judgment.⁴⁸ The real question is not whether both the executive and the legislative branches of government have a role in foreign policy; rather, it is how each may fulfill its perceived role without bringing to fruition the very real problem of interfering with the other.

Legislation is inherently inflexible and slow to be displaced, even when national needs change. Executive decision-making capability can be prompted, for good or bad, by the exigencies of the moment. Cutting Solomon's baby in half, we should expect that legislation affecting covert action, properly considered, would (1) slow impulse, but not impede decision-making, with procedural rather than substantive requirements; (2) promote executive decision-making that takes into account popular will, and, (3) permit the Executive to remain sufficiently flexible to meet changing or novel circumstances. Objectively, the Congressional attempt to control covert action seems to meet these goals.

A Potent Option

By any standard, covert action is less offensive than overt intervention, but it remains politically risky.⁴⁹ Such are the sensitivities of nations that today

even economic or political coercion may be viewed with the same jaundiced eye as the world once viewed physical intervention.⁵⁰ This will certainly be the case as the tensions of the Cold War continue to dissipate. With the world less concerned about global conflict, intrusive behavior that once might have been tolerated as anemic warfare, or justified as a measure of extra-legal justice, will become less acceptable. Nevertheless, just as overt but coercive diplomatic and economic activities will be tolerated, even if condemned, so will covert actions.

There are limits, however, beyond which the American public will not countenance covert action and both the executive and legislative branches of government must know and respect those limits. The bottom line is that the President cannot, without repercussion, engage in a covert action that the people would not approve *were they to know of the facts and circumstances*. The Congress, without covert action capabilities itself, has chosen to serve as the people's overseer.

With what is hopefully the wisdom of Solomon, both the executive and legislative branches publicly acknowledge a willingness to engage in covert action. The world knows, if it cares to know, that the U.S. is willing to interfere in the internal affairs of other sovereigns. It knows also that Congressional involvement negates the probability, if not the possibility, of a rogue executive. Finally, the world also must presume that the American citizenry would, if it could be fully informed, approve the covert actions undertaken.

What makes the United States unique is that we dislike the fundamentals of our own policy. We take national pride in promoting self-determination, public disclosure, and public diplomacy. We dislike secrecy. We dislike covert action.

Still, despite our moralistic foundation, we sidestep Westphalian sovereignty and acknowledge a commitment to secret foreign policy. Even we find it anomalous that we will interfere with the internal affairs of other nations. But ours is, after all, a unique culture.

Notes

1. During the 1950's, when covert action was a growing business, it included "political and economic actions, propaganda, and paramilitary activities, . . . planned and executed . . . to conceal the identity of the sponsor or else to permit the sponsor's plausible denial of the action." See, e.g., U.S. SENATE, I FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94th Cong., 2d Sess. (1976), at 540 (hereinafter FINAL REPORT). The meaning is largely unchanged today.

2. The United States is not without a history of intelligence activities. Indeed, it has a rich history, but a checkered one, not favored with continuity until recently. See STEPHEN KNOTT, SECRET AND SANCTIONED (1996); G.J.A. O'TOOLE, HONORABLE TREACHERY (1991);

Edward Sayle, *The Historical Underpinnings of the U.S. Intelligence Community*, INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE, Spring 1986, at 1.

3. 50 U.S.C. §401 *et seq.*; See also M. LOWENTHAL, *THE CENTRAL INTELLIGENCE AGENCY: ORGANIZATIONAL HISTORY 2* (Congressional Research Service Rep. No. 78-168F, 1978).

4. See, e.g., Exec. Order No. 12,333, 46 Fed. Reg. 59941 ("United States Intelligence Activities," (1981), § 1.11 (b)). That Order, as did its predecessors, publicly assigns to the National Security Agency (NSA) responsibility to establish and operate a unified signals intelligence operation to control, collect, process, and disseminate signals intelligence for national foreign intelligence and counterintelligence; in essence, to read the communications of other nations.

5. See generally M.E. Bowman, *Intelligence and International Law*, INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE, Fall 1995, at 321.

6. See *infra* note 18.

7. See, e.g., 50 U.S.C. § 413b (1996), which expressly limits covert actions to activities which the President finds are necessary to support U.S. foreign policy.

8. By the 1990s, the numbers of nation-States had again dramatically increased, numbering in excess of 180.

9. The Church Committee also defined covert action as "clandestine activity designed to influence foreign governments, events, organizations, or persons in support of U.S. foreign policy conducted in such a way that the involvement of the U.S. Government is not apparent." FINAL REPORT, *supra* note 1, at 131. Today "clandestine" refers more precisely to actions not intended to be known at all or ones ascribed to other actors.

10. See generally JOHN PRADOS, *PRESIDENT'S SECRET WARS* (1986).

11. Plausible deniability became a household phrase with Iran-Contra, but it did not originate then. The term was evolutionary. The Church Committee noted that the term had been used to shield the President from knowledge—placing the onus for covert action on subordinates. Current legislative history clearly shows that Congress intends that the President be unable to use it to avoid accountability to Congress.

12. *But cf.* KNOTT, *supra* note 2. Knott's excellent treatise on covert operations documents early use by presidents, but, as with intelligence, no expertise ever really developed until World War II, and no singular responsibility for covert operations was assigned until even later.

13. HENRY KISSINGER, *WHITE HOUSE YEARS 658-659* (1979).

14. President Harry Truman discovered the essential dilemma early. Covert actions required oversight, but he knew that he could not plausibly deny activities too openly discussed at official councils. His solution, in an era of "containment" foreign policy, was to have covert action worked out of a special panel in which he did not participate. See PRADOS, *supra* note 10, at 79. President Dwight Eisenhower, who criticized the Truman foreign policy of containment, quickly learned that the problems of control versus security and plausible deniability were colossal. He, too, came to rely on a special group to run covert operations. By then, however, covert operations had grown so rapidly that secret oversight was more a wish than a reality. See *id.* at 144-148.

15. 1975 testimony of former Secretary of Defense Clark Clifford, cited in FINAL REPORT, *supra* note 1, at 141.

16. Possibly to capture attention, this scrutiny focused initially on assassination before moving to a concentrated focus on the intelligence community and the FBI. See generally AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, Rep. No. 94-465 (1975). The Committee

denounced ill-advised assassination plots, but not assassination itself. Not until President Jimmy Carter banned the technique by Executive Order did it cease to be a potential arrow in the national security quiver.

17. See FINAL REPORT, *supra* note 1, at 153. The language has been slightly modified by subsequent legislation. It now requires that the Director of the Central Intelligence Agency "perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct." 50 U.S.C. §403-3 (d)(5).

18. E.g., NSC-4-A authorized covert psychological operations and NSC 10/2 authorized covert political and paramilitary operations. Both were directed primarily at the Soviet Union, but, of course, containment policy meant they were geographically unfocused.

19. FINAL REPORT, *supra* note 1, at 145.

20. For a brief description of this process, see John B. Chomeau, *Covert Action's Proper Role in U.S. Policy*, INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE, Fall 1988, at 407, 410-411. See also PRADOS, *supra* note 10, at 110-111.

21. CONG. REC. S. 5292 (daily ed. Apr. 9, 1956) cited in FINAL REPORT, *supra* note 1, at 149.

22. See FINAL REPORT, *supra* note 1, at 153.

23. The Church Committee noted that covert activities mounted into the hundreds in each of the administrations of Presidents Dwight Eisenhower, John Kennedy, and Lyndon Johnson. FINAL REPORT, *supra* note 1, at 56.

24. 22 Pub. L. 93-559, 50 U.S.C. §2422 (1974). President Gerald Ford personally opposed the personal certification requirement in his recommendations on the legislation. See FINAL REPORT, *supra* note 1 at 58, n. 26.

25. Pub. L. No. 97-377, §793, 46 Stat. 1865 (1982).

26. Pub. L. No. 98-473, §8066, 98 Stat. 1935 (1984). See also Pub. L. No. 99-591 (Department of Defense Appropriations Act, 1987) §9037, 100 Stat. 3341-108; §9045, 100 Stat. 3341-109 (1986).

27. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR WITH THE MINORITY VIEW 48-52 (Brinkley and Engelberg eds., 1988). The National Security Council was, and is, a policy-advising body, not an "agency or entity involved in intelligence activities."

28. Compare Christopher C. Joyner & Michael A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621 (1985), with John N. Moore, *The Secret War in Central American and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986).

29. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4.

30. Exec. Order No. 12,333, *supra* note 4, § 1.8(e).

31. See HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 216, H.R. REP. NO. 433, at 3-11 (1987).

32. E.g., a covert operation in support of Afghanistan guerilla resistance to the 1979 Soviet invasion remains a source of criticism. In 1997 the United States was still trying to recover Stinger anti-aircraft missiles originally destined to oppose Soviet aircraft but today potentially in the hands of terrorists.

33. 50 U.S.C. § 413b(3); see note 43 *infra*.

34. See, e.g., MARK RIEBLING, WEDGE: THE SECRET WAR BETWEEN THE FBI AND CIA 151 (1994).

35. 50 U.S.C. §413b(a).

36. *Id.*, §413b(b).

37. The dissemination of nonattributable information or communications designed to affect the conditions under which governments act. The substance may be either true or false, or some combination of each.

38. This might consist of advice, money, or physical assistance, with a purpose to encourage desired activities or dissuade those considered hostile.

39. Secret military assistance, usually in the form of training.

40. E.g., security assistance and intelligence training for the leadership of the "right" faction.

41. Two respected authorities argue that the statute was intended to supersede the definition found in Exec. Order No. 12,333. *See* W. MICHAEL REISMAN and JAMES BAKER, *REGULATING COVERT ACTION 123* (1992). The author respectfully disagrees with the breadth of that statement. Legislative history indicates that the intent was to regulate by procedure only a limited portion of the Order's concept of activities, not to displace legislatively its broad foreign policy scope. Reisman and Baker criticize the legislative definition as under-inclusive and write more approvingly of the definition in the Hughes-Ryan Amendment. Virtually any definition will be subject to criticism as being either under or over-inclusive, but under-inclusion is consistent with the limited scope of oversight that Congress then thought appropriate.

42. Covert action means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, 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 paragraphs (1), (2) or (3) of other United States Government agencies abroad. 50 U.S.C § 413b(3).

43. S. REP. NO. 85, at 42 (1991), *reprinted in* 1991 U.S.C.C.A.N. 193, 236. Some view this language to indicate that Congress meant to treat all Executive actions intended to remain secret as covert action. This writer believes that view is grossly over-inclusive. Like the issue of unintended consequences, this is a subject deserving of a stand-alone analysis.

44. An even more difficult question is whether any Executive action that is intended to remain secret invokes the statute. Despite the statutory language and its legislative history, this is an issue over which reasonable minds can differ and is, more properly, an issue for separate analysis.

45. PRADOS, *supra* note 10, is a thoughtful study of paramilitary covert actions that, in large measure, reflects this concern.

46. The Hughes-Ryan Amendment, for example, required the CIA to report all covert actions to eight congressional committees, four in each house. While it is difficult to argue against the propriety of Congress being in the "know," in practical terms this meant sixty members, plus staff, all newly exposed to facts, the mere intimation of which can cause a failure in foreign policy and, perhaps, the death of the actors.

47. One historian, writing of General Washington's military espionage apparatus, concluded: "It was deemed good propaganda to impute clandestine methods only to the enemy,

thus implying that Britain was unscrupulous and had to use underhanded tactics to succeed.” RHODRI JEFFREYS-JONES, *AMERICAN ESPIONAGE: FROM SECRET SERVICE TO CIA* 9 (1977).

48. In *Little v. Barreme*, 2 Cranch 170 (1805), the Supreme Court limited the foreign policy powers of the President because the Congress had chosen to speak. During a period of hostilities with France, and acting on Presidential orders, the U.S. Navy seized a ship departing a French port. Congress, however, had enacted legislation to halt the intercourse with France which authorized seizure of ships sailing to a French port. Speaking for the Court, Chief Justice Marshall opined that the President’s orders would undoubtedly have been lawful had not Congress legislated differently.

49. To illustrate, two covert actions usually cited as successes were Operations “Ajax” in Iran (placing the Shah in power) and “Success” in Guatemala (displacement of President Arbenz). Both were short-term gains, and neither materially affected the balance of power in the Cold War; yet a failure in either might well have forced those nations into the Soviet camp. The truth is that national interest suffers if a covert action fails, particularly so if it is the more visible paramilitary action. While it is impossible to know the real history of all covert actions, covert paramilitary actions do not have a gleaming record of success.

50. See e.g., Mitrovic, *Non-Intervention in the Internal Affairs of States*, in *PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION* 219 (Milan Sahovic ed., 1972).