THE IMPACT OF THE IRAN-CONTRA MATTER ON CONGRESSIONAL OVERSIGHT OF THE CIA*

*Russell J. Bruemmer***
*Marshall H. Silverberg****

Since the earliest days of the Republic, and even before, the United States has engaged in the clandestine collection of intelligence and in the conduct of covert actions.[1] Most of these efforts have been and are continuing to be conducted successfully. The details of these successes usually cannot be disclosed to the public because the government needs to protect its intelligence sources and methods. Not all intelligence efforts are successful, however, and they are usually the ones that receive public attention.

This phenomena is especially true with respect to covert actions. Less than five percent of the intelligence community's resources are devoted to covert actions. These activities, however, receive a disproportionate level of public attention and debate, especially when they are unsuccessful.

This seminar discussed the legal and policy issues raised by one of the unsuccessful covert action programs—the initiative to sell arms to Iran in exchange for the release of U.S. citizens held hostage in Lebanon. Some of the funds generated in that initiative were later used by certain

---

* This article has been reviewed by the CIA to assist the authors in removing classified, or otherwise privileged information. However, that review neither constitutes CIA authentication of this article as factual nor implies CIA endorsement of the authors' views. This article reflects developments through May 13, 1988.

** General Counsel, Central Intelligence Agency; B.A., Luther College (1974); J.D., University of Michigan (1977).

*** Assistant General Counsel, Central Intelligence Agency; B.A., State University of New York at Binghamton (1980); J.D., L.L.M. (Int'l & Comp. Law), Georgetown University Law Center (1983, 1987).

1. In 1777, General George Washington wrote that "[t]he necessity of procuring good intelligence is apparent and need not be further urged—all that remains for me to add, is, that you keep the whole matter as secret as possible." Letter from General George Washington to Colonel Elias Kayton (July 26,1777), *quoted in* THE INTELLIGENCE COMMUNITY 3 (T. Fain, K. Plant and R. Milloy eds. 1977). At the outset of the Revolutionary War, covert actions were employed to obtain arms in exchange for food and to gain the support of the French and to influence the Canadians.

Even though covert actions have been engaged in for so long, an exact definition of the term "covert action" has not been generally recognized. This article describes several attempts at such a definition.

individuals to support the Nicaraguan Democratic Resistance (the Contras). Other participants have discussed the legal and policy issues raised as a result of actions by members of the National Security Council staff and the implications of those actions on the relationship between the President and the Congress.

This article, in contrast, will focus on the role of the Central Intelligence Agency (CIA) in the Iran-Contra matter. It begins by discussing the background and existing legal and policy requirements that govern the congressional oversight process of the CIA, including covert action. It then summarizes the CIA's limited role in the Iran-Contra matter and concludes that the performance of CIA employees was authorized in accordance with existing law and regulations. The article also describes measures instituted by Director of Central Intelligence (DCI) William H. Webster to improve the CIA's future performance in covert actions. Finally, the article discusses two remaining oversight issues that Congress is in the process of considering.

I. Congressional Oversight of the CIA

A. Background

The Central Intelligence Agency was created by the National Security Act of 1947.[2] It draws its authorities from that Act and the Central Intelligence Agency Act of 1949.[3] These statutes provide for the collection of intelligence. They do not, however, specifically authorize the CIA to conduct covert actions.

In particular, the National Security Act, which establishes the CIA's mission, instructs the CIA to:

> (1) advise the National Security Council (NSC) on matters related to national security;
> (2) make recommendations to the NSC for coordination of intelligence activities of departments and agencies of government;
> (3) correlate and evaluate intelligence and provide for its appropriate dissemination within the government;
> (4) perform for the benefit of existing intelligence agencies such additional services of common concern as the NSC determines can be more efficiently accomplished centrally;
> (5) perform such other functions and duties related to intelligence affecting the national security as the NSC may from time

2. National Security Act of 1947, § 102(d), 50 U.S.C. § 403(d) (1982). For a history of the events leading up to the creation of the CIA, see J. Ranelagh, The Agency: The Rise and Decline of the CIA (1986).

3. Central Intelligence Agency Act, ch. 227, 63 Stat. 208 (1949) (codified as amended at 50 U.S.C. §§ 403a-403j (1982)).

to time direct.[4]

The fifth of these directives—"to perform such other functions and duties related to intelligence affecting the national security as the NSC may from time to time direct"— has long served as the statutory authorization for covert actions. Indeed, in 1947, the CIA's general counsel determined that the CIA could undertake covert actions if directed by the NSC and if Congress appropriated funds for those activities.[5] Since 1976, the CIA has also relied on specific authorization contained in successive Executive orders issued by Presidents Ford, Carter, and Reagan to conduct covert actions.[6]

For many years, congressional oversight of the CIA's covert actions was very informal.[7] In 1956, however, Senator Mike Mansfield proposed that a joint intelligence committee be established. Congress rejected that proposal.[8] In 1966, Senator Eugene McCarthy introduced a resolution that would have authorized the Senate Committee on Foreign Relations to make a complete study of the CIA's influence on foreign policy. That resolution also was rejected.[9]

In the early 1970's, public allegations of CIA wrongdoing focused Congress' attention on the issue of oversight. These allegations of wrongdoing were investigated by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Frank Church, and by the House Select Committee on Intelligence, chaired by Representative Otis Pike. After concluding their investigations, both committees recommended that Congress establish permanent intelligence oversight committees.[10]

---

4. National Security Act of 1947, § 102(d), 50 U.S.C. § 403(d) (1982).

5. *See* CIA Memorandum for the Director of Central Intelligence from then CIA General Counsel Lawrence Houston (Jan. 15, 1962).

6. *See generally* Exec. Order No. 11,905, 3 C.F.R. 91 (1977), *reprinted in* 50 U.S.C. § 401 app. (1976) (Ford); Exec. Order No. 12,036, § 4-212, 3 C.F.R. 134 (1979), *reprinted in* 50 U.S.C. § 401 app. at 1577-85 (Supp. III 1979) (Carter); Exec. Order No. 12,333, § 3.4(h), 3 C.F.R. 215 (1982), *reprinted in* 50 U.S.C. § 401 app. at 44-51 (1982) (Reagan).

7. *See generally* G. TREVERTON, COVERT ACTION: THE LIMITS OF INTERVENTION IN THE POSTWAR WORLD 75-76 (1987) (congressional "review of covert action was informal in the extreme").

8. C. CRABB & P. HOLD, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY 41 (1980).

9. *Id.* at 144.

10. *See generally* Note, *The Extent of Independent Presidential Authority to Conduct Foreign Intelligence Activities*, 72 GEO. L.J. 1855, 1862-63 (1984).

The Church committee concluded, *inter alia*, that its investigation:

> underscores the need for an effective legislative oversight committee which has sufficient power to resolve such fundamental conflicts between secrecy and democracy. As stated previously, it is the Committee's view that effective congressional oversight requires the power to authorize the budgets of the national intelligence agencies. Without such authority, an oversight committee may find itself in possession of important secret information but unable to act effectively to protect the principles, integrity, and reputation of the United States.

In response to these recommendations, the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI) were established.[11] Almost immediately, these two committees became involved in oversight of the intelligence community. This included enactment of the Fiscal Year 1979 Authorization Act for intelligence activities.[12] This Act, for the first time, placed the CIA and the other intelligence agencies under congressional authorization and appropriation procedures.[13]

B. *The Hughes-Ryan Amendment*

Even before the two Intelligence Committees were established, however, Congress addressed the question of oversight of covert actions. Several members of Congress made legislative proposals that would have substantially restricted the CIA's authority to conduct covert actions.[14] Even though these proposals were not enacted, they evidenced considerable congressional opposition to and skepticism about covert actions. The legislation that did pass adopted a compromise position. In December 1974, Congress passed the Hughes-Ryan amendment requiring that CIA covert actions be conducted only after receiving express Presidential authorization. That provision provides that:

FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FOREIGN AND MILITARY INTELLIGENCE, FINAL REPORT, BOOK I, S. REP. No. 755, 94th Cong., 2d Sess. 424 (1976).

11. The Senate Select Committee on Intelligence [hereinafter SSCI] was established by S. Res. 400, 94th Cong., 2d Sess., 122 CONG. REC. 4754 (1976). The resolution directed the committee to "oversee and make continuing studies of the intelligence activities and programs of the United States Government, and to submit to the Senate appropriate proposals for legislation concerning such intelligence activities and programs." *Id.* § 1.

The House of Representatives Permanent Select Committee on Intelligence [hereinafter HPSCI] was established by H.R. Res. 658, 95th Cong., 1st Sess., 123 CONG. REC. 22,949 (1977). The resolution set forth the duties of the HPSCI in nearly identical terms as that contained in S. Res. 400 which established the SSCI.

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

13. Before this law was enacted, "a few members of the House and Senate Armed Services Committees and the Defense Subcommittees of the House and Senate Appropriations Committees had been the only members of the legislative branch exercising legislative oversight over the intelligence agencies. There had been no annual bills authorizing appropriations for the intelligence community, and there was no identifiable appropriation for intelligence. There was only an appropriation concealed in the defense appropriations bill." Oversight and Accountability of the U.S. Intelligence Agencies—An Evaluation, A Report by the Working Group on Intelligence Oversight and Accountability, Task Force on Intelligence and Counterintelligence, American Bar Association (1985).

The two Intelligence Committees were also the leading advocates of the ultimately unsuccessful effort to enact charter legislation for the CIA and the other intelligence agencies. For a discussion of the provisions of the charter legislation and the efforts to enact such legislation, see Note, *Policing Executive Adventurism: Congressional Oversight of Military and Paramilitary Operations*, 19 HARV. J. ON LEGIS. 327, 355-58 (1982).

14. For a discussion of these legislative proposals, see S. BRECKINRIDGE, THE CIA AND THE U.S. INTELLIGENCE SYSTEM 265-266 (1986).

> 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 . . . .[15]

Thus, the Hughes-Ryan amendment requires that a Presidential Finding be obtained for (1) any "operation" that (2) is conducted by the CIA, (3) occurs in a foreign country, and (4) is not intended solely for obtaining necessary intelligence.[16]

The first criterion, that of an "operation," is neither defined by the statute, nor discussed explicitly in the legislative history. Whether a CIA activity is an "operation" that requires, or is covered by, a Presidential Finding is not always apparent. Answering this question, however, is pivotal to analyzing whether a Finding is required.

It is clear that in enacting the Hughes-Ryan amendment, Congress wanted the President to be responsible for activities that are considered to be "covert actions."[17] The Church committee wrote in 1976 that most covert actions "can be grouped into four broad categories: political action, propaganda, paramilitary, and economic action."[18] With these activities in mind, the Church committee stated that the Hughes-Ryan amendment established "a reporting requirement to Congress on *covert action*."[19]

It is much less clear whether the term "operation" covers other types of activities that are not generally considered to be covert actions—

15. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 662, 88 Stat. 1795, 1804 (1974) (codified as amended at 22 U.S.C. § 2422 (1982)).

16. The exception for "obtaining necessary intelligence" was an acknowledgement by Congress that the collection of intelligence by the Agency was separate from its conduct of covert actions. A description of the Agency's intelligence collection activities was stated by Deputy Director of Central Intelligence Robert M. Gates:

> The CIA devotes the overwhelming preponderance of its resources to the collection and analysis of information in order to learn the capabilities and intentions of adversaries of the United States, to forewarn of hostile actions against this country from whatever quarter, and to forecast and monitor political, economic and military developments worldwide that have potential to affect American interests or security. The CIA also endeavors to determine and respond to policymakers longer-range requirements for information and analysis.

Gates, *The CIA and American Foreign Policy,* FOREIGN AFFAIRS 215, 216 (1988). Gates also noted that "over 95 percent of the national intelligence budget is devoted to the collection and anaylsis of information. Only about three percent of the CIA's people are involved in covert action." *Id.*

17. *See* 120 CONG. REC. 33,488 (daily ed. Oct. 2, 1974) (statement of Sen. Hughes); H.R. REP. No. 1471, 93d Cong., 2d Sess. 44 (1974).

18. FOREIGN AND MILITARY INTELLIGENCE, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK I, S. REP. No. 755, 94th Cong., 2d Sess. 141 n.2 (1976).

19. *Id.* at 151.

for example, support to an overt activity of another U.S. government agency. There are no references in the Church committee report, or in any other contemporaneous document that has been identified, that suggest Congress intended the term "operation" as used in the Hughes-Ryan amendment to reach every incidental or routine CIA activity abroad that did not involve the direct collection of intelligence.[20] Indeed, the requirement that the President personally find the operation important to national security suggests that the term should not be interpreted to require Findings for relatively routine activities.

Relevant Executive orders in effect following the enactment of the Hughes-Ryan amendment have addressed the CIA's authority to conduct covert actions, which are referred to as "special activities" in the Executive orders. The Executive orders have required Presidential Findings only when the covert actions are in support of "national foreign policy objectives."[21] Routine CIA activities such as logistical support to other governmental agencies generally cannot be considered substantial enough to be deemed to be in support of "national foreign policy objectives."[22]

The two most recent relevant Executive orders also explicitly recognize that "diplomatic activities" and certain "support functions" are not "special activities."[23] Similarly, the Executive orders appear to place "counterintelligence activities" outside the ambit of "special activities" by containing provisions for counterintelligence separate from the requirements for special activities.[24]

The CIA has relied on the "plain meaning" and legislative history of the Hughes-Ryan amendment and these Executive orders to determine that certain CIA activities other than intelligence collection do not require a Presidential Finding. The activities have included counterintelligence activities and certain covert support to other U.S. government agencies such as the Department of State or the Department of Defense.

20. *See infra* note 86 and accompanying text.

21. Exec. Order No. 11,905, § 2(c), 3 C.F.R. 91 (1977), *reprinted in* 50 U.S.C. § 401 app. (1976); Exec. Order No. 12,036, § 4-212, 3 C.F.R. 134 (1979), *reprinted in* 50 U.S.C. § 401 app. at 1577-85 (Supp. III 1979); Exec. Order No. 12,333, § 3.4(h), 3 C.F.R. 215 (1982), *reprinted in* 50 U.S.C. § 401 app. at 44-51 (1982).

22. It must be acknowledged that under certain circumstances, logistical or routine support could rise to a level that it would be considered to be an operation in support of a national foreign policy objective. At that point, the activity would require a Presidential Finding under the Hughes-Ryan amendment.

23. Exec. Order No. 12,036, § 4-212, 3 C.F.R. 134 (1979), *reprinted in* 50 U.S.C. § 401 app. at 1576 (Supp. III 1979); Exec. Order No. 12,333, § 3.4(h), 3 C.F.R. 215 (1982), *reprinted in* 50 U.S.C. § 401 app. at 44 (1982).

24. Exec. Order No. 11,905, §§ 4(b)(4), 2(a)(2), 3 C.F.R. 96 (1982), *reprinted in* 50 U.S.C. § 401 app. at 44 (1982); Exec. Order No. 12,036, §§ 1-804, 4-202, 3 C.F.R. 134 (1979), *reprinted in* 50 U.S.C. § 401 app. at 1576 (Supp. III 1979); Exec. Order No. 12,333, §§ 3.4(a), 1.8 (c), 3 C.F.R. 215 (1982), *reprinted in* 50 U.S.C. § 401 app. at 44 (1982).

This position is supported by interpretations of the Department of Justice.[25] This process, and conclusions reached thereunder, have also been reported to the Intelligence Committees.[26]

C. *Reporting to Congress*

The Hughes-Ryan amendment made the President accountable for all covert actions. The Amendment, as first enacted, also required that covert actions for which a Presidential Finding is obtained be reported in timely fashion to the appropriate committees of the Congress. In total, there were eight congressional committees that had to be notified, involving over two hundred members and aides.[27] In order to streamline the reporting process, a new law, the Intelligence Oversight Act of 1980,[28] which amended the National Security Act of 1947 by adding section 501, was enacted. Section 501 provides that:

---

25. Mary C. Lawton, counsel for intelligence policy and review, U.S. Department of Justice, stated in a memorandum sent to the Assistant to the President for National Security Affairs (July 18, 1984): "Members [of Congress] acknowledged in debate that the language chosen was imprecise but made clear that the thrust of the Amendment was 'covert action.' " The Lawton memorandum was based, in part, on an Oct. 27, 1977 Justice Department opinion written by John M. Harmon, Assistant Attorney General, Office of Legal Counsel, which suggested that the term "operation" referred only to covert actions and that Congress could not have meant to involve the President in the day-to-day operational details of the CIA infrastructure." More recently, the Attorney General told the Tower Commission that a Presidential Finding is not "required for every single foreign operation that is not strictly intended solely for obtaining necessary intelligence," or for "every form of CIA assistance to another agency, no matter how peripheral or indirect." Letter from Edwin Meese III, Attorney General of the United States to John Tower, chairman, President's Special Review Board of the United States (Feb. 18, 1987), *reprinted in* REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, JOHN TOWER, CHAIRMAN (Feb. 26, 1987).

26. For example, Mitchell Rogovin, special counsel to the DCI, stated in a letter to A. Searle Field, staff director for the House Select Committee on Intelligence (the predecessor to the HPSCI) (Jan. 6, 1976):

> The legislative history regarding these conditions is sparse. For example, it does not provide any guidance as to the meaning of the term "operation." Nor, does it specify which activities are to be treated as intended solely for obtaining necessary intelligence.
>
> Nevertheless, it has been the Agency's position that Section 662 applies to 'covert actions' in foreign countries including paramilitary activities and activities intended to influence events in such countries. These activities would not include the gathering of intelligence, related management and support activities, liaison activities with cooperating intelligence agencies, intelligence briefings, or dissemination of foreign intelligence information to United States officials abroad.

Id. (Other activities for which no Finding has been obtained have been briefed to the Congress pursuant to the Intelligence Oversight Act.).

27. *See* C. MEYER, FACING REALITY: FROM WORLD FEDERALISM TO THE CIA 384 (1980).

28. The Intelligence Oversight Act of 1980 was passed as Title V of the Intelligence Authorization Act for FY 1981, Pub. L. No. 96-450, § 501, 94 Stat. 1981 (1980) (codified as amended in 50 U.S.C. § 413 (1982) amending the National Security Act of 1947, 50 U.S.C. § 401 (1982)).

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in the intelligence activities shall—
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, *including any significant anticipated intelligence activity* . . . .[29]

Simultaneously, the Hughes-Ryan amendment was amended to reduce the reporting requirements only to the Intelligence Committees, and to provide that covert actions are considered significant *anticipated* intelligence activities for purposes of section 501. The characterization of covert actions as significant anticipated intelligence activities imposes a duty upon the DCI to report such programs to the Intelligence Committees in advance of implementation. As stated in the Senate report on the bill that became section 501, "[t]he requirement to 'fully and currently inform' the oversight committees of 'any significant anticipated intelligence activity' is intended to mean that the committees shall be informed at the time of the Presidential Finding that authorizes initiation of such activity."[30]

This prior notice requirement is subject to two exceptions. First, section 501 provides that notice may be limited to the chairmen and ranking minority members of the Intelligence Committees, the Speaker and the minority leader of the House of Representatives, and the majority and minority leaders of the Senate "if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States."[31] This provision allows the executive branch to limit disclosure in very sensitive cases to a greater extent than would be the case in more routine covert actions, which must be reported to the full Intelligence Committees. As a practical matter, this provision has not been used by the executive branch to limit prior notice.

---

29. 50 U.S.C. § 413a(1) (1982) (emphasis added).
30. S. REP. No. 730, 96th Cong., 2d Sess. 9 (1980) [hereinafter SSCI Report].
31. Intelligence Oversight Act of 1980, § 501(a)(1)(B), 50 U.S.C. § 413(a)(1)(B) (1982).

The second exception to the prior notice requirement resulted from another compromise. During a mark-up session on the bill that was to become section 501, then CIA General Counsel Daniel Silver explained the Administration's understanding of how the preambular language limited the prior notice requirement.

> My reading, sir, is that the administration would be obligated to tell the oversight committees about all significant anticipated intelligence activities, both collection activities and so-called covert actions, subject to the two principles enunciated in the preambular language, namely, the reservation of the President's constitutional authority in exceptional cases, and the reference to a due regard to the protection of intelligence sources and methods.

Mr. Silver continued:

> In what I would expect to be highly unusual cases, the President may act in the exercise of his constitutional authority or in rare circumstances, under the second preambular phrase, and not give prior notice to anyone in the Congress.[32]

A number of members disagreed with the Administration's claim. Congress asserted that the first preambular phrase quoted above merely recognized that both branches have constitutional authorities and duties that cannot be altered by statute.[33] According to these members, section 501 "[left] the Constitution as it [found] it,"[34] and did not attempt to expand, contract, or define the applicable authorities.[35]

Congress, however, also recognized that the executive branch asserted a constitutional authority to withhold prior notice of covert operations, and apparently, chose not to do battle with the President. Instead, it added section 501(b) to the new oversight provisions. That section reads:

> The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.[36]

The SSCI report explains that this provision reflects an "understanding"

---

32. Mr. Silver's remarks occurred in a discussion with Senator Chafee on May 6, 1980 during a mark-up of S. 2284.

33. *E.g.*, 126 CONG. REC. S13,124 (daily ed. June 3, 1980) (remarks of Senators Javitz and Huddleston), 126 CONG. REC. H28,392 (daily ed. Sept. 30, 1980) (remarks of Rep. Boland).

34. 126 CONG. REC. H28,392 (daily ed. Sept. 30, 1980) (remarks of Rep. Boland).

35. SSCI Report, *supra* note 30, at 6.

36. Intelligence Oversight Act of 1980, § 501(b), 50 U.S.C. § 413(b) (1982).

between the SSCI and the executive branch "that in rare extraordinary circumstances if the President withholds prior notice of covert operations, he is obliged to inform the two oversight committees in a timely fashion of the action and the reasons for withholding prior notice."[37]

II. THE CIA'S ROLE IN THE IRAN-CONTRA AFFAIR

A. *Background*

It is now common knowledge that during the period from August 1985 through October 1986, the U.S. Government sold weapons to the government of Iran.[38] The CIA assisted in these sales under Findings signed by the President in December 1985 and January 1986. Pursuant to these Findings, the President instructed the CIA not to notify Congress of these activities until specifically directed otherwise, notification that would otherwise have been made pursuant to section 501 of the Intelligence Oversight Act of 1980.

In November 1986, the existence of these activities became publicly known and Congress was notified. On November 21, 1986, the President instructed the Attorney General to conduct an inquiry for the purpose of compiling a "complete factual record" with respect to the Iran arms sale. On November 25, 1986, the Attorney General publicly announced his inquiry had produced evidence that some of the monies generated in the course of these arms sales had been made available to support the Contras at a time when restrictions on U.S. Government assistance to the Contras had been imposed by Congress.

As a result of these revelations, several official inquiries were initiated into these activities. These included inquiries by the President's Special Review Board (the Tower Commission), the Senate Select Committee on Intelligence (SSCI), the House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition (together, the Iran-Contra committees), and an independent counsel appointed pursuant to the Ethics in Government Act.[39] In addition, the

37. SSCI Report, *supra* note 30, at 12. Congress apparently rejected the assertion that due regard for the protection of sources and methods could justify failure to provide prior notice. "A claim of constitutional authority is the sole grounds that may be asserted for withholding prior notice of a covert operation." 126 CONG. REC. S13,125 (daily ed. June 3, 1980) (remarks of Sen. Huddleston). Consistent with the second preambular clause, however, it was recognized that "in extremely rare circumstances a need to preserve essential secrecy may result in a decision not to impart certain sensitive aspects of operations or collection programs to the oversight committees in order to protect extremely sensitive sources and methods." SSCI Report, *supra* note 30, at 6.

38. That initiative is more fully described in the Tower Commission Report and the Iran-Contra Report. This summary focuses only on CIA activities in support of the initiative.

39. 28 U.S.C. § 592 (1982).

CIA's inspector general conducted a series of inquiries into these activities. The SSCI, the Tower Commission, and the Iran-Contra committees publicly released the results of their inquiries.[40]

On September 1, 1987, Director of Central Intelligence (DCI), William H. Webster, appointed a special counsel to review the results of the inquiries.[41] The special counsel was instructed to review the available records of, and to provide his professional assessment of the relevant information produced by, the inquiries that had previously been conducted. The special counsel's report focused on the role of the CIA and of current CIA employees in the matters discussed in the previous reports. The remainder of this section describes the conclusions of that report.

B. The Iranian Initiative

The CIA's first involvement in the Iranian initiative occurred in the fall of 1985 when the NSC staff requested the CIA to increase intelligence collection on certain Iranian targets. This assistance, which was conducted with the authorization of then DCI William J. Casey, continued through the period of the Iranian initiative. This intelligence assistance was consistent with all laws and CIA policies governing such activities.

In November 1985, CIA officers assisted in arranging for a CIA proprietary to transport HAWK missiles from Israel to Iran, again at the request of the NSC staff.[42] CIA assistance in connection with this flight was in violation of the CIA regulation that requires DCI approval in advance of assistance to the White House staff.[43] Moreover, this assistance should not have been undertaken in the absence of a Presidential

40. REPORT OF THE SELECT COMMITTEE ON INTELLIGENCE, S. REP. No. 7, 100th Cong., 1st Sess. (GPO Feb. 2, 1987). REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD, JOHN TOWER, CHAIRMAN (Washington: GPO Feb. 26, 1987). REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. No. 433, 100th Cong., 1st Sess. (GPO Nov. 1987); S. REP. No. 216, 100th Cong., 1st Sess. (GPO Nov. 1987) [hereinafter the Iran-Contra Report].

41. One of the authors of this article, Mr. Bruemmer, served as the Special Counsel appointed by Director Webster, and the other author, Mr. Silverberg, was a member of Mr. Bruemmer's staff.

42. Iran-Contra Report, *supra* note 40, at 184-85.

43. At the time of these activities, that regulation read as follows:

> SUPPORT TO THE WHITE HOUSE. Any support requested by or extended to the White House Office, excluding the production and dissemination of foreign intelligence, must have the approval of the Director.

This CIA regulation has since been revised. The revised regulation states more clearly that DCI approval is required for activities of the type engaged in here. The revision reads as follows:

> ASSISTANCE TO THE WHITE HOUSE. Any assistance requested by or extended to the White House must be approved in advance by the DCI, excluding the production

Finding.[44] When apprised of these activities, but not of the cargo on this flight, then Deputy Director of Central Intelligence John N. McMahon ordered that no additional flights be undertaken until a Presidential Finding was signed.[45]

Lawyers in the CIA's General Counsel's Office immediately began drafting a Finding. The Finding was sent to the Assistant to the President for National Securities Affairs (the National Security Advisor) the next day. Although no one in the CIA saw the signed Finding, there is considerable evidence that this first Finding was signed by the President on December 5, 1985.[46] Two subsequent Findings were signed by the President on January 6, 1986, and January 17, 1986. All of these Findings provided that Congress should not be notified of the existence of the initiative.[47]

After the Presidential Findings were signed, the CIA provided logistical and other assistance in connection with the transfer of TOW missiles and HAWK missile spare parts to Iran. The CIA also provided assistance in connection with a number of meetings between U.S. Government officials and representatives of the Government of Iran.[48] These activities were authorized by the Findings and were consistent with applicable law and CIA policy.

C. *The Diversion of Funds to the Contras*

The Iran-Contra Report concludes that funds generated by the arms sales to Iran were diverted to support the Contras in Nicaragua at a time when U.S. Government assistance to the Contras was restricted. CIA

> and dissemination of foreign intelligence, except that the Foreign Broadcast Information Service (FBIS) may provide the White House information obtained from the monitoring of foreign public media and honor any requests pertaining to the collection of foreign intelligence information from foreign public media. For the purposes of this provision, the White House includes the National Security Council Staff and those positions listed in the United States Government Manual under the White House office.

CIA Headquarter Regulation 7-1a(6)(a)(4).

44. The CIA's initial activity consisted only of communications and flight clearance assistance. This activity may or may not have required a Finding under the Hughes-Ryan amendment because it is not clear that this activity rose to the level of an "operation in a foreign country." Later, however, a CIA proprietary was used to transport HAWK missiles to Iran for the purpose of securing the release of American hostages. A Finding should have been obtained for this activity. Especially when considered in conjunction with the active assistance being rendered by CIA stations, this activity cannot be properly characterized as a straight commercial transaction by a proprietary. The goal was to assist an NSC operation to free hostages and was intended to influence the policy and actions of a foreign government without public disclosure of the U.S. Government's role.

45. Iran-Contra Report, *supra* note 40, at 185.

46. Former National Security Advisor John Poindexter testified that he destroyed the only copy of the signed Finding on November 21, 1986. *See Id.* at 195.

47. *Id.* at 202-03, 205, 208-09.

48. *Id.* at 218-19.

officers heard references about a possible diversion of funds to the Contras as early as January 1986.[49] As described in the Iran-Contra Report, these officers thought that the references were "far-fetched" and "trivial," and thus did not report them to more senior officers.[50]

During the summer of 1986, the officers were also aware that the Iranians were complaining about being overcharged for the missiles.[51] These complaints raised concerns within the CIA that the Iranians might cancel the operation, but were insufficient to conclude that a diversion was ongoing.[52]

In the fall of 1986, further information suggesting that the possible existence of a diversion, but not the involvement of U.S. Government personnel, came to the attention of the CIA officers working on the Iranian initiative.[53] This information was reviewed by the CIA's then general counsel and was conveyed to then National Security Advisor John Poindexter.[54] The evidence was not, however, conclusive that a diversion had occurred until the Attorney General's announcement on November 25, 1986.[55]

D. Support to the Contras

The CIA was the agency principally responsible for U.S. Government assistance to the Contras. Since the early 1980's, Congress has restricted that assistance in some manner. The restrictions varied significantly over time and often presented complex questions of legal interpretation that had to be resolved at each stage. A short summary of that legislation demonstrates that complexity.[56]

The first piece of legislation prohibited the CIA and the Department of Defense from using any appropriated funds for the purpose of overthrowing the Nicaraguan Government.[57] That restriction was soon changed by Congress to allow up to twenty-four million dollars to be used during fiscal year 1984 "for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua."[58]

---

49. *Id.* at 273.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 273-74.
54. *Id.* at 274.
55. *Id.*
56. For a more complete discussion of the various legal restrictions, see *id.* at 32-41.
57. Department of Defense Appropriations Act of 1983, Pub. L. No. 97-377, § 793, *as incorporated in* the Continuing Appropriations Resolution for Fiscal Year 1983, Pub. L. No. 97-377, 96 Stat. 1830, 1865 (1982).
58. *Id*; Department of Defense Appropriations Act, Pub. L. No. 98-212, § 775, 97 Stat.

This limited appropriation was not renewed the following fiscal year and Congress enacted a complete prohibition on the use of CIA funds to support military or paramilitary operations in Nicaragua.[59] The prohibition was later clarified in another statute as not prohibiting the "United States Government from exchanging information with the Nicaraguan democratic resistance . . . ."[60] This clarification allowed intelligence exchanges between the CIA and the Contras.

Congress continued further to modify the complete prohibition by authorizing the expenditure of twenty-seven million dollars in humanitarian aid to the Contras on August 8, 1985.[61] Such assistance, however, could not be provided by the CIA or the Department of Defense; instead, the aid program was administered by the Department of State. Then, on December 4, 1985, Congress authorized the CIA to provide "advice, including intelligence and counterintelligence information," and "communications training" to the Contras,[62] if the assistance did not amount to "participation in the planning or execution of military or paramilitary operations in Nicaragua . . . or to participation in logistics activities integral to such operations."[63]

All of these restrictions were removed on October 18, 1986, when Congress authorized the provision of 100 million dollars in support to

---

1421, 1452 (1983); Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983).

59. There was a funding hiatus between September 30, 1984 and October 3, 1984. On October 3, 1984, Congress passed the First Continuing Appropriations Resolution for Fiscal Year 1985, Pub. L. No. 98-441, § 102(c), 98 Stat. 1699, 1700 (1984), containing the prohibition ultimately found in section 8806(a) of the Department of Defense Appropriations Act of 1985, Pub. L. No. 98-473, 98 Stat. 1873, 1935 (1984), and section 801 of the Intelligence Authorization Act for Fiscal Year 1985, Pub. L. No. 98-618, 98 Stat. 3298, 3304 (1984). Subsequent resolutions continued the prohibition until Congress passed the Department of Defense Appropriations Act of 1985, *as incorporated in* the Continuing Appropriations Resolution for Fiscal Year 1985, Pub. L. No. 98-473, 98 Stat. 1837, 1935 (1984), on October 12, 1984, and the Intelligence Authorization Act for Fiscal Year 1985, Pub. L. No. 98-618, 98 Stat. 3298, 3304 (1984), on November 8, 1984.

60. Supplemental Appropriations Act of 1985, Pub. L. No. 99-88, § 102(b), 99 Stat. 293, 325 (1985).

61. International Security and Development Act of 1985, Pub. L. No. 99-83, § 722(g), 99 Stat. 190, 254 (1985). "Humanitarian assistance" was defined by the Act as the provision of "food, clothing, medicine, and other humanitarian assistance, [but] not . . . the provision of weapons, weapons system, ammunition, or other equipment, vehicles or material which can be used to inflict serious bodily harm or death." *Id.*

62. Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, § 105(a), 99 Stat. 1003 (1985). A series of Continuing Appropriations Resolutions continued the 1985 fiscal year restrictions beyond fiscal year 1985 until Congress passed the Intelligence Authorization Act for Fiscal Year 1986 on December 4, 1985.

63. JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, CONF. REP. No. 373, 99th Cong., 1st sess. 16 (1985).

the Contras during fiscal year 1987.[64] Congress specified that thirty million dollars of this amount was to be used for humanitarian aid only, but left the remaining seventy million dollars available for other uses. The 100 million dollars became available in three stages.[65] That authority expired on February 29, 1988. Thus, there was another period in which support to the military and paramilitary operations of the Contras was prohibited.

Even the 100 million dollars in support, however, contained restrictions that the CIA was required to follow. First, U.S. military and civilian personnel were prohibited from entering Nicaragua "to provide military advice, training, or logistical support to paramilitary groups."[66] Second, the provision barred aid to any group with members found to have engaged in "gross violations of internationally agreed human rights . . . or drug smuggling, or significant misuse of public or private funds."[67] Finally, the "Mrazek amendment" to the Act prohibited U.S. military personnel or executive branch employees, with certain exceptions, from providing any training or other service" to the Contras "within those land areas of Honduras and Costa Rica which are within twenty miles of the border with Nicaragua."[68]

Despite the legal complexities caused by these seven different pieces of legislation dealing with Contra assistance during a five-year period, CIA headquarters guidance with respect to these statutes was determined to be generally clear and often more conservative than required by the applicable statutes. CIA field stations were generally notified of the statutory restrictions in a timely and accurate manner.

Between September 1985 and February 1987, however, two CIA

---

64. This provision was contained in § 101(k) of the Continuing Appropriations Resolution for Fiscal Year 1987, Pub. L. No. 99-500; *see* Title II, § 206(a)(2); *see also* Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 106, 100 Stat. 3191.

65. Forty million dollars was to be made available upon enactment. Twenty million dollars was to be made after October 15, 1986, and 15 days after the President made a required report to Congress; and $40 million after February 15, 1987, and 15 days after the President made a second required report to Congress. Until February 15, 1987, however, the funds could be used only for (1) humanitarian assistance; (2) logistics advice and assistance; (3) support for democratic political and diplomatic activities; (4) training, services, equipment and supplies for radio communications, collection and utilization of intelligence, logistics, and small-unit skills, tactics, and operations; and (5) equipment and supplies for air defense.

66. This restriction was contained in section 203(e) in Title II of the Fiscal Year 1987 Military Construction Appropriations Act, which was ultimately passed on Oct. 30, 1986 as part of the Fiscal Year 1987 Continuing Resolution, Pub. L. No. 99-591, 100 Stat. 3341-297.

67. *Id.* § 204(b), 100 Stat. 3341-298.

68. *Id.* § 216(a), 100 Stat. 3341-307. The Mrazek amendment, named after its sponsor, Congressman Robert J. Mrazek (D-NY), was enacted in order to prevent U.S. troops who were training the Nicaraguan resistance from becoming a "tripwire" for large-scale U.S. military intervention in Nicaragua. *See* CONG. REC. H4296 (daily ed. June 25, 1986) (statement of Rep. Mrazek).

field managers engaged in activities that violated CIA policy or legal guidance restricting assistance to the Contras.[69] As described in the Iran-Contra Report, their improper activities included transportation, and other logistical assistance undertaken at a time when such assistance was prohibited.[70] One CIA field manager authorized his subordinates to engage in these improper activities.[71] The other field manager apparently undertook these activities on his own.[72]

The evidence in the record demonstrates that the overwhelming majority of CIA employees involved in the Contra program performed in a lawful and proper manner. Activities by a few other field officers that violated the statutory restrictions appear to have been done under instructions from or with the acquiescence of one of these field managers. Moreover, CIA Headquarters personnel were not aware that these activities were taking place.

III. Remedial Actions

On December 16, 1987, DCI Webster took disciplinary action against seven CIA employees who acted contrary to law or policy in the Iran-Contra matter.[73] As importantly, he also acted to strengthen the internal procedures of covert action review, the investigative capabilities of the CIA's Office of Inspector General were strengthened, and guidelines governing CIA testimony or briefings to members of Congress or their staffs were drafted and adopted. In addition, the President had earlier signed a National Security Decision Directive (NSDD) that clarified the review and reporting of covert actions. This section describes those remedial measures.

---

69. Iran-Contra Report, *supra* note 40, at 651. (Additional views of Senators David L. Boren and William S. Cohen).

70. *Id.*

71. *Id.*

72. *Id.*

73. DCI Webster later described the basis for these disciplinary actions as follows:

> It was apparent to me that as an institution we had performed well—that there was no systemic disrespect for authority, rules, and guidance. But it was also apparent that there had been some violations of CIA rules. I ordered disciplinary action in seven cases. In each case, discipline was based upon serious violation of existing regulations and instructions and/or failing to give candid responses to our inspector general and to committees of Congress charged by law with oversight of our work. No one was disciplined for carrying out instructions of a superior officer. I focused upon violations of clearly given instructions.

Speech by DCI William H. Webster before the Central Intelligence Retirees Association (Feb. 8, 1988).

A. Reporting to Congress

On October 15, 1987, the President signed NSDD 286 on the Approval and Review of Special Activities. NSDD 286 covers all "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 and acknowledged publicly."[74] The phrase does not include diplomatic activities or activities undertaken for the collection or production of intelligence.

The NSDD was issued after discussions between the White House and congressional leadership. It addresses congressional concerns over the manner in which the Findings with respect to the arms sales to Iran were initiated and implemented. As set forth in the unclassified extract:

> These procedures are designed, *inter alia* (1) to ensure that all special activities conducted by, or at the direction of, the United States are consistent with national defense and foreign policies and applicable law; (2) to provide standards ensuring the secrecy of such activities even when the results become publicly known or the activities themselves are the subject of unauthorized disclosure; and (3) to implement section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), concerning notification to Congress of such activities.[75]

NSDD 286 declares that the "National Security Advisor and the NSC staff . . . shall not undertake the conduct of special activities." Moreover, it reaffirms the principle set forth in Executive Order No. 12,333 that the CIA will generally be the responsible agency for the conduct of a special activity. Thus, under NSDD 286, the CIA should not be placed in the position of merely supporting an operation run by an NSC staff member.

NSDD 286 requires that no special activity may take place in the absence of a Presidential Finding that the activity is "important to the national security of the United States." NSDD 286 also reiterates that "Presidential Findings shall be obtained with respect to all CIA activities abroad, other than those activities that are intended solely for obtaining necessary intelligence" as required by the Hughes-Ryan amendment. Except in the "rarest of circumstances," a Finding must be in writing

74. National Security Decision Directive (NSDD) 286: Declassification of Excerpts, National Security Council, December 16, 1987. This definition is identical to the definition of "special activities" set forth in Exec. Order No. 12,333, § 3.4h, 3 C.F.R. 134 (1982), *reprinted in* 50 U.S.C. § 401 app. at 44 (1982). The complete text of NSDD 286 is classified. The portions and quotations set forth in this article are excerpted from a declassified extract released by the National Security Council on December 15, 1987.

75. Declassification of Excerpts, National Security Council (Dec. 15, 1987).

and a Finding, according to NSDD 286, "may not retroactively authorize or sanction a special activity."

A proposed Finding is reviewed by the National Security Planning Group (NSPG), a committee of the National Security Council, before it is submitted to the President. Each signed Finding and Memorandum of Notification (which, in effect, may be an amendment to a Finding), together with the National Security Advisor's memorandum recording the President's decision, is sent to the DCI, every other member of the NSPG, and the head of any other executive department or entity instructed to engage in a special activity. In addition, the NSPG reviews each approved special activity at least annually and submits a recommendation for its continuation to the President. Unless the President approves continuation, the special activity is cancelled.

NSDD 286 also states that the DCI or the head of any other executive branch entity instructed to undertake a special activity shall notify Congress prior to the initiation of the special activity. The NSDD establishes an expectation of notice prior to or within two days of initiation. In "extraordinary circumstances affecting the vital interests of the United States," the notification may be limited to the leadership of each house of Congress and their respective intelligence committees.

The only exception to this prior notification is in "rare, extraordinary circumstances" in which "the President otherwise directs in writing pursuant to his constitutional authorities and duties." The basis for any decision to delay notice must be memorialized in writing, and such a decision must be reconsidered by the NSPG at least once every ten days. As described by DCI Webster, this reconsideration every ten days "will ensure that where a delay in notification is deemed necessary, the rationale for that decision will be continually reassessed to ensure that the delay will be kept to the absolute minimum length of time."[76]

B. *Strengthened Internal Procedures*

Since the mid-1970's, CIA policy has required that assistance provided to White House staff be approved by the DCI or Deputy Director of Central Intelligence (DDCI). During the Iranian initiative, this policy was not followed in one instance in which a CIA officer provided assistance to the NSC staff. The policy guidance has been revised since then to clarify the types of assistance that require such approvals.[77]

The Iran-Contra experience has also enhanced the importance of

76. Statement on S. 1721 by DCI William H. Webster before the Senate Select Committee on Intelligence (Nov. 20, 1987).

77. *See supra* note 43.

internal CIA review of proposed covert actions. A senior level policy group reviews all Presidential Findings that the directorate of operations proposes the Director of Central Intelligence forward to the National Security Council. Review group members identify potential problems and bring key issues into focus for resolution by the DCI. The intent is to ensure that each Finding reflects the best judgment of the DCI's senior advisers, including the CIA's general counsel and other senior managers from outside the operations directorate, in order to avoid potentially troublesome legal and policy issues. Once approved by this review group, the Finding is forwarded to the Deputy Director of Central Intelligence, and then to the DCI.

Although there was a similar senior CIA group in existence before the Iran-Contra matter, its review was not as formal as the review group now conducts. The review group also now conducts a formalized semi-annual review of each covert action program. Because of the manner in which the Iranian initiative was undertaken, it was not subjected to the internal CIA review process, either initially or while it was ongoing.[78]

C. *Office of Inspector General*

Another strengthened aspect of the internal CIA oversight involves investigations conducted by the CIA's Office of Inspector General. The Iran-Contra Report concluded that this office "appears not to have had the manpower, resources, or tenacity to acquire key facts uncovered by other investigations."[79] In fact, the Office of the Inspector General performed well in investigating the CIA's role in the Iran arms sale. Its Findings and conclusions were used by all investigations that came thereafter. Its investigation into the Contra side of this matter, however, was not as successful, in part because a few CIA employees were deceptive or not forthcoming with relevant information when interviewed.

DCI Webster has strengthened the resources, responsibilities, and duties of the Inspector General's Office in a way that will improve its investigative capabilities. Initially, he has taken steps to enhance the authority, status, and image of the inspector general, including ensuring that the position is recognized as being equivalent in rank to a deputy director, subordinate only to the DCI and DDCI.

Other measures include ensuring that the inspector general's staff is

78. The general counsel was not involved in the semi-annual review process before the Iranian initiative occurred, but he has always been involved with the initial review and approval of Presidential Findings. He is now included in that process. His inclusion in the process emphasizes that legal concerns are considered beyond the initial approval stage of a covert action.

79. Iran-Contra Report, *supra* note 40, at 425.

drawn from a cross-section of the highest-rated officers in the CIA. Furthermore, assignment to the inspector general's staff will be an important career development assignment en route to more senior positions in the CIA. Finally, the size of the inspector general's investigative staff will be increased, and the training and support provided to that staff will be improved. Thus, the CIA's inspector general should be better equipped to investigate any future allegations of wrongdoing that may arise.

D. Congressional Testimony

Both the Iran-Contra Report and the Special Counsel's Report identified evidence that a few CIA officers deliberately misled or withheld information from the CIA's inspector general, the Tower Commission, and congressional committees with jurisdiction over CIA activities. Deception can be part of the CIA's foreign activities and secrecy is used to protect legitimately classified information. But deception and failure to inform should not be used to withhold information from those, both external and internal, with oversight responsibilities.

DCI Webster has clearly expressed his views on this subject in testimony before the Congress and in his public speeches. For example, he said:

> In our relationship with the Congress, I believe it is important for us to recognize that it must be one of truth and not of deception . . . . In covert activity, there is often deception to conceal the source of the activity in order to influence through means that we believe to be appropriate but must necessarily be covert. But in dealing with the Congress there is absolutely no excuse for deception. There will be occasions, . . . when I [do] not believe that I [am] in a position to respond to a particular question, particularly if it were one in open session. But I believe it is possible to tell members of Congress—and I have done so on occasion—that I am not at liberty to answer the question, that I have an answer but I cannot give it. That is a lot different from trying to answer the question narrowly when I know what the Congress wants to hear from, and pretending that they have failed to ask the question accurately enough.[80]

These principles have also been embodied in a set of guidelines for congressional testimony prepared by the CIA's Office of Congressional Affairs and approved by DCI Webster. The guidelines balance the statutorily recognized duty of the DCI to protect intelligence sources and

80. Speech by DCI William H. Webster before the Eighth Circuit Judicial Conference in Colorado Springs (July 18, 1987).

methods with the need to be candid and complete in dealings with Congress. They should serve to guide the testimony of future CIA witnesses when appearing before congressional committees.

IV. Proposed Legislation

Even after the Iran-Contra Report was issued, the threshold question of the early 1970's—whether covert actions are a legitimate tool of U.S. foreign policy—does not appear to be in dispute. Indeed, the Iran-Contra Report concludes that "[c]overt actions are a necessary component of our Nation's foreign policy . . . [that] are compatible with democratic government if they are conducted in an accountable manner and in accordance with [U.S.] law."[81] The substantive policy debate seems largely centered around the question of when should such actions be employed and what means should be used to accomplish those goals.[82]

As a result of the Iran-Contra revelations, however, legislation was introduced in Congress to "strengthen" the oversight process described in section I of this article, especially with respect to covert action. These bills—S. 1721 in the Senate and H.R. 3822 in the House—would codify many of the procedures now directed by the President in NSDD 286. As such, the major issue on those aspects of the proposed bills appears to be whether it is better to legislate such procedures or to provide for them through Presidential directive.[83]

A. Mandatory Notice Requirements

One issue that remains unresolved is whether the President has the constitutional authority to order the CIA not to comply with a statutory requirement requiring that the two Intelligence Committees be given prior notice of all significant intelligence activities. The Iran-Contra committees concluded that the "Administration's conduct in the Iran-Contra Affair was inconsistent" with section 501 of the Oversight Act

---

81. Iran-Contra Report, *supra* note 40, at 383.

82. For somewhat conflicting views on the efficacy of covert actions, compare S. Breckinridge, The CIA and the U.S. Intelligence System 213-241 (1986) with G. Treverton, Covert Action: The Limits of Intervention in the Postwar World (1987).

83. The Reagan administration's opposition to this legislation, in part for this reason, is not unique. In 1980, the Carter administration opposed provisions codifying the provisions of the Carter Executive order. *See e.g.*, Highsmith, *Policing Executive Adventurism: Congressional Oversight of Military and Paramilitary Operations*, 19 Harv. J. on Legis. 327, 357 (1982).

because it did not provide notice of the Iranian arms sales to the Intelligence Committees in a timely fashion.[84] The proposed legislation addresses this issue by requiring that notice be given in all cases within forty-eight hours of the signing of a Presidential Finding.

The Iran-Contra committee's conclusion and the proposed legislation will not end the debate. The President, and future Presidents, will undoubtedly continue to assert the inherent constitutional authority to conduct intelligence activities without notifying Congress, a constitutional power they will assert can be exercised independently of any statutory limitations.[85] Congress understandably will not accept that argument. There is no easy solution to this constitutional quandary. Unfortunately, if any President in the future orders that a covert action be conducted and that Congress not be notified, the CIA may be caught in the middle.

B. Definition of Covert Action

Another oversight issue that continues to be discussed is the types of CIA activities that require Presidential Findings. As discussed above, under current law this issue revolves around the definition of the term "operation" as used in the Hughes-Ryan amendment.[86] The Senate version of the oversight bill, which passed the Senate on March 15, 1988, contains the following definition of activities that would require Presidential Findings:

> (1) any operation of the Central Intelligence Agency conducted in foreign countries, other than activities intended solely for obtaining necessary intelligence; and
>
> (2) to the extent not inconsistent with subsection (1) above, any activity conducted by any department, agency, or entity of the United States Government in support of national foreign policy objectives abroad which is planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activity, but which does not include diplomatic activities or the collection and production of intelligence or related support activities.[87]

84. Related to this issue, is the problem of how the Administration, including the CIA, can challenge the constitutionality of a statute that contains such a provision. If the constitutionality of a law can be challenged only by violating its terms, it could be argued that the President is no longer ensuring that the laws are being faithfully executed, a criticism made in the Iran-Contra Report.

85. *Cf.* Legal Opinion of May 9, 1980, by Lloyd Cutler, the President's counsel on War Powers Consultation Relative to the Iran Rescue Mission.

86. *See supra* notes 17-19 and accompanying text.

87. INTELLIGENCE OVERSIGHT ACT OF 1988, S. REP. NO. 100-276, 100th Cong., 2d Sess. 46 (1988).

If this bill is enacted into law, the interplay between the two subsections must be determined. The exceptions listed in the second subsection are types of activities for which the CIA does not now obtain Presidential Findings. The committee report that accompanied the bill when it was reported out of the SSCI recognizes that the CIA does not now obtain Presidential Findings for these or other similar types of activities. The report states:

> Under current law, i.e., the Hughes-Ryan Amendment (22 U.S.C. 2422), the CIA is prohibited from expending any appropriated funds for "operations in foreign countries, other than activities intended solely for obtaining necessary intelligence," unless pursuant to a Presidential Finding.
>
> This provision, and in particular, the phrase "operations in foreign countries," was never intended by Congress to require a Presidential Finding for all CIA's overseas activities other than collection. It has been recognized both by the executive branch and the intelligence committees that certain CIA activities abroad, such as certain counterintelligence activities, routine assistance to the Department of State in performing certain diplomatic or overt initiatives, and certain routine assistance to the Department of Defense or other agencies under the Economy Act, were not "operations in foreign countries," requiring Presidential Findings.[88]

The bifurcated definition in the Senate bill is difficult to reconcile with the legislative history. Thus, the Senate bill does not clear up the existing ambiguities in the Hughes-Ryan amendment's use of the term "operation." It may, in fact, lead to additional confusion about whether the two definitions create significantly different criteria in determining whether a proposed activity requires a Presidential Finding, depending on whether the activity would be conducted by the CIA or another government agency.

The House version of the oversight bill, which was reported out of HPSCI on May 11, 1988, adopts a single definition for all intelligence agencies. The bill, which uses the term "covert action" in legislation for the first time, defines the term as follows:

> (e) The term 'covert action' means an activity or activities conducted by an element of the United States Government to influence political, economic, or military conditions abroad so that the role of the United States Government is not intended to be apparent or acknowledged publicly, but does not include:

88. *Id.* at 38.

> (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.[89]

This definition, more detailed than the term "operation" in the Hughes-Ryan amendment, is much clearer in the types of activities that would require Presidential Findings. Its list of exceptions is also consistent with the types of activities that are now being conducted by the CIA without a Finding. If enacted into law, this definition would significantly clarify the Presidential Finding requirement. It might also assist in establishing a more cooperative oversight relationship between the intelligence agencies and the Intelligence Committees.

V. CONCLUSION

Some might suggest that the Iran-Contra matter represents a "failure" of congressional oversight of the CIA. For the most part, however, the CIA's performance in this initiative was undertaken pursuant to Presidential Findings and was consistent with applicable law and CIA policy guidance. To be sure, certain individuals at the CIA performed in a manner that did not comport with applicable laws and CIA policies, but those shortcomings have been dealt with through disciplinary actions and remedial measures described in this article.

It would be a mistake to suggest that these shortcomings require a major overhaul of the congressional oversight system. That system has functioned well in the fourteen years since the Hughes-Ryan amendment was passed, and the Iran-Contra matter should not be cited as evidence that existing procedures, including those requiring Presidential notice to Congress concerning covert action, are inadequate.

If new legislation is enacted, however, it should amend the definition of "operations in foreign countries" to clarify the types of activities that require Presidential Findings. The existing definition has generally served well, but only as a result of extensive interpretation and discussion

89. H.R. 2833, 100th Cong., 1st Sess. (daily ed. May 11, 1988).

between the executive branch and the Congress. A more explicit definition, in particular one that identifies those activities that require Presidential Findings, would benefit the oversight process.