# DANCING IN THE DARK: ACCEPTING THE INVITATION TO STRUGGLE IN THE CONTEXT OF "COVERT ACTION," THE IRAN-CONTRA AFFAIR AND THE INTELLIGENCE OVERSIGHT PROCESS*

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> I said damn it, I told you not to get involved. And he said, we're not involved. They came to us and we said no. And they asked if we knew the name of a secure airline and we gave them the name of our proprietary. I said damn it, we can't do that without a Finding.
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> -Deposition of John McMahon, Deputy Director of Central Intelligence, Before the Iran-Contra Investigating Committee, June 1, 1987.

## I. Introduction

The roots of the Iran-Contra Affair, only the most recent breakdown in executive-congressional relations concerning covert intelligence activities, are anchored in our history and are traceable to the basic separation of powers principles that characterize our system of government. If the Executive had clear authority to carry out covert operations without any responsibility to inform Congress, or if Congress had undisputed authority to require information concerning covert operations from the Executive, there would be little basis for the continuing tension, competition, suspicion and paranoia that have characterized relations between the branches in this regard over the past several decades.

Ordinarily, discussions of these issues focus on the constitutional prerogatives, functions and authorities of the two political branches. These discussions run long and deep, with little prospect of ultimate resolution. The irrefutable historical sources that are available to each side to

* The views expressed in this article are those of the author and do not necessarily represent those of the Justice Department.

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buttress its position are formidable, but are often contradictory and less than definitive.

On the side of the broadest executive discretion, there is Supreme Court Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*,[1] the case that Lieutenant Colonel Oliver North turned into something of a household phrase. That case explains that in the area of foreign affairs:

> with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it. As [John] Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[2]

In retort, on behalf of the Legislature's power to control the Executive, the full context of Marshall's "great argument" in the House debate is cited, explaining that President John Adams was only carrying out the will of Congress under a treaty;

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.
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> He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.
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> . . . .
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> Congress, unquestionably, may prescribe the mode [of executing the treaty], and Congress may devolve on others the whole execution of the [treaty]; but, till this be done, it seems the duty of the Executive department to execute the [treaty] by any means it possesses.[3]

The Executive's promoters will enumerate proudly the constitutional powers of the President who is vested with "the executive 'Power,' " power to act as "Commander in Chief of the Army and Navy

1. 299 U.S. 304 (1936).
2. *Id.* at 319 (citing ANNALS OF CONG., 6th Cong., 613 (1800)) [hereinafter ANNALS OF CONG.]; *see* REPORT OF THE CONGRESSIONAL COMM. INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 216, 100th Cong., 1st Sess. 387-88 [hereinafter IRAN-CONTRA REPORT].
3. ANNALS OF CONG., *supra* note 2, at 613-14.

of the United States," power to "make Treaties" and to "appoint Ambassadors, other public Ministers," and to "take Care that the Laws be faithfully executed."[4] The legislative supremacists respond in trump with the constitutional authorities of the Congress to "provide for the common Defense," "regulate Commerce with foreign nations," "define and punish Piracies and Felonies on the high Seas, and Offenses against the Law of Nations," "declare War [and] grant Letters of Marque and Reprisal," "raise and support Armies," "provide and maintain a Navy," "make Rules for the Government and Regulation of the land and naval Forces," "provide for calling forth the Militia to . . . repel invasions," "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," and for the Senate to provide "Advice and Consent" regarding treaties and ambassadorial appointments.[5]

The advocates of a strong Presidency call forth the spirits of the founders to support their views—for example, Jefferson:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations [and] no law has undertaken to prescribe its specific duties,[6]

and Jay:

> It seldom happens in the negotiation of treaties of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The conventions have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.[7]

The proponents of legislative supremacy counter with opposing views from other, or even the same, historical figures—again, Jefferson:

4. U.S. CONST. art. II, § 1, cl. 1; § 2, cls. 1, 2; § 3 (Bicentennial Commemorative ed., Central Intelligence Agency).

5. *Id.* art. I, § 8, cls. 1, 3, 10-15, 18; art. II, § 2, cl. 2.

6. 11 WRITINGS OF THOMAS JEFFERSON 9 (1804) (letter to Treasury Secretary Albert Gallatin) (A. Lipscomb & A. Bergh eds. 1903).

7. THE FEDERALIST OR, THE NEW CONSTITUTION, No. 64, at 329 (J. Jay) (J.M. Dent & Sons ed. 1937).

> We have already given . . . one effectual check to the dog of war by transferring the power of letting him loose, from the executive to the legislative body, from those who are to spend to those who are to pay,[8]

and Madison:

> [T]he executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.[9]

To the various classical,[10] judicial,[11] and congressional[12] testimonies supporting enhanced executive powers that are raised by the pro-President group, the contra-President group responds with its own stock of judicial[13] and modern-day[14] pronouncements.

The effect of this endless debate is to confirm that the matter is unclear. The essential power is separated, but shared. The President has primacy in certain matters, the Congress in others, and each has a greater or lesser right to check the other, even in areas of primacy by one. There is much to be said in support of the oft-cited maxim that the Constitution presents an "invitation to struggle for the privilege of directing American foreign policy."[15]

Nowhere has this struggle been more evident and intense during the past twenty years than in that small, but incendiary, corner of foreign affairs and national security policy wherein resides the planning, conduct and control of covert operations (covert action). Since the 1961 failure at the Bay of Pigs, and despite the continuing objections of the theorists

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8. XVI PAPERS OF THOMAS JEFFERSON (1789) 378-79, 397 (Boyd ed. 1978).

9. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 179 (M. Farrand ed. 1937).

10. *See* J. LOCKE, SECOND TREATISE OF GOVERNMENT (1690); C. MONTESQUIEU, THE SPIRIT OF LAWS (1748).

11. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 291 (1981); Dames & Moore v. Regan, 453 U.S. 654, 678-79 (1981); Goldwater v. Carter, 444 U.S. 996, 998 (1979); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), *aff'g* 558 F. Supp. 893 (D.D.C. 1982).

12. *See, e.g.*, Act of July 1, 1790, ch. 22, 1 Stat. 128 (1790) (authorizing the President to draw funds from U.S. Treasury; however, the President shall account specifically for all such expenditures); E. CORWIN, THE PRESIDENT; OFFICE AND POWERS 441 n.114 (4th rev. ed. 1957) (citing *1816 Report of the First Congressional Committee on Foreign Affairs* (President manages foreign affairs with responsibility to the Constitution)).

13. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); American Int'l Group v. Islamic Republic of Iran, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981); United States v. Guy W. Capps, Inc., 204 F.2d 655, 660 (4th Cir. 1953), *aff'd on other grounds* 348 U.S. 296 (1955); United States v. Smith, 27 F. Cas. 1192, 1229 (C.C.N.Y. 1806).

14. *See, e.g.*, 1 PUB. PAPERS 605 (1984) (President Reagan stating to a joint session of Congress, "The Congress shares both the power and the responsibility for our foreign policy."); 72 DEPT. OF STATE BULL. 562 (1975) (Secretary Kissinger explaining that, "The executive accepts that the Congress must have both the sense and the reality of participation: foreign policy must be a shared enterprise.").

15. E. CORWIN, *supra* note 12, at 171.

who support maximum Presidential discretion, Congress has slowly, but steadily, increased both its knowledge and influence regarding such operations. The Executive, for its part, and to the cheers of the theorists who support greater congressional control, has succumbed gradually and grudgingly to this effort due to political judgments and events that have weakened Presidential power to resist and strengthened Congress' claim to such authority. Beginning with a period when only a very few members of Congress were favored with briefings at the whim of the agencies, now it appears that only the core constitutional issue remains; that is whether the President may be compelled to advise Congress of the precise details of every covert action within a specified, and relatively short, period of time following its approval or initiation.[16]

Yet, despite all the theoretical fusillades regarding the ultimate sources, nature and locus of the authority over these operations, despite the extensive executive-legislative experience and exchange of views over the past fifteen years, despite the enactment of statutes and the promulgation of Executive orders, there is surprisingly little agreement and paltry substantive guidance available concerning exactly what constitutes "covert action." The constitutional and theoretical exchanges are mildly entertaining and highly educational. But they are exceedingly irrelevant to the day-to-day management of the covert action oversight process by congressional staff members and the operational and legal personnel of the executive branch. These are the officials who, on a regular basis, must parse the facts and circumstances of a variety of proposals and determine whether and when Presidential approval and congressional notification are appropriate.

A procedural framework clearly exists in congressional statute[17] and in Presidential directive.[18] The difficulty comes, assuming certain clear-cut types of covert action, such as paramilitary operations, are put aside, in determining whether a particular proposal or set of circumstances requires that those procedures be invoked. These problems are illustrated by the differing perspectives and delays that preceded the decision to apply the procedural framework to the CIA's participation in the Iran-Contra Affair.[19] In addition, more general failure of agreement between

16. *See, e.g.*, REPORT OF THE SENATE SELECT COMM. ON INTELLIGENCE TO ACCOMPANY S. 1721, THE INTELLIGENCE OVERSIGHT ACT OF 1988, S. REP. NO. 276, 100th Cong., 2d Sess. 19-25 (1988) [hereinafter 1988 SSCI REPORT].

17. *See* 22 U.S.C. § 2422 (1974); § 662 of the 1974 Foreign Assistance Act, Pub. L. No. 93-559, § 32, 88 Stat. 1804 (1974) [hereinafter Hughes-Ryan]; 50 U.S.C. § 413 (1980) (the Intelligence Oversight Act of 1980).

18. *See* Exec. Order No. 12,333 ("United States Intelligence Activities"), 46 Fed. Reg. 59,941, §§ 1.8 (e), 3.1, 3.4(h) (1981); National Security Decision Directive on Special Activities (NSDD 286) (1987), *described in* 1988 SSCI REPORT, *supra* note 16, at 8-9.

19. *See* IRAN-CONTRA REPORT, *supra* note 2, at 185-86.

the Executive and Congress as to the basic nature and purpose of the activities that were undertaken and the meaning and nature of the procedures that were or were not invoked has had much to do with the uproar that followed exposure of these activities. These developments have, in turn, placed even greater stress on the oversight relationship and threatened to cause significant alterations of that relationship by Congress.

The purpose of this discussion is to explore the sources and the extent of the available guidance concerning what constitutes "covert action," also recently referred to as "special activities." In doing so, it will attempt to illustrate the persistent difficulty and room for misunderstanding that now prevail. Hopefully, this will assist in promoting reforms that will enable better communication between Congress and the Executive, as well as assist those personnel in the government who agonize over these decisions on a daily basis.

## II. THE HUGHES-RYAN AMENDMENT

Prior to 1976, there had been over 200 proposals for various forms of improved oversight regarding United States intelligence activities.[20] The sole proposal relating to oversight activity to be enacted into law, however, was the 1974 Hughes-Ryan amendment to the Foreign Assistance Act of 1961.[21] This legislation arose from a congressional tide that was fed by a series of revelations of covert operations over the prior decade.[22] It was brought to flood stage by exposure of the covert policies, including support to antigovernment factions, that were pursued in Chile from 1963 to 1974[23] and by allegations of CIA involvement in plots to

20. *See* REPORT OF THE SENATE SELECT COMM. ON GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES TO ACCOMPANY S. RES. 400 S. REP. NO. 675, 94th Cong., 2d Sess. 4 (1976) [hereinafter THE CHURCH COMM.]; *see also* 122 CONG. REC. 13,981 (Sen. Church), 13,983 (Sen. Javits), 13,988 (Sen. Schweiker) (1976). According to Clark Clifford, of these 200 bills, 150 specifically related to congressional oversight with 147 of those dealing with the idea of a joint intelligence committee. Only 2 bills actually reached the floor where they were "promptly and soundly" defeated. *1978 SSCI Hearings, infra* note 89, at 9.

21. Hughes-Ryan, *supra* note 17.

22. *See, e.g.*, 120 CONG. REC. 26,432 (1974) (Rep. Harrington) (identifying: funding the Chinese nationalists in the 1950's; a coup in Guatemala to overthrow President Arbenz; the Bay of Pigs invasion of Cuba; action against the Huk guerrillas in the Philippines; a 1958 coup against President Sukarno of Indonesia; assisting Bolivia in 1967 to find and kill Che Guevara; a disinformation campaign in Thailand; building a Meo Army in Laos in the 1960's; support to Moise Tshombe in the Congo; training police throughout South and Central America; influencing foreign elections; funding student, labor and cultural groups; and clandestine support for radio propaganda outlets).

23. *See* STAFF REPORT OF THE CHURCH COMM., 94TH CONG., 1ST SESS., COVERT ACTION IN CHILE 1963-1973 49-50 (Comm. Print 1975). This report noted that members of Congress had been advised of only eight of the 33 covert action projects undertaken in Chile

assassinate foreign leaders.[24]

The move toward Hughes-Ryan began on August 1, 1974 when Representative Michael Harrington proposed to amend the Foreign Assistance Act to limit the CIA covert operations that are intended to "manipulate and intervene in the internal affairs of foreign countries."[25] He stated that such activities usurped "Congress' role and responsibility for formulating foreign policy" and that the CIA enjoyed "the best of both worlds" because it selected those members of Congress who would be advised of these matters.[26]

In September of 1974, both Representative Elizabeth Holtzman and Senator James Abourezk proposed banning, rather than merely limiting, such activities on the ground that there is "no justification in our legal, moral, or religious principles for [U.S.] operations . . . which result in assassinations, sabotage, political disruptions, or other meddling in another country's internal affairs."[27] Senator Abourezk's proposal was entitled "Illegal Activities In Foreign Countries" and in broad terms provided that:

> (a) No funds made available under this or any other law may be used by any agency of the United States Government to carry out any activity within any foreign country which violates, or is intended to encourage the violation of, the laws of the United States or of such country.
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> (b) The provisions of this section shall not be construed to prohibit the use of such funds to carry out any activity necessary to the security of the United States which is intended solely to gather intelligence information.[28]

Several Senators agreed there was a need to control covert operations, but objected to this proposal when it was debated in October: these dissenters claimed that they had little, if any, specific information or understanding concerning the scope and nature of the operations they were being asked to prohibit.[29]

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and that the scope of CIA covert involvement in Chile was "unusual but by no means unprecedented." *Id.* at 2, 49.

24. *See generally* INTERIM REPORT OF THE CHURCH COMM., ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. No. 465, 94th Cong., 1st Sess. (1975).

25. 120 CONG. REC. 26,432 (1974).

26. *Id.*

27. *See* 120 CONG. REC. 32,060 (Sen. Abourezk), 9492-93 (Rep. Holtzman) (1974); *see also* FINAL REPORT OF THE CHURCH COMM., FOREIGN AND MILITARY INTELLIGENCE, Bk. I, S. REP. No. 755, 94th Cong., 2d Sess. 502-03 (1976) (these proposals would have barred the spending of funds by CIA "for the purpose of undermining or destabilizing" foreign governments).

28. 120 CONG. REC. 33,477 (1974).

29. *See, e.g., id.* at 33,479 (Sen. Baker) ("the thing that really disturbs . . . me is that I am not sure . . . that any of us have any way to know whether or not covert operations are being

Responding to these concerns, Senator Harold Hughes called attention to his alternative version. This proposal would have barred the expenditure of funds by or on behalf of the CIA or any other United States government agency for "the conduct of covert action operations other than operations intended solely for obtaining necessary intelligence," unless the President found the operation to be vital to the defense of the United States and provided a report of the finding and a detailed description of the operation's nature and scope to any congressional committee with jurisdiction over intelligence activities.[30] The sponsor explained that this proposal represented "only a beginning" in the efforts of Congress to impose order, structure and control over covert operations that "interfere with the internal affairs of other nations" or "provoke political revolution."[31] In his view,

> it is fully acknowledged that the American people and the Congress are largely in the dark about the covert operations of the CIA and cannot judge with certainty whether or not some of these operations and the overall pattern of them can be justified in the public interest.
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> [This amendment] provides a temporary arrangement, not a permanent one, recognizing that a permanent arrangement is in the process of being developed.[32]

A short time later, Representative David Ryan introduced a similar measure in the House intended to give the relevant committees "access to information about overseas activities which affect our foreign policy and U.S. relations with foreign countries . . . ."[33] In December, on the House floor, the Ryan bill was described as relating to CIA activities that were "designed to subvert or undermine foreign governments" or were "foreign-policy related."[34]

Ultimately, the Congress adopted the House version,[35] and the pertinent provision of the Hughes-Ryan amendment, as enacted, provided:

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properly conducted, or conducted at all, or for what purpose."); *see also*, *id.* at 33,478, 33,481 (Sens. Humphrey & Stennis). The proposal was defeated, 68 to 17. *Id.* at 33,482.

30. *Id.* at 33,487-88. The Senate Foreign Relations Committee approved this version in November 1974. *See* REPORT OF THE SENATE FOREIGN RELATIONS COMM. TO ACCOMPANY THE FOREIGN ASSISTANCE ACT (S. 3394) S. REP. NO. 1299, 93d Cong., 1st Sess. 6707 (1974) [hereinafter SENATE FOREIGN RELATIONS REPORT].

31. 120 CONG. REC. 33,488 (1974).

32. *Id.*

33. *See* REPORT OF THE HOUSE FOREIGN AFFAIRS COMMITTEE ON H.R. 17,234, H.R. REP. NO. 1471, 93d Cong., 2d Sess. 44 (1974). Among other things, the Ryan bill referred to "operations in foreign countries," rather than "covert action operations" as did the Hughes version. *Id.*

34. 120 CONG. REC. 39,165-66 (1974) (Reps. Holtzman & Morgan).

35. *See generally* HOUSE CONFERENCE COMM. REPORT TO ACCOMPANY S. 3394, H.R. REP. NO. 1610, 93d Cong., 2d Sess. (1974).

> LIMITATION ON INTELLIGENCE ACTIVITIES:
> (a) No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency *for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence*, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress . . . .[36]

This sparse formulation has served for fourteen years as the basic legislative guidance to the executive branch concerning congressional expectations regarding covert action operations that are required to be reported to Congress. Yet it is clear from the language and legislative history of this provision that Congress had only the vaguest notion of what activities it expected to be reported and that the legislation was designed to fill this knowledge gap prior to further legislative action.[37] As later explained by the Justice Department, Congress was attempting to inform itself and the reach of Hughes-Ryan "was accordingly made broad, without attempting to limit the provisions by a specific definition of covert action, to ensure that the appropriate committees would obtain an education in the whole area . . . ."[38]

The difficulty with this approach, of course, is that neither the notified nor the notifiers could be precisely certain of the scope of their relative rights and responsibilities. Read literally, Congress intended to be apprised of all CIA-sponsored "operations in foreign countries" that were not intended "solely for obtaining necessary intelligence."[39] However, Congress clearly did not intend that Presidential and congressional attention to covert action issues should be diverted by reviewing all CIA activities abroad that had *any* purpose other than such collection.

Additional guidance concerning the scope of Hughes-Ryan can be gleaned from the legislative history, which is replete with references to assassination plots, sabotage operations, manipulating or undermining foreign governments and other forms of political disruption, paramilitary

36. 22 U.S.C. § 2422 (1974) (emphasis added).

37. *See, e.g.*, FINAL REPORT OF THE CHURCH COMM., Bk. I, *supra* note 27, at 135, 507 (the purpose of Hughes-Ryan was "to acquire information about these operations so that a decision could be made about their legitimacy").

38. Memorandum for the Attorney General from John Harmon, Assistant Attorney General, Office of Legal Counsel, United States Dept. of Justice, *Re: Requirements of the Hughes-Ryan Amendment, 22 U.S.C. § 2422*, at 2 (October 25, 1977) [hereinafter Harmon opinion] (released under Freedom of Information Act).

39. 22 U.S.C. § 2422 (1974).

efforts, propaganda campaigns, and funding of various types of international groups.[40] It can also be divined from these sources, and those relating to a companion section that imposed controls on relations between United States agencies and foreign law enforcement entities, that Hughes-Ryan was not intended to include, or interfere with, the development and execution of United States law enforcement activities abroad.[41] The latter conclusion is made more reasonable because Hughes-Ryan speaks only to the CIA, which is barred by law from exercising any law enforcement powers.[42] However, the actual language of the statute is not further limited and is not even restricted on its face to activities of a covert or clandestine nature.

Confronted with such a lack of guidance, the executive branch concluded internally that interpreting Hughes-Ryan required the application of "reasonable inference" drawn from the circumstances surrounding its enactment and its purpose, *i.e.,* "to insure that foreign policy was not conducted in secret" without Presidential approval or congressional awareness.[43] Because this purpose was to be fulfilled by imposing greater executive and legislative oversight, prudence appeared to dictate that the finding and reporting requirements be interpreted "generously and applied to include, rather than exclude, borderline situations."[44]

According to the Justice Department, any CIA activity with a goal of affecting the attitudes, activities, or policies of a foreign nation was to be included, even if the CIA involvement occurred in the United States.[45] The existence of a "primary," rather than "sole," purpose of collecting intelligence was insufficient to warrant exclusion.[46] Further, a finding and notification would be required even when the role of the United States Government was overt and public, but CIA participation was covert.[47] The only liberty that the Justice Department felt free to take with regard to the scope of Hughes-Ryan was to conclude that "obtaining" could reasonably be read to exempt processing and dissemination, as well as collection, of intelligence.[48]

The executive branch perceived the broad scope intended for the

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40. *See, e.g.,* 120 CONG. REC. 26,432, 32,060, 33,481-89, and 39,165-66 (1974).

41. *See, e.g.,* 120 CONG. REC. 33,475 (1974) (Sen. Humphrey); 122 CONG. REC. 14,667 (1976) (Sen. Kennedy); *see also* SENATE FOREIGN RELATIONS REPORT, *supra* note 30; *cf.* REPORT OF THE SENATE COMM. ON GOVERNMENT OPERATIONS TO ACCOMPANY S. RES. 400, SENATE COMM. ON INTELLIGENCE ACTIVITIES, S. REP. No. 675, 94th Cong., 2d Sess. 31 (1976).

42. *See* 50 U.S.C. § 403(d)(3) (1976).

43. Harmon opinion, *supra* note 38, at 2.

44. *Id.* at 7.

45. *Id.* at 12.

46. *Id.*

47. *Id.* at 14.

48. *Id.* at 13.

Hughes-Ryan obligations very clearly and, in the absence of further clarification from Congress, interpreted the statute in a strict, literal sense. Very little clarity has been added in the decade since that reading, and executive efforts to relax this interpretation over the years have recently been called into question.

## III. THE CHURCH COMMITTEE INVESTIGATION

In 1975, as a response to allegations of widespread abuses by the Intelligence Agencies of the United States, the Senate adopted *Senate Resolution 21* and established a Select Committee to Study Governmental Operations with Respect to Intelligence Activities chaired by Senator Frank Church, "the Church committee," to investigate.[49] During the hearings that followed, the covert activities that were understood to be included under Hughes-Ryan were further described as ranging from:

> relatively passive actions, such as passing money to shape the outcome of elections, to the influencing of men's minds through propaganda and 'misinformation' placed in the media of other nations, to the more aggressive and belligerent techniques of organizing coups d'etat and . . . paramilitary warfare.
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> To begin first with definitions of what the law is supposed to govern: According to the CIA's own present definition, covert action means any clandestine or secret activities designed to influence foreign governments, events, organizations, or persons in support of U.S. foreign policy conducted in such manner that the involvement of the U.S. Government is not apparent.[50]

It was recognized that the law concerning these matters was "ambiguous at best" and that it was not clear whether Congress or the Executive had intended that the CIA be authorized to engage in such activities at the time of its creation under the National Security Act of 1947.[51]

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49. *See* FINAL REPORT OF THE CHURCH COMM., Bk. I, *supra* note 27, at 1-2.

50. *Covert Action: Hearings Before the Church Comm.*, 94th Cong., 1st Sess. 4 (1975) [hereinafter *Church Comm. Hearings*] (testimony of William G. Miller, Committee Staff Director).

51. *Id.*; *See also* FINAL REPORT OF THE CHURCH COMM., Bk. I, *supra* note 27, at 149. Section 102 (d)(5) of the National Security Act, 50 U.S.C. § 403(d)(5) (1976), provides blankly that CIA should perform "such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." The Church committee staff had scoured the public and secret legislative history in vain for evidence of Congress' intent. President Truman, who signed the Act, claimed he never had any thought "that [CIA] would be injected into peacetime cloak and dagger operations." Van Atta, *God and Man at the CIA*, in THE WASHINGTONIAN 111 (Dec. 1983). But Clark Clifford, an aide to Truman who participated directly in development of the Act, explained that the section was intended to be a "catch-all" for future contingencies and that covert action had begun to be authorized under it as early as 1947. *Church Comm. Hearings*, *supra* note 50, at 50-51.

The final report of the Church committee was a little more edifying in its explanation of covert action. It cited the same internal CIA definition and also added a definition used by the National Security Council (NSC), *i.e.,* "secret action to influence events in foreign countries which is so designed that, if discovered, official U.S. Government participation can be plausibly denied."[52] The ambiguity accompanying the issue of authority to conduct such activities, whatever their essence, was again explained. Arguments that the authority had been contemplated by Congress were strengthened, however, by citing references in the legislative history of the National Security Act to "operational activities" and "special operations." On the other hand, a legal opinion had been authored by the CIA's first general counsel, who had participated directly in the drafting of the National Security Act only seven days after the CIA came into official existence, concluding that there was no evidence that Congress intended to authorize covert action by the CIA.[53] The Church committee report acknowledged that Congress bore substantial responsibility for the lack of precision in this regard.[54]

From this uncertain beginning, however, it was noted that the CIA had *major* covert operations underway in forty-eight countries by 1953.[55] These could be grouped generally into four categories: propaganda, paramilitary operations, political activity, and economic action.[56] Only three months after the CIA's birth, the first NSC directive concerning CIA covert actions was issued, instructing the Agency to conduct "covert psychological operations consistent with United States policy . . . ."[57] Six months later, a second NSC directive was issued, authorizing a broad range of covert activities including political and paramilitary operations, countering Soviet propaganda and support to West European labor unions and student groups, support of foreign political parties, economic warfare, sabotage, support for anti-communist groups in occupied or threatened areas, and assistance to refugee liberation groups.[58] The committee also identified CIA clandestine funding of Radio Free Europe and Radio Liberty in furtherance of its propaganda role.[59]

In the findings and recommendations portion of its final report, the

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52. FINAL REPORT OF THE CHURCH COMM., Bk. I, *supra* note 27, at 131, 141, 475 n.1 (citing testimony of Mitchell Rogovin, Special Counsel to the Director of Central Intelligence).
53. *Id.* at 132, 478, 489.
54. *Id.* at 425.
55. *Id.* at 153.
56. *Id.* at 141 n.2, 445.
57. *Id.* at 144 (citing NSC Directive 4-A, December 12, 1947).
58. *Id.* at 132, 144 (citing NSC Directive 10/2, June 18, 1948).
59. *Id.* at 145.

Church committee restated Congress' failure to provide adequate statutory guidance or oversight procedures.[60] This was particularly important because covert action had become routine, used to excess, and increasingly harmful to the reputation of the United States.[61] These conclusions were based on the findings that the CIA had conducted "some 900 major or sensitive covert action projects plus several thousand smaller projects since 1961" and that approximately three-fourths of all covert action projects prior to 1974 had never been reviewed or approved outside the CIA.[62] While the committee seriously considered a recommendation that covert action be barred altogether, it recognized its value in extraordinary situations and concluded, instead, that the highest priority for Congress should be recasting the National Security Act and developing omnibus charter legislation that would regulate all intelligence activities.[63]

Among the scores of recommendations developed by the committee were: a requirement of a formal executive review process for covert action, an oversight committee in the Senate, an amendment to Hughes-Ryan providing for notification to that committee in advance of major covert action projects and aggregations of smaller projects, a specification of the CIA as the sole performer of covert action functions, and an enactment of statutory prohibitions on political assassination, efforts to subvert foreign governments, and support to police and internal security forces abroad that violate human rights.[64] For purposes of its final conclusions, the committee defined covert action as any attempt—

> to influence the internal affairs of other nations in support of United States foreign policy in a manner that conceals the participation of the United States Government. Covert action includes political and economic action, propaganda and paramilitary activities.
>
> The basic unit of covert action is the project. Covert action projects can range from single assets, such as a journalist placing propaganda, through a network of assets working in the media, to major covert and military intervention such as in Laos. The Agency also maintains what it terms an "operational infrastructure" of "stand-by" assets (agents of influence or media assets) who can be used in major operations—such as in Chile . . . .[65]

60. *Id.* at 425.
61. *Id.*
62. *Id.* at 445, 447.
63. *Id.* at 426, 446.
64. *Id.* at 430-31, 431 n.7 (Recs. 5, 13, 14), 445-49 (Recs. 35-40).
65. *Id.* at 445. The report also discussed paramilitary operations in some detail. *Id.*

It was evident that the CIA had been thrust into the midst of the Cold War as the primary covert agent of the United States Government. However, the Church committee hearings and reports retraced much of the ambiguous terrain that had been covered in the Hughes-Ryan debates and added little, if anything, to a full understanding of what constitutes covert action. In fact, the committee noted that espionage and counterintelligence activities abroad "also have a potential for embarrassing the United States and sometimes may be difficult to distinguish from covert action operations."[66]

## IV. THE PIKE COMMITTEE

The House of Representatives also formed an investigating committee in 1975, initially chaired by Representative Otis Pike. However, its proceedings were much more tumultuous and the committee was rent by dissension among its members and with the executive branch.[67] It was also largely nonproductive in terms of further understanding the scope of covert action. The committee's final report, which was prematurely furnished to the media and published before it could be cleansed of sensitive information and approved by the full House,[68] focused primarily on budgetary and procedural matters. The report did provide its own definition of covert action as "clandestine activity other than purely information-gathering, which is directed at producing a particular political, economic, or military result."[69] Applying this definition, the committee found four general types of covert action: election support (the largest category), media and propaganda (potentially the largest), paramilitary/arms transfers (the most expensive), and organizational support.[70]

Perhaps the most informative source concerning covert action that resulted from the Pike committee inquiry is a response from the special counsel to the Director of Central Intelligence to a request from the committee staff director regarding the Agency's implementation of Hughes-

66. *Id.* at 428.

67. *See, e.g., U.S. Intelligence Agencies and Activities: The Performance of the Intelligence Community: Hearings Before the House Select Comm. on Intelligence,* 94th Cong., 1st Sess. pt. 2, at 663-81 (1975) [hereinafter *the Pike Comm.*] (debating release of classified information); *U.S. Intelligence Agencies and Activities: Committee Proceedings—Proceedings of the Pike Comm.*, pt. 4, at 1231-60 (1975) (debating subpoenas for information).

68. *See generally* REPORT OF THE COMM. ON STANDARDS OF OFFICIAL CONDUCT ON INVESTIGATION PURSUANT TO H. RES. 1042 CONCERNING UNAUTHORIZED PUBLICATION OF THE REPORT OF THE SELECT COMM. ON INTELLIGENCE, H.R. REP. NO. 1754, 94th Cong., 2d Sess. (1976).

69. *Investigation of Publication of Select Comm. on Intelligence Report: Hearings Before the House Comm. on Standards of Official Conduct,* 94th Cong., 2d Sess. 662 (1976).

70. *Id.* at 664-65.

Ryan.[71] This response shed further light on executive practice by explaining that, while the CIA interpreted the statute as applying to paramilitary activities and activities intended to influence events in foreign countries, it did not consider the law to relate to: "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."[72] This appears to be the first general acknowledgement that the Hughes-Ryan amendment was not being applied literally to cover all CIA operations abroad that were not solely to obtain intelligence. Apparently there was no congressional reaction to this advisement.

## V. President Ford's Executive Order

In early 1976, President Ford issued Executive Order No. 11,905, the first in a series of such orders, in an effort to salve the concerns of the public and Congress regarding controls and authority for the intelligence agencies.[73] This order barred "political" assassination and charged the CIA with responsibility for carrying out, at the direction of the President or the NSC and within the limits of applicable law, the euphemistic function of "special activities in support of national foreign policy objectives."[74] That term was defined to mean: "activities, other than the collection and *production of intelligence and related support functions,* designed to further official United States programs and policies abroad which are planned and executed so that the role of the United States Government is not apparent or publicly acknowledged."[75] This was a more visible, albeit more limited, exposition of the less than literal manner in which the Executive interpreted the Hughes-Ryan requirements and introduced several elements (furthering U.S. policy, covertness) that have survived to the current definition of "special activity."

71. *Reprinted in U.S. Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence: Hearings Before the Pike Comm.*, pt. 5, at 2011-20 (1975).

72. *Id.* at 2015 (letter from Mitchell Rogovin to A. Searle Field, January 6, 1976) (emphasis added).

73. Exec. Order No. 11,905, United States Foreign Intelligence Activities, 41 Fed. Reg. 7703 (1976). President Ford had earlier appointed a commission to look into the matters that inspired the Church and Pike committees, but limited its jurisdiction to CIA alone, and only to CIA's domestic activities. That group, chaired by Vice President Rockefeller and including former Governor Ronald Reagan, nonetheless noted the allegations relating to CIA involvement in assassination but could not complete an inquiry into this area before its charter expired. *See* Report to the President by the Commission on CIA Activities Within the United States, at XI (1975).

74. Exec. Order No. 11,905, *supra* note 73, §§ 4(b)(5), 5(g).

75. *Id.* § 2(c) (emphasis added). The order also established procedures for review and approval of such activities. *Id.* §§ 3(a)(3), (c).

## VI. THE SENATE AND HOUSE INTELLIGENCE COMMITTEES

The Congress had a further opportunity to provide guidance to the Executive concerning its intentions for reporting under Hughes-Ryan during the discussions of the jurisdiction that should be granted to the Senate and House Intelligence Oversight Committees that were being created in 1976 and 1977, respectively.

*Senate Resolution 400*, creating the Senate Select Committee on Intelligence (SSCI), included an expectation that agency and department heads would keep the committee fully and currently informed of covert activities, subsumed under the oblique requirement to advise the committee of "any significant anticipated activities."[76] The term "significant" was intended to capture *any* activity with "political implications," explained further to mean any activity that was:

> particularly costly financially, as well as those which are not necessarily costly, but which have *any potential* for affecting this country's diplomatic, political or military relations with other countries or groups. For example, government paramilitary operations and covert political actions designed to influence political situations in foreign countries, including providing aid to political parties, would be covered. *It excludes day-to-day implementation of previously adopted policies or programs.*[77]

The all-encompassing potential of this explanation of Congress' intent added almost no meaning to the covert action reporting requirement and only promised many opportunities for disagreement with the executive branch regarding its attempts to apply such "guidance" to actual operations.

The Congress itself recognized these problems since one element of the SSCI charter was to study covert action and the effectiveness of Hughes-Ryan and to develop a common set of terms "[i]n view of the vagueness and ambiguity of such terms as 'covert operations.' "[78] In the interim, however, Congress indicated that "intelligence activities" that could be deemed "significant" for purposes of informing the SSCI would continue to encompass "covert or clandestine activities" which could affect United States relations with any foreign government, political group or party, military force, movement, or other association, and would include:

> *but is not limited to*, covert political actions designed to exercise

76. THE CHURCH COMM., *supra* note 20, at 26.
77. *Id.* at 27 (emphasis added).
78. *Id.* at 9, 29.

> influence on political situations in foreign countries, including support for political parties or economic action programs; covert propaganda or the covert use of foreign media to disseminate information helpful to the United States; intelligence deception operations involving the calculated feeding of information to a foreign government for the purpose of influencing it to act in a certain way; and covert paramilitary actions, including the provision of covert military assistance and advice to foreign military forces or organizations, and counterinsurgency programs. . . . It is not, of course, necessary to come within this definition that the covert operation actually succeed, or that this country's relations with a foreign country are actually affected as a result . . . .[79]

These statements concerning the meaning of "significant" and "intelligence activities" appeared to broaden substantially the recorded expectations of Congress as to covert action reporting. Subsequent discussion on the floor of the Senate added other elements as well. For example, Senator Walter Mondale, who had been an active member of the Church committee, referred to the important role that had been played by the Defense Department in covert operations in Chile, Laos and Cambodia.[80] In his view, unless Departments other than the CIA were also required to report such matters to the SSCI, the intent of Congress could be frustrated merely by shifting these activities from the CIA to other agencies outside the SSCI's jurisdiction.[81] Senator Strom Thurmond also contributed to these discussions by adding his view that "covert" military operations, such as the mining of Haiphong Harbor, the raid on the Son Tay Prison, and the *Mayaguez* rescue operation, should fall within the reporting requirement.[82]

Later, discussions in the House of Representatives concerning establishment of the House Permanent Select Committee on Intelligence (HPSCI) under *House Resolution 658* merely adopted much of the Senate materials. Although the HPSCI charter did not include the "fully and currently informed" language nor refer to "significant anticipated intelligence activities," it did define the committee's jurisdiction to include intelligence activities affecting relations with foreign governments, groups or parties.[83]

Thus, while the executive branch appeared to be moving toward a narrow reading of Hughes-Ryan that excluded a broad range of support

79. *Id.* at 30-31 (emphasis added).
80. 122 CONG. REC. 14,152-53, 14,156 (1976).
81. *Id.* at 14,156.
82. *Id.* at 14,162.
83. *See* REPORT OF THE HOUSE RULES COMM. TO ACCOMPANY H. RES. 658, H.R. REP. NO. 498, 95th Cong., 1st Sess. 4 (1977); 122 CONG. REC. H7112-13 (daily ed. July 14, 1977).

and other noncollection activities, the Congress continued to apply the broadest possible perspective to its reporting expectations and oversight responsibilities. Little or no effort appeared to be exerted by either side at this time to resolve the obvious differences in perspective.

## VII. PRESIDENT CARTER'S EXECUTIVE ORDER

In January of 1978, President Carter superseded President Ford's Executive order on intelligence activities with one of his own, heavily influenced by then Vice President Mondale.[84] Despite the notoriety that covert action had achieved, this order continued to use the euphemism "special activities" instead. The term was defined, much more elaborately than the Ford order, to mean:

> activities conducted abroad in support of national foreign policy objectives which are designed to further official United States programs and policies abroad and which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but not including diplomatic activity or the collection and production of intelligence or related support functions.[85]

The Carter order altered, but continued to include, provisions relating to the procedure for reviewing these activities, the CIA's authority to carry out such functions, and the bar on assassinations.[86] However, the order also included a provision that limited the conduct of special activities to intelligence agencies and further limited this function to the CIA, unless the President decided to use another intelligence agency for a particular purpose.[87] Further, the order implicitly adopted the principle that the reporting requirements extended to agencies other than the CIA, and specifically incorporated requirements drawn from *Senate Resolution 400* to keep the Intelligence Committees fully and currently informed of significant anticipated activities.[88]

The "sense of the Senate" now became fully binding, for better or for worse, on the executive branch. Neither party had yet, however, contributed in a substantial way to a common understanding of exactly what that sense encompassed.

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84. Exec. Order No. 12,036, United States Intelligence Activities, 43 Fed. Reg. 3674 (1978).
85. *Id.* § 4-212.
86. *Id.* §§ 1-302, 1-808, 2-305.
87. *Id.* § 2-306.
88. *Id.* § 3-401.

## VIII. Charter Legislation and the Intelligence Oversight Act of 1980

In 1978, acting upon the recommendations of the Church committee and after extensive discussions with executive branch personnel, members of the SSCI introduced and held hearings on a proposed omnibus intelligence charter entitled the "National Intelligence Reorganization and Reform Act of 1978."[89] Included among the 263 pages of that bill were provisions that authorized covert action (here, also denominated as "special activities"); repealed Hughes-Ryan and established executive branch review and congressional notification procedures relating to such operations; identified the CIA as the primary, but not exclusive, covert action agent; and restricted or prohibited certain types of activities by or on behalf of intelligence personnel, including combat, assassination of foreign officials due to their office or policy positions, supporting international terrorism, mass property destruction, creating droughts, famines, floods, or epidemics, violating biological, chemical, or other weapons treaties, violent overthrow of democratic governments, torture, and support for foreign forces that violate human rights.[90] In addition, the term "special activity in support of national foreign policy objectives" was defined as:

> an intelligence activity conducted abroad which is (A) designed to further official United States programs and policies abroad, and (B) planned and executed so that the role of the United States Government is not apparent or acknowledged publicly [but] does not include any counterintelligence or counterterrorism activity or the collection, correlation, processing, dissemination and analysis of intelligence or related support functions, nor any diplomatic activity of the United States.[91]

The bill also preserved, and extended to the HPSCI, the essence of *Senate Resolution 400* that the SSCI should be kept fully and currently informed of any "significant anticipated" intelligence activity.[92]

These proposals generated much consternation, even from those who supported greater controls over covert action, on the grounds that the provisions were too sweeping, unseemly, inflexible, and shortsighted.[93] The committees digested the views expressed both publicly

89. *See generally National Intelligence Reorganization and Reform Act of 1978: Hearings Before the SSCI on S. 2525*, 95th Cong., 2d Sess. (1978) [hereinafter *1978 SSCI Hearings*] (The House counterpart was H.R. 11,245).

90. *See* S. 2525, §§ 111(a), 131, 131(j), 133-36, *reprinted in 1978 SSCI Hearings, supra* note 89, at 839, 850, 882-88, 893-904.

91. *Id.* § 104 (27), at 857.

92. *Id.* § 152(a)(1), at 924-25.

93. *See, e.g.*, testimony of Clark Clifford, *id.* at 7, 11-12; testimony of William Colby and George Bush, *id.* at 62-63.

and in private by a broad range of individuals and groups, and two years later produced a revised proposal entitled the "National Intelligence Act of 1980."[94] This bill comprised only 172 pages and included essentially the same definition of a "special activity."[95] The authorization and oversight provisions relating to special activities, including the repeal of Hughes-Ryan and the bar on assassination, remained essentially the same in principle, but were substantially pared down and the prohibitions on other forms of special activities were deleted.[96]

The charter effort did not shed any additional light on the focus of the reporting requirements and ultimately foundered when it became apparent that five years of discussion and drafting had failed to resolve several fairly fundamental differences in perspective and principle that persisted between the Congress and the Executive.[97] The sole surviving remnant of this exhaustive effort consisted of three paragraphs enacted as Title V of the National Security Act, "Accountability for Intelligence Activities."[98]

These provisions codified, among other things, the reporting standard of *Senate Resolution 400* regarding any significant anticipated intelligence activity, but qualified this requirement with language that recognized the President might have constitutional prerogatives and the real need for secrecy.[99] Hughes-Ryan was not repealed, but was amended to indicate that its "operations in foreign countries" were to be considered "significant anticipated" activities and that its reporting obligations would now run only to the SSCI and HPSCI.[100]

This meant that the history and intent, sparse as it may be, of the

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94. *See generally National Intelligence Act of 1980: Hearings Before the SSCI on S. 2284*, 96th Cong., 2d Sess. 2-3 (1980) [hereinafter *1980 SSCI Hearings*] (statement of Sen. Bayh); *H.R. 6588, The National Intelligence Act of 1980*: *Hearings Before the HPSCI*, 96th Cong., 2d Sess. (1980) [hereinafter *1980 HPSCI Hearings*]; Highsmith, *Policing Executive Adventurism; Congressional Oversight of Military and Paramilitary Operations*, 19 HARV. J. ON LEGIS. 327, 354-64 (1982).

95. *See* H.R. 6588 § 103(18), *reprinted in 1980 HPSCI Hearings*, *supra* note 94, at 400, 409.

96. *Id.* §§ 122, 123, 125, 131, 142(a), at 414-18, 426.

97. The ultimate failure of consensus was due to the highly detailed nature of the bill, even as slimmed down, and in no small part, to the proposed requirement to notify the committees in advance of covert action proposals. *See, e.g.*, *1980 SSCI Hearings*, *supra* note 94, 15-22, 28-31 (statement of Adm. Stansfield Turner; exchange between Adm. Turner and Sen. Bayh); *1983 HPSCI Hearings*, *infra* note 107, at 98 (statement of David Aaron).

98. Section 407(b) of the Intelligence Authorization Act for Fiscal Year 1981, § 407(b), Pub. L. No. 96-450, 94 Stat. 1975, 1981 (1980) (codified at 50 U.S.C. § 413 (1980)). This outcome was described by Senator Bayh as "a quarter of a loaf is better than none." 126 CONG. REC. S5503 (daily ed. May 15, 1980).

99. 50 U.S.C. § 413(a) (1980).

100. 22 U.S.C. § 2422 (1980), as amended; *see* 126 CONG. REC. S5503-09 (daily ed. May 15, 1980), S6137-53, S6165-71 (daily ed. June 3, 1980).

language in *Senate Resolution 400* and Hughes-Ryan relating to the nature of the activities that were considered by Congress to be "covert action" continued to be pertinent.[101] Although no additional, nor more specific, guidance was provided, the SSCI report did allow that the committee expected to "work together" with the executive branch "to delineate the matters covered by this provision."[102]

## IX. PRESIDENT REAGAN'S EXECUTIVE ORDER

In 1981, the Executive order on intelligence activities promulgated by President Carter to replace President Ford's order was itself superseded by an order issued by President Ronald Reagan.[103] It contained no specific review and approval process for "special activities" within the executive branch; continued to identify the CIA as the primary, though not sole, covert action agent; substituted a brief reference to the statutory oversight provisions for the more elaborate language in the Carter order that was based upon *Senate Resolution 400*; and made explicit the requirement that agencies other than the CIA were also subject to the finding and reporting requirements if they engaged in special activities.[104]

The Reagan order, remarkable for its general consistency with the Carter order given the ideological differences between the two Administrations, continued to include a slightly modified definition of "special activities." The only real substantive change, for purposes of this discussion, was made to ensure that activities conducted within the United States in support or furtherance of covert action programs directed abroad would be authorized as special activities, subject to the same review, approval and oversight requirements.[105] This definition remains in

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101. *See* REPORT OF THE SSCI TO ACCOMPANY S. 2284, INTELLIGENCE OVERSIGHT ACT OF 1980, S. REP. No. 730, 96th Cong., 2d Sess. 4-5, 7, 8 (1980) (quoting explanation of "significant" from THE CHURCH COMM., *supra* note 20).

102. *Id.* at 8.

103. Exec. Order No. 12,333, United States Intelligence Activities, 46 Fed. Reg. 59,941 (1981).

104. *Id.* §§ 1.2(b), 1.8(e), 3.1.

105. The new definition, with deletions indicated by brackets and new language italicized, reads:

> Special activities means activities conducted [abroad] in support of national foreign policy objectives *abroad* which are [designed to further official United States programs and policies abroad and which are] planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, *but which are not intended to influence United States political processes, public opinion, policies, or media* [but not including] *and do not include* diplomatic [activity] activities or the collection and production of intelligence or related support functions.

*Id.* § 3.4(h). The added phrase relating to the problem of propaganda disseminated overseas by the CIA and "blowing back" to the United States is not so much a definitional element of covert action, but represents a roundabout policy limitation on what should be done under that rubric.

place as the general benchmark for executive interpretation and application of the statutory requirements.

## X. Congressional Response to Covert Action in Nicaragua

Congressional-Presidential disagreements over covert support to the Contras in Nicaragua placed great stress on the oversight process during the mid-1980's. In addition to the statutory controls and limitations, *e.g.,* the "Boland amendments," that were enacted regarding that program,[106] several more general bills were proposed that drew upon the previous several years of oversight experience and were intended to codify the administrative practices and standards to be used by the Executive to initiate covert action programs, as well as to empower the SSCI and HPSCI to disapprove such proposals.[107]

While the bills themselves only drew upon the Executive order's definition of "special activities" for meaning, several interesting perspectives on the degree of ambiguity involved and the kinds of activities that were being treated as covert action, as a consequence, were revealed during the hearings. One witness, generally disposed to eliminate covert action altogether, explained the problem with the overbreadth of the current statutory requirements and suggested that only activities directed against non-friendly governments should be treated as covert action:

> it is only an accident of the way the Hughes-Ryan language was originally written, that is activities by the CIA other than for the purpose of collection, that we have come to think of CIA aid to friendly governments openly allied to the United States as covert operations.
>
> The CIA, we learned from a freedom of information request and some statements by the Director, gave some aid to the Salvadoran Government in using stamps on peoples' hands to make sure people did not vote twice. That was apparently treated as a covert action.
>
> . . . that is [not] what anybody meant by a covert operation. When the Italians wanted the CIA to send a psychiatrist to help them deal with understanding the Red Brigade when

106. *See, e.g.*, Joint Resolutions for Continuing Appropriations, 1983, § 793, Pub. L. No. 97-377, 96 Stat. 1830, 1935 (1982); Intelligence Authorization Act for Fiscal Year 1984, §§ 108, 109, Pub. L. No. 98-215, 97 Stat. 1473, 1475 (1983); Joint Resolution on Continuing Appropriations for 1985, § 106(c), Pub. L. No. 98-441, 98 Stat. 1699, 1700 (1984); Department of Defense Appropriations Act for Fiscal Year 1985, § 8066, Pub. L. No. 98-473, 98 Stat. 1837, 1935 (1984). These statutes and others that succeeded them merely referred to military and paramilitary activities that were clearly intended to be covered by the covert action reporting requirements and do not add light to the definitional issues.

107. *See Congressional Oversight of Covert Activities: Hearings Before the HPSCI,* 98th Cong., 1st Sess. 2-5 (1983) [hereinafter *1983 HPSCI Hearings*] (statement of Rep. Fowler).

> the former Prime Minister was kidnapped, that was also apparently considered a covert operation. [I]n general, regarding actions which involve aid to friendly governments, maybe we ought to rethink the definition there . . . .[108]

The same witness also expressed the view that paramilitary operations should not be treated as covert action since they went beyond "secret efforts to do subtle and discrete things."[109]

In subsequent hearings on various proposals to alter the statutory procedures following exposure of the Iran-Contra Affair, former Director of Central Intelligence (DCI) Stansfield Turner shed further light on current executive branch thinking and practice by illuminating the issue of what should be subject to a finding and reporting to the committees. He explained that there had been three instances during his term at the CIA where he had delayed notifying Congress:

> —sending a CIA "covert action professional" into Tehran to assist the escape of six Americans who had sought refuge in the Canadian Ambassador's residence;
> —sending a CIA team into Iran in a light plane to collect soil samples from the planned landing site for the mission to rescue U.S. hostages in Tehran; and
> —repeated visits to Tehran by CIA personnel to survey the area and procure transportation to the U.S. embassy for the rescue mission.[110]

While the latter two appear to be collection activities that arguably would be excluded from Hughes-Ryan, they apparently were caught up under the "significant anticipated" activities prong of the reporting arrangements.[111]

While these public discussions were underway, the SSCI was confronting the CIA and its Director behind the scenes over a number of instances in which the committee believed the covert action reporting obligations were not being satisfied. The products of this confrontation were formal, written procedures that illustrate the persistent ambiguity of the reporting requirements and the continuing drive by Congress to both compensate for and take advantage of this lack of precision.

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108. *Id.* at 55, 72-73 (statement of Morton Halperin, Director, American Civil Liberties Union Center for National Security Studies).

109. *Id.* at 73.

110. *H.R. 1013, H.R. 1371, and other Proposals which Address the Issue of Affording Prior Notice of Covert Actions to the Congress: Hearings Before the HPSCI Subcomm. on Legislation*, 100th Cong., 1st Sess. 46 (1987) [hereinafter *1987 HPSCI Hearings*] (statement of Stansfield Turner).

111. Director of Central Intelligence Turner stated he had delayed notifying Congress for three months as to the first project, and six months regarding the second and third. *Id.* at 58.

The first procedure was signed by DCI Casey and Senators Goldwater and Moynihan following the burst of controversy that erupted in April 1984 over the CIA's involvement in the mining of Nicaraguan harbors.[112] Under this procedure, the DCI agreed that the CIA's obligations to inform the SSCI did not end when it briefed the committee on Presidential findings that authorized a new covert action program, but also that notice should be provided of "any other planned" covert action activity for which "higher authority" or Presidential approval had been obtained.[113] This supplementary obligation included, "but [was] not limited to, approvals of any activity which would substantially change the scope of an ongoing covert action operation."[114]

Furthermore, the DCI and SSCI agreed that other activities undertaken in connection with ongoing covert action operations "may be of such a nature that the Committee will desire notification of the activity prior to implementation, even if the activity does not require separate higher authority or Presidential approval."[115] Since this was obviously laying ambiguity on ambiguity, the SSCI agreed to advise the DCI of the types of activities that it would desire to be notified of in connection with each covert action.

As if to cure any doubts as to ultimate responsibility, however, the DCI agreed to take independent measures to ensure that the SSCI would be advised of other activities that he "reasonably believes" the committee would desire to be made aware of even though not previously identified by the committee.[116] Briefings to the SSCI on all covert activities were to include "all important elements . . . , including operational and political risks, possible repercussions under treaty obligations or agreements, and any special issues raised under U.S. law."[117]

A revelatory explanation of the SSCI's intent with regard to this procedure was contained in a subsequent committee report:

> A key component of the agreement that ultimately was achieved concerned recognition by the Executive branch that, while each new covert action operation is by definition a "significant anticipated intelligence activity," *this is not the exclusive definition of that term.* Thus, activities planned to be undertaken as part of ongoing covert action programs should in

112. *See Procedures Governing Reporting to the Senate Select Comm. on Intelligence (SSCI) On Covert Action*, June 6, 1984, *reprinted in 1987 HPSCI Hearings*, *supra* note 110, at 38-40 [hereinafter *Procedures*]; *see also* 134 CONG. REC. S1865-67 (daily ed. March 3, 1988) (Sen. Moynihan).

113. *Procedures*, *supra* note 112, para. 2.

114. *Id.*

115. *Id.* para. 4, at 39.

116. *Id.*

117. *Id.*

> and of themselves be considered "significant anticipated intelligence activities" requiring prior notification to the intelligence committees *if they are inherently significant because of factors such as their political sensitivity, potential for adverse consequences, effect on the scope of an on-going program, involvement of U.S. personnel, or approval within the Executive branch by the President or by higher authority than that required for routine program implementation* . . . .[118]

This intent statement appears to contemplate a new Hughes-Ryan-type obligation as to any aspect of every covert action that can in any way go wrong or, even if it is successful, produce consequences abroad. Apparently, the committee's sense of restraint regarding the details of "day-to-day implementation" of previously approved projects had been eroded.[119]

The "joint review" of these procedures that was scheduled in the agreement to be performed after one year produced an addendum agreed to by DCI Casey and Senators Durenberger and Leahy in June 1986.[120] This supplementary agreement reached even deeper into the covert action process and revealed something more about the types of activities that were being caught up in congressional oversight. It specified that briefings to the SSCI should include explanations of the nature and scope of any "substantial nonroutine support" for covert action to be provided by any other United States government agency or foreign government and of any "significant" developments in or related to covert action operations.[121]

"Special interest and concern" was noted with regard to "significant implementing activities" related to military or paramilitary covert action.[122] These activities were to be reported regardless of the absence of any higher approval and, in uncharacteristically specific guidance, were described to include:

> —initially supplying "significant military equipment";
> —"significant" changes in the quantity or quality of such equipment;
> —initially supplying equipment that is identifiably of U.S. origin; and
> —"significant" changes in the participation of U.S. military, civilian, contractor, or agent personnel.[123]

118. *See* SSCI REPORT TO THE SENATE, JANUARY 1, 1983 TO DECEMBER 31, 1984, S. REP. No. 665, 98th Cong., 2d Sess. 14 (1984) (emphasis added).
119. *See supra* note 77 and accompanying text.
120. *See Procedures, supra* note 112, at 42-43.
121. *Id.* para. 2, at 41.
122. *Id.* para. 3, at 42.
123. *Id.*

A further explanation was to be provided whenever covert material assistance or training was to be furnished to any foreign entity that was also receiving overt assistance, and the SSCI was to be informed of any Presidential decision to waive, alter, or rescind any Executive order provision relating to covert action.[124]

Based on these detailed procedures and agreements, it appeared that Congress had become a full and complete participant in the planning and development of all aspects of covert action operations. Rather than delineating its requirements in a specific manner so as to narrow executive obligations to the matters that truly concerned the committees, however, the available definitions and explanations of intent were allowed to remain exceedingly vague and amorphous. In order to avoid overlooking anything that might later be deemed to be something it should have known of, Congress called for notice of everything that might possibly be worthy of its attention. Unfortunately, even this "foolproof" approach broke down.

## XI. CONGRESS REACTS TO THE IRAN-CONTRA AFFAIR

In addition to issues relating to what constitutes "timely notice" to Congress and whether the reporting and other statutory requirements applied to the NSC, the Iran-Contra Investigating Committee identified at least four major activities that appeared to warrant a finding, but for which no finding was obtained: the creation of a private channel to provide support for the Contras; efforts to ransom hostages; early CIA involvement in covert arms shipments to Iran; and use of funds from the arms sales to support the Contras.[125] In addition, the CIA had obtained a finding after the fact to cover its role in securing transportation for arms transfers to Iran and a second finding regarding its involvement in the subsequent purchase of weapons for Iran from DOD stocks.[126] The SSCI reacted to the revelations by developing proposed amendments that would replace the current oversight provisions of Hughes-Ryan and the National Security Act with more comprehensive, specific and consolidated requirements.[127] While much of this proposal is beyond the scope of this discussion, there are portions of it and its legislative history that illustrate the continuing room for, and potential for even greater, confusion if this opportunity to clarify the system is neglected.

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124. *Id.* paras. 4, 5, at 42-43.

125. *See, e.g.,* IRAN-CONTRA REPORT, *supra* note 2, at 379, 400, 414-15; *see also* 134 CONG. REC. S1856-1860 (daily ed. March 3, 1988).

126. IRAN-CONTRA REPORT, *supra* note 2, at 182-87, 195-97, 202-09.

127. *See generally* 1988 SSCI REPORT, *supra* note 16.

The laudatory purposes of the bill include "to clarify" responsibilities of the committees, to "eliminate unnecessary ambiguities in the law" and to provide specific authority for covert action.[128] In the words of the committee, current law neither contains such authority,

> [n]or does it specify what types of activity are intended to be covered by the legal requirements for covert action [and] has called into question the legality of some covert actions, such as arms transfers, undertaken as alternatives to overt programs with express statutory authority and limitations . . . .[129]

Unfortunately, the SSCI chose to attempt to achieve these objectives not only by reenacting the current language and definition of Hughes-Ryan and Executive Order No. 12,333, which would have simply retained the sins of the past, but also by combining and intermingling them in a way that will surely add to the confusion. In the Senate bill, "special activity" would be defined to (1) maintain the Hughes-Ryan "operations in foreign countries" terminology for the CIA, (2) adopt the Executive order "activities in support of national foreign policy objectives" formulation for all other departments and agencies, and (3) link the former with the latter so as to make the latter available to the CIA to the extent the two definitions are not inconsistent.[130] The ostensible purpose of this arrangement is to "reflect and incorporate the existing law and *mutually-agreed upon practice*" and "not to disturb the body of legal interpretation under the current legal requirements."[131]

The committee conceded that Hughes-Ryan was "never intended by Congress" to require a finding for all of CIA's non-collection activities overseas and had been recognized not to apply to such matters as "routine assistance" to the State Department, Department of Defense and other agencies, as well as "certain" counterintelligence activities.[132] Also, the SSCI knew that the Executive order definition had been relied upon

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128. *Id.* at 18.

129. *Id.* at 18, 30-31.

130. S. 1721, 100th Cong., 2d Sess. § 503(e) (1988), *reprinted in* 1988 SSCI REPORT, *supra* note 16, at 46. The full definition would read as follows:

> (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.

*Id.*

131. 1988 SSCI REPORT, *supra* note 16, at 6, 32, 40 (emphasis added).

132. *Id.* at 38.

to justify not applying Hughes-Ryan to these activities and had not objected to this practice.[133] While an Executive order cannot modify a statutory obligation, the language in the Executive order was useful to both sides because it enabled the executive branch to narrow its burden openly and reasonably, and yet provided Congress with access to activities—those in the United States, those conducted by agencies other than the CIA—that were not covered by the Hughes-Ryan language.[134]

It is true that the Hughes-Ryan and Executive order provisions have their own history and provide a semblance of content to the process. While enacting them without the connecting phrase would make it more difficult to argue for the exclusion of certain CIA activities under the Executive order language; combining the two in the manner contemplated makes little sense. The committee explained that the CIA will remain subject to the provision drawn from Hughes-Ryan, but may benefit from the provision drawn from the Executive order so long as the activities in question "do not fall within the intended ambit" of the Hughes-Ryan language.[135] This is intended to mean that:

> Where CIA has not legally been barred in the past from undertaking certain activities in foreign countries without a presidential finding (*i.e.*, 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) it is not so barred under this definition. It does not mean, however, that to the extent CIA activities in the United States or abroad have been barred under previous law from being undertaken without a presidential finding, even though they are not expressly covered by the Executive order definition (*e.g.*, covert support to other U.S. agencies abroad whose activities would be apparent or publicly acknowledged upon execution) they will continue to be included . . . .
>
> In short, the two-part definition . . . is intended to maintain current law with respect to both CIA and the Executive branch as a whole, as mutually interpreted and agreed upon by the Executive branch and the intelligence committees.[136]

This intent to maintain the status quo would, of course, be very helpful if there were a common understanding of what the reporting requirements mean. Unfortunately, as recent history so clearly demonstrates, no such understanding exists.

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133. *Id.*
134. *Id.* at 38-39.
135. *Id.* at 39.
136. *Id.* at 39-40.

The fogginess of the matter would be compounded further by the adoption of a formal statutory requirement that not only "significant" covert activities be reported, but also "significant" participation by any other governmental or non-governmental entity.[137] This term is intended to exclude "routine, minimal or incidental" administrative, personnel or logistics support that can be characterized as de minimus.[138] Examples include "permitting use of secure communications systems, refueling or servicing aircraft, maintenance of equipment, obtaining overflight clearances or landing rights" when routinely provided to agencies for other purposes.[139] The nature of the participation, not the number of employees involved, is to be determinative.[140]

Apparently recognizing the ambiguities in the SSCI proposal and dissatisfied with the lack of coherence and precision in the existing definitions, the HPSCI has developed an alternative definition of "covert action" to include in the House version of new oversight legislation.[141] In addition to eschewing the euphemistic, the HPSCI version would specifically exempt certain categories of activities that until now have been excluded based upon interpretation, implication and surmise.[142] The exempted categories include traditional counterintelligence, security, military and law enforcement operations that may not be overt but do not fit comfortably within the original ambit of the term "covert action."[143]

137. S. 1721, 100th Cong., 2d Sess. § 503(3), (4) (1988), *reprinted in* 1988 SSCI REPORT, *supra* note 16, at 44.

138. 1988 SSCI REPORT, *supra* note 16, at 32-33.

139. *Id.* Had they been available at the time, these examples might have allowed the CIA to exclude its early involvement in the Iran arms transfers if it had a practice of facilitating transportation or obtaining overflight clearance for other agencies. *See* Report of the President's Special Review Board ("The Tower Commission"), B-31 n.22, B-38-39 (1987).

140. *Id.* at 33.

141. *See* REPORT OF HOUSE PERMANENT HOUSE SELECT COMM. ON INTELLIGENCE TO ACCOMPANY H.R. 3822, THE INTELLIGENCE OVERSIGHT ACT OF 1986, H.R. REP. NO. 705, 100th Cong., 2d Sess., pt. 1, at 3 (1988).

142. *Id.* § 503(e), at 3.

143. The full definition would read as follows:

> As used in this title, 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—
>
> (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 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.
>
> A request by any department, agency, or entity of the United States to a foreign

If adopted by the Congress and enacted into law, the HPSCI definition would represent an enormous improvement. Nonetheless, there are currently five separate definitional expressions "on the street" at the same time—Hughes-Ryan, Title V of the National Security Act, Executive Order No. 12,333, S. 1721, and the H.R. 3822. No better testimony exists to establish the need for reform.

## XII. APPLYING CURRENT GUIDELINES

Currently, an executive branch official must, consciously or unconsciously, consider at least the following core questions based upon existing statutory and Executive order provisions in determining whether a proposed activity requires a Presidential finding and a prior or "timely" report to the Intelligence Committees of the Congress:

—Does it involve the expenditure of *any* funds by the CIA?
—Does it involve the expenditure of *any* funds on behalf of the CIA?
—Is it intended to have any purpose other than collecting intelligence?
—Is that other purpose only the production of intelligence?
—Will the activity be conducted abroad?
—If conducted in the United States, is it designed to have consequences abroad?
—Are those consequences in support of national foreign policy objectives abroad?
—Is the role of the United States Government intended to be apparent?
—Will that role be acknowledged publicly?
—Does it constitute diplomatic activity?
—Does it amount to a support function for intelligence collection or production or for diplomatic activity?
—Can it be considered a "significant anticipated intelligence activity"?

In answering these core questions, a host of ancillary questions, drawn from the legislative history of the statutory and Executive order provisions, must be addressed as well:

—If the purpose is dissemination of intelligence, what is the nature of the recipient?
—To what end will the disseminated information be put?
—Can the dissemination be related closely to a collection function?

government or a private citizen to conduct a covert action on behalf of the United States shall be deemed to be covert action.

*Id.*

—Can the CIA involvement be considered minimal or routine support?
—If not routine or minimal, is it substantial?
—Is it in furtherance of a liaison relationship?
—Can it be considered to be a paramilitary, propaganda, psychological, or political operation?
—Are political or economic consequences likely?
—Will it interfere with or influence in any way the internal affairs of a foreign country?
—Is it intended to influence the policies or programs of a foreign country?
—Will money change hands or be moved through international channels?
—Where the role of the United States will be known to foreign officials or others involved in the operation, can this be considered to be apparent or public knowledge?
—Even if the role of the United States is overt, will the role of the CIA be covert?
—What nature and purpose is there for any training or assistance that may be involved?
—Is there a military aspect to the operation?
—Will material or equipment change hands?
—Will military or lethal equipment be involved?
—Can humans be killed or injured or property damaged as a consequence?
—Would exposure of the activity tend to embarrass the United States?
—Could foreign, military, or other relations between the United States and foreign countries or groups be affected?
—Are there substantial financial costs associated with the operation?
—Will numbers of American personnel be involved?
—What will be the nature and extent of their involvement?
—Is the operation intended to mislead an adversary?
—Does the operation raise domestic, foreign, or international legal questions?
—Are there ethical or moral issues relating to the activity?
—Will allied governments be adversely affected?
—Would the activity affect or change the nature of a previously reported activity?
—Is there a requirement for more senior-level review or Presidential consideration or is such review advisable?
—Are there any risks associated with the operation?
—Has this type of operation traditionally been characterized as a counterintelligence, countermeasures, security, logistical, administrative, law enforcement, or other non-covert action activity?

Finally, after all the core and ancillary questions have been addressed, the most important question of all must be considered: is there reason to believe the activity is of such a nature that the Intelligence Committees would desire advance notice?

## XIII. CONCLUSION

As stated in a report to the chairman of the American Bar Association Standing Committee on Law and National Security by four former senior government officials who reviewed the current SSCI proposal:

> The authors of the Hughes-Ryan Amendment, in lieu of hazarding a definition of special activities, took the blunderbuss approach of requiring a presidential finding for everything done abroad by the CIA which did not meet the purity of purpose test embraced in "intended solely for obtaining necessary intelligence." It is now almost 15 years since passage of that law .... The time is long past to free the President from the unnecessary burden of making findings about low-level activities carried out by the CIA abroad merely because they arise in circumstances that cast doubt on whether intelligence collection is the sole and unalloyed purpose.[144]

This logic is also true with regard to the potential impact the proposed SSCI definition would have on agencies other than the CIA and the intelligence agencies whose programs would be subjected to scrutiny under the law for the first time. The current statutory provisions and Executive order definition have, until now, been limited almost unconsciously by their context to agencies with intelligence functions. For example, the oversight provisions speak to covert actions as part of "significant anticipated *intelligence* activities." The current SSCI proposal for reform would separate the covert action reporting requirement from this concept and no longer limit the context to intelligence activities or agencies.

There is no basis for estimating the number and type of activities in which other entities of the United States Government are engaged that could conceivably be swept into the finding and reporting process by a literal application of the "special activity" definition merely because they are planned and executed secretly and further foreign policy objectives abroad.[145] The executive branch should not be subjected to an additional

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144. *See* 134 CONG. REC. S1861, S1863 (daily ed. March 3, 1988) [hereinafter ABA WORKING GROUP REPORT]. The working group included Dan Silver, former CIA general counsel; Fred Hitz, former CIA legislative counsel; John Shenefield, former associate Attorney General; and Bob Turner, former counsel to the Intelligence Oversight Board.

145. *See, e.g.*, Pretrial Memorandum Order No. 5, United States v. Yunis, Cr. No. 87-0377, (D.D.C. filed Feb. 23, 1988) (denying Motion to Dismiss Because of Illegal Arrest; granting

fifteen-year period of uncertainty and certain controversy with regard to these other agencies and functions.

The HPSCI version is a useful first step, but this effort to clarify matters must be a joint undertaking. Senator Daniel Moynihan has said that "trust is the coin of the realm. Debase that coin and all is lost."[146] The current situation breeds distrust because of the large margin for error. The additional distrust bred by the Iran-Contra Affair should be put aside to enable a lessening of the potential for aggravated distrust in the future.

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Motion to Suppress Statements; and describing FBI undercover operation to lure alleged terrorist into international waters for arrest and delivery to the United States).

146. 134 CONG. REC. S1867 (daily ed. March 3, 1988) (quoting Bryce Harlow); *see also* ABA WORKING GROUP REPORT, *supra* note 144, at S1863.