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# Covert Action: Legislative Background and Possible Policy Questions

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## Summary

Published reports have suggested that in the wake of the 9/11 terrorist attacks, the Pentagon has expanded its counter-terrorism intelligence activities as part of the global war on terror. Some observers have asserted that the Department of Defense (DOD) may be conducting certain kinds of counterterrorism intelligence activities that would statutorily qualify as "covert actions," and thus require a presidential finding and the notification of the congressional intelligence committees.

Defense officials assert that none of DOD's current counter-terrorist intelligence activities constitute covert action as defined under the law, and therefore, do not require a presidential finding and the notification of the intelligence committees. Some of these DOD's activities have been variously described publicly as efforts to collect intelligence on terrorists that will aid in planning counter-terrorism missions; to prepare for potential missions to disrupt, capture or kill them; and to help local militaries conduct counter-terrorism missions of their own.

Senior U.S. intelligence community officials have conceded that the line separating CIA and DOD intelligence activities has blurred, making it more difficult to distinguish between the traditional secret intelligence missions carried out by each. In some of their public comments, however, these officials have not specifically addressed the issue of whether Pentagon counter-terrorist activities meet the legal definition of covert actions.

This report examines the statutory procedures governing covert action and associated questions to consider. This report will be updated as warranted.

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# Covert Action: Legislative Background and Possible Policy Questions

## Introduction

Some observers assert that since 9/11 the Pentagon has begun to conduct certain types of counterterrorism intelligence activities that may meet the statutory definition of a covert action. The Pentagon, while stating that it has attempted to improve the quality of its intelligence program in the wake of 9/11, contends that it does not conduct covert actions.

Congress in 1990 toughened procedures governing intelligence covert actions in the wake of the Iran-Contra affair, after it was discovered that the Reagan Administration had secretly sold arms to Iran, an avowed enemy that had branded as terrorist, and used the proceeds to fund the Nicaraguan Democratic Resistance, also referred to some as "Contras." In response, Congress adopted several statutory changes, including enacting several restrictions on the conduct of covert actions and establishing new procedures by which Congress is notified of covert action programs. But in its most important change, Congress for the first time statutorily defined covert action to mean "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where its intended that the role of the United States Government will not be apparent or acknowledged publicly."[1]

The 1991 statutory changes remain in effect today. This report examines the legislative background surrounding covert action and poses several related policy questions.

## Background

In 1974, Congress asserted statutory control over covert actions in response to revelations about covert military operations in Southeast Asia and other intelligence activities. It approved the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961 requiring that no appropriated funds could be expended by the Central Intelligence Agency for covert actions unless and until the President found that each such operation was important to national security, and provided the appropriate committees of Congress with a description and scope of each operation in a timely fashion.[2] The phrase "timely fashion" was not defined in statute.

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[1] Sec. 503(e) of the National Security Act of 1947 [50 U.S.C. 413b].

[2] P.L. 93-559 (1974). The "appropriate committees of Congress" was interpreted to include

(continued...)

In 1980, Congress endeavored to provide the two new congressional intelligence committees with a more comprehensive statutory framework under which to conduct oversight.[3] As part of this effort, Congress repealed the Hughes-Ryan Amendment and replaced it with a statutory requirement that the executive branch limit its reporting on covert actions to the two intelligence committees, and established certain procedures for notifying Congress prior to the implementation of such operations. Specifically, the statute stipulates that if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting the vital interests of the United States, the President may limit prior notice to the chairmen and ranking minority members of the intelligence committees, the speaker and minority leader of the House, and the majority and minority leaders of the Senate — a formulation that has become known as the "Gang of Eight." If prior notice is withheld, the President is required to inform the Committees in a "timely fashion" and provide a statement of the reasons for not giving prior notice.[4]

In 1984, in the wake of the mining of Nicaraguan harbors in support of the Nicaraguan Democratic Resistance, the chairman and vice chairman of the Senate Select Committee on Intelligence signed an informal agreement — which became known as the "Casey Accords" — with then-Director of Central Intelligence (DCI) William Casey establishing certain procedures that would govern the reporting of covert actions to Congress. In 1986, the committee's principals and the DCI signed an addendum to the earlier agreement, stipulating that the Committee would receive prior notice if "significant military equipment actually is to be supplied for the first time in an ongoing operation...even if there is no requirement for separate higher authority or Presidential approval." This agreement reportedly was reached several months after President Reagan signed the January 17, 1986, Iran Finding which authorized the secret transfer of certain missiles to Iran.[5]

Following the Iran-Contra revelations, President Ronald Reagan in 1987 issued National Security Decision Directive 286 prohibiting retroactive findings and requiring that findings be written. The executive branch, without congressional consent, can revise or revoke such National Security Directives.

In 1988, acting on a recommendation made by the Congressional Iran-Contra Committee, the Senate approved bipartisan legislation that would have required that the President notify the congressional intelligence committees within 48 hours of the implementation of a covert action if prior notice had not been provided. The House did not vote on the measure.

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[2] (...continued)
the Committees on Armed Services, Foreign Relations (Senate) and Foreign Affairs (House), and Appropriations of each House of Congress, a total of six committees.

[3] The Senate Select Committee on Intelligence was established in 1976. The House Permanent Select Committee on Intelligence was established in 1977.

[4] P.L. 96-450 (1980).

[5] W. Michael Reisman and James E. Baker, *Regulating Covert Action*, 1992, (Yale University Press) pp. 131-132.

Still concerned by the fall-out from the Iran-Contra affair, Congress in 1990 attempted to tighten its oversight of covert action. The Senate Intelligence Committee approved a new set of statutory reporting requirements, citing the ambiguous, confusing and incomplete congressional mandate governing covert actions under the then-current law. After the bill was modified in conference, Congress approved the changes.[6]

President George H.W. Bush, however, pocket-vetoed the 1990 legislation, citing several concerns, including conference report language indicating congressional intent that the intelligence committees be notified "within a few days" when prior notice of a covert action was not provided, and that prior notice could only be withheld in "exigent circumstances."[7] The legislation also contained language stipulating that a U.S. Government request of a foreign government or a private citizen to conduct covert action would constitute a covert action.

In 1991, after asserting in new conference language its intent as to the meaning of "timely fashion" and eliminating any reference to third-party covert action requests, Congress approved and the President signed into law the new measures.[8] President Bush noted in his signing statement his satisfaction that the revised provision concerning "timely" notice to the Congress of covert actions incorporates without substantive change the requirement found in existing law, and that any reference to third-party requests had been eliminated. Those covert action provisions remain in effect today.[9]

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[6] S. 2834

[7] Memorandum of Disapproval issued by President George H.W. Bush, Nov. 30, 1990.

[8] P.L. 102-88. See covert action requirements in Sec. 503 of the National Security Act of 1947 [50 U.S.C. 413b].

[9] Although the covert action statute has remained virtually unchanged, Congress has addressed some related concerns. The fiscal year 2004 defense authorization law (P.L. 108-136) included a provision requiring the Secretary of Defense to report to Congress on the Special Operations Forces' changing role in counterterrorism, and on the implications of those changes, if any, on the Special Operations command. Also included was a provision requiring that any Special Operations Command-led missions be authorized by the President or the Secretary of Defense. In the 2004 intelligence authorization law, conferees reaffirmed the "functional definition of covert action" and cited the "critical importance to the requirements for covert action approval and notification" contained in the 1991 intelligence authorization law. For a more detailed discussion of these and related issues, see Helen Fessenden, CQ Weekly, "Intelligence: Hill's Oversight Role At Risk, Mar. 27, 2004, p. 734. Congress also gave the Secretary of Defense authority to spend up to $25 million through 2007 to provide support to "...foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism." Congress further required that the Secretary of Defense notify the congressional defense committees "...expeditiously, and in any event in not less than 48 hours, of the use of such authority with respect to that operation..." Congress said that this authority does not constitute the authority to conduct a covert action. See Section 1208, P.L. 108-375.

## Post 9/11 Concerns

Since the 9/11 terrorist attacks, concerns have surfaced, particularly with regard to the Pentagon's expanded intelligence counterterrorism efforts. Some lawmakers reportedly have expressed concern that the Pentagon is creating a parallel intelligence capability independent from the CIA or other American authorities, and one that encroaches on the CIA's realm.[10] It has been suggested that the Pentagon has adopted a broad definition of its current authority to conduct "traditional military activities" and "prepare the battlefield."[11] Senior Defense Department officials reportedly have responded that the Pentagon's need for intelligence to support ground troops after 9/11 requires a more extensive Pentagon intelligence operation, and they suggest that any difference in DOD's approach is due more to the amount of intelligence gathering that is necessarily being carried out, rather than to any difference in the activity it is conducting.[12] These same officials, however, also reportedly contend that American troops were now more likely to be working with indigenous forces in countries like Iraq or Afghanistan to combat stateless terrorist organizations and need as much flexibility as possible.[13]

To add even more complexity to DOD and CIA mission differences, Michael Hayden, Director of the Central Intelligence Agency, reportedly has stated that it has become more difficult to distinguish between traditional secret intelligence missions carried out by the military and those by the CIA and that any problems resulting from overlapping missions will be resolved case-by-case.[14] As a result, some observers suggest that Congress needs to increase its oversight of military activities that some contend may not meet the definition of covert action, and may therefore, be exempt from the degree of congressional oversight accorded to covert actions. Others contend that increased oversight will hamper the military's effectiveness.[15]

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[10] Eric Schmitt, *The New York Times*, "Clash Forseen Between CIA and Pentagon," May 10, 2006, p 1.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Ibid. The Department of Defense makes the following distinction between a clandestine operation and a covert action: a clandestine operation is an operation sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment. Such an operation differs from a covert action in that emphasis is placed on concealment of the operation rather than on the concealment of the identity of the sponsor. According to the DOD, in special operations, an activity may be both covert and clandestine and may focus equally on operational considerations and intelligence-related activities. See "Department of Defense Dictionary of Military and Associated Terms," Joint Publication 1-02, Aug. 8, 2006.

[15] Helen Fessenden, *CQ Weekly*, "Intelligence: Hill's Oversight Role At Risk," Mar. 27, 2004, p. 734.

## Current Statute Governing Covert Actions

The current statute with regard to covert action remains virtually unchanged since it was signed into law in 1991.[16] In essence it codified elements of the "Casey Accords," the President's 1988 national security directive and various legislative initiatives.

The legislation approved that year, according to the conferees,[17] for the first time imposed the following requirements pertaining to covert action:

- A finding must be in writing.
- A finding may not retroactively authorize covert activities which have already occurred.
- The President must determine that the covert action is necessary to support identifiable foreign policy objectives of the United States.
- A finding must specify all government agencies involved and whether any third party will be involved.
- A finding may not authorize any action intended to influence United States political processes, public opinion, policies or media.
- A finding may not authorize any action which violates the Constitution of the United States or any statutes of the United States.
- Notification to the congressional leaders specified in the bill must be followed by submission of the written finding to the chairmen of the intelligence committees.
- The intelligence committees must be informed of significant changes in covert actions.
- No funds may be spent by any department, agency or entity of the executive branch on a covert action until there has been a signed, written finding.

The term "covert action" was defined for the first time in statute to mean "...an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States will not be apparent or acknowledged publicly..."[18]

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[16] Sec. 503 of the National Security Act of 1947 [50 U.S.C. 413b].

[17] Joint Explanatory Statement of the Committee of Conference, H.R. 1455, July 25, 1991.

[18] Ibid.

In 1991, Congressional conferees said this new definition was intended to clarify understandings of intelligence activities requiring the President's approval, not to relax or go beyond previous understandings. Conferees also signaled their intent that government activities aimed at misleading a potential adversary to the true nature of U.S. military capabilities, intentions or operations, for example, would not be included under the definition. And they stated that covert action does not apply to acknowledged U.S. government activities which are intended to influence public opinion or governmental attitudes in foreign countries. To mislead or to misrepresent the true nature of an acknowledged U.S. activity does not make it a covert action, according to the conferees.[19]

## Exceptions Under the Statutory Definition of Covert Action

In approving a statutory definition of covert action, Congress also statutorily stipulated four categories of activities which would not constitute covert action. They are: (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; (4) activities to provide routine support to the overt activities (other than activities described in the first three categories) of other United States Government agencies abroad.[20]

This report addresses the second category of activities — traditional military activities and routine support to those activities.

## Traditional Military Activities

Conferees stated:

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

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[19] Ibid.

[20] Ibid.

> military commander. Activities that are not under the direction and control of a military commander should not be considered as "traditional military activities."[21]

## Routine Support of Traditional Military Activities

Conferees further stated that whether or not activities undertaken well in advance of a possible or eventual U.S. military operation constitute "covert action" will depend in most cases upon whether they constitute "routine support" and referenced the report accompanying the Senate bill for an explanation of the term.[22]

The report accompanying the Senate bill[23] states:

> The committee considers as "routine support" unilateral U.S. activities to provide or arrange for logistical or other support for U.S. military forces in the event of a military operation that is to be publicly acknowledged. Examples include caching communications equipment or weapons, the lease or purchase from unwitting sources of residential or commercial property to support an aspect of an operation, or obtaining currency or documentation for possible operational uses, if the operation as a whole is to be publicly acknowledged.

The report goes on to state:

> The committee would regard as "other-than-routine" support activities undertaken in another country which involve other than unilateral activities. Examples of such activity include clandestine attempts to recruit or train foreign nationals with access to the target country to support U.S. forces in the event of a military operation; clandestine [efforts] to influence foreign nationals of the target country concerned to take certain actions in the event of a U.S. military operation; clandestine efforts to influence and effect [sic] public opinion in the country concerned where U.S. sponsorship of such efforts is concealed; and clandestine efforts to influence foreign officials in third countries to take certain actions without the knowledge or approval of their government in the event of a U.S. military operation.

As the congressional conferees declared in 1991, timing of such activities — whether proximate to a military operation, or well in advance — does not define "other-than-routine" support of military activities. Rather, whether such activities constitute "other-than-routine" support, and thus constitute covert action, will depend, in most cases, on whether such an activity is unilateral in nature, that is, whether U.S. government personnel conduct the activity, or whether they enlist the assistance of foreign nationals.

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[21] Joint Explanatory Statement of the Committee of Conference, H.R. 1455, July 25, 1991.

[22] Ibid.

[23] S.Rept. 102-85, S. 1325, 102nd Congress, 1st Session (1991).

## Policy Issues

The lines defining mission and authorities with regard to covert action are less than clear. The lack of clarity raises a number of policy questions for Congress, including the following far from exclusive list.

How should Congress define its oversight role? Which committees should be involved?

Can the U.S. military improve the effectiveness of its intelligence operations without at some point enlisting the support of foreign nationals in such a way that such activity could be viewed as "non-routine support" to traditional military activities, that is, a covert action?

Is it appropriate to view U.S. counterterrorism efforts in the context of a global battlefield and to view the military as having the authority to "prepare" that battlefield, and can "anticipated" military action precede the on-set of hostilities by months or years?

Is it appropriate to view the military as being involved in "a war" against terrorists, and thus its activities as constituting "traditional military activities" as it wages that war?

By asserting that its activities do not constitute covert actions, is the Pentagon trying to avoid the statutory requirements governing covert action, including a signed presidential finding, congressional notification, and oversight by the congressional intelligence committees? Or, as Pentagon officials suggest, is DOD, in the wake of 9/11, simply fulfilling a greater number of intelligence needs associated with combating terrorism that are sanctioned in statute and do not fall under the statutory definition of covert action?

In the 15 years since Congress last comprehensively addressed the issue of covert action, has the environment in which the U.S. military operates changed sufficiently to warrant a review of the statute that applies to covert actions?

In his 1991 signing statement, President George H.W. Bush argued that Congress's definition of "covert action" was unnecessary. He went on to state that in determining whether particular military activities constitute covert actions, he would continue to bear in mind the historic missions of the Armed Forces to protect the United States and its interests, influence foreign capabilities and intentions, and conduct activities preparatory to the execution of operations.