

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

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Since the mid-1970s, Congress's oversight of the Intelligence Community (IC) has been a fundamental component of ensuring that the IC's seventeen diverse elements are held accountable for the effectiveness of their programs supporting United States national security. This has been especially true for covert action and clandestine intelligence activities because of their significant risk of compromise and potential long-term impact on U.S. foreign relations. Yet, by their very nature, these and other intelligence programs and activities are classified and shielded from the public. Congressional oversight of intelligence, therefore, is unlike its oversight of more transparent government activities with a broad public following. In the case of the Intelligence Community, congressional oversight is one of the few means by which the public can have confidence that intelligence activities are being conducted effectively, legally, and in line with American values.

*Covert action* is defined in statute (50 U.S.C. §3093(e)) as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” When informed of covert actions through Presidential *findings* prior to their execution—as is most often the case—Congress has a number of options: to provide additional unbiased perspective on how these activities can best support U.S. policy objectives; to express reservations about the plan and request changes; or withhold funding. Although Congress does not have the authority to approve or disapprove covert actions, it can have (and has had) influence on the President's decision.

The term *clandestine* describes a methodology for a range of activities wherein both the role of the United States and the activity itself are secret. Clandestine activities can involve traditional intelligence or unconventional military assets. Like covert action, their impact can be strategic even though a specific activity may be tactical in scope. Their secret character suggests the potential harm to sources and methods in the event of an unauthorized or unanticipated public disclosure.

Congressional oversight of *covert* action can be organized around a framework of five issue areas: (1) the activity's statutory parameters, (2) U.S. national security interests, (3) U.S. foreign policy objectives, (4) funding and implementation, and (5) risk assessment. These categories enable Congress to analyze and assess the specific elements of each activity from a strategic point of view. By extension, Congressional oversight of anticipated *clandestine* intelligence activities that might also shape the political, economic or military environment abroad can apply the same framework and, as with covert action oversight, address the risk of compromise, unintended consequences, and loss of life.

This report is accompanied by two related reports: CRS Report R45175, *Covert Action and Clandestine Activities of the Intelligence Community: Selected Definitions in Brief*, by Michael E. DeVine, and CRS Report R45191, *Covert Action and Clandestine Activities of the Intelligence Community: Selected Congressional Notification Requirements in Brief*, by Michael E. DeVine.

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## Introduction

The present structure of congressional oversight of the Intelligence Community (IC) largely resulted from investigations by two congressional committees in the 1970s—in the Senate, chaired by Idaho Senator Frank Church, and in the House, chaired by Representative Otis Pike—that suggested a need for permanent committees in each chamber: today’s Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI). It is important to note, however, that oversight of intelligence is a function of more than just the two congressional intelligence committees. Ten other committees—the Armed Services, Foreign Affairs/Foreign Relations, Homeland Security, Judiciary, and Appropriations committees of both chambers—exercise oversight responsibility to varying degrees over intelligence programs or IC elements that fall under their jurisdiction.

The Church and Pike committees’ oversight focused primarily on two themes: investigation of past abuses and IC organizational reform. Over the succeeding years those efforts have been both beneficial and occasionally burdensome. In protecting against the IC’s abuse of its authorities, Congress has helped ensure intelligence activities were legal, ethical and consistent with American values. Congress’s influence in IC organizational reform has resulted in improved performance and accountability. On other occasions, however, congressional oversight has tended toward micromanagement resulting in strains in the relationship with the IC.<sup>1</sup>

This report posits a potential framework for congressional oversight of intelligence-related programs and activities using the *existing* committee structure and notification standards for the most sensitive intelligence activities: covert action and clandestine intelligence collection.<sup>2</sup> The framework may assist Congress in assessing the premises justifying each of these activities, their impact on national security, operational viability, funding requirements, and possible long-term or unintended consequences.

Unlike areas with a broad public following, such as health care, veterans’ services, and agriculture, intelligence programs and activities are generally classified, receive little public exposure, and have no natural public constituency. Highly classified covert action and clandestine intelligence programs do not often have visibility outside of Congress. Congressional oversight, therefore, provides one of the few meaningful checks on the President’s execution of intelligence policy and programs that may have significant bearing on U.S. foreign relations and national security.

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<sup>1</sup> See, for example, James Clapper, interview with Representative James Himes, *After Words with James Clapper*, C-SPAN, May 21, 2018, at <https://www.c-span.org/video/?c4732869/oversight-us-intelligence-community>:

“The Intelligence Community needs oversight. Unfortunately, our history is replete with abuses over time... So we need... an independent, autonomous oversight. Is what we’re doing legal, ethical, moral and in accordance with American standards and values? And that, to me, should be the main purpose of those [intelligence] committees... What sometimes happens... It kind of devolves into micromanagement, where essentially people want to do the job of seniors in the Intelligence Community for them. And that’s not good either because I think you have a tendency to lose sight of the big things, the important things: Is what the Community is doing legal, moral, and ethical?”

See also, Mark Hosenball and Jonathan Landay, “U.S. Spy Agencies Fight Congress over Plan for Probe of Covert Russian Influence Campaign,” *Reuters*, December 2, 2016, at <https://www.reuters.com/article/us-usa-intelligence-russia-idUSKBN13R2GB>.

<sup>2</sup> For an examination of options for reforming congressional oversight of the IC, see CRS Report R45421, *Congressional Oversight of Intelligence: Background and Selected Options for Further Reform*, by Michael E. DeVine.

## Background

Among the recommendations of the National Commission on Terrorist Attacks upon the United States (the “9/11 Commission”) were those aimed at strengthening intelligence oversight.<sup>3</sup> Since the Church and Pike committees of the 1970s, Congress occasionally has been able to refine its oversight of the IC. However, it has not been able to sustain its early momentum. As the Final Report of the 9/11 Commission put it,

“...the oversight function of the Congress...diminished over time. In recent years, traditional review of the administration of programs and implementation of laws has been replaced by ‘a focus on personal investigations, possible scandals, and issues designed to generate media attention.’ The unglamorous but essential work of oversight has been neglected, and few members past or present believe it is performed well....[T]he executive branch needed help from Congress in addressing the questions of counterterrorism strategy and policy, looking past day-to-day concerns....Congress...often missed the big questions—as did the executive branch.”<sup>4</sup>

Since 9/11, the Senate especially has made progress toward following through with organizational reform of the oversight process, following through on several of the 9/11 Commission’s recommendations. S.Res. 445 (108<sup>th</sup> Congress) amended Senate rules governing intelligence oversight (S.Res. 400) aimed at increasing the authority of the SSCI relative to the standing committees, promoting bipartisanship, and building expertise.<sup>5</sup> However, a number of factors have complicated Congress’s efforts to improve oversight. This poses risks to national security when involving the most sensitive aspects of intelligence—covert action and clandestine activities—due to their potential impact on U.S. foreign relations.

Moreover, greater integration of military operations and intelligence activities has resulted in some confusion over the proper congressional jurisdiction for exercising oversight on Capitol Hill.<sup>6</sup> Congress has expressed concern that the Department of Defense’s (DOD) overuse of terms that are not defined in statute, such as *operational preparation of the environment* (OPE), to describe operations that may resemble intelligence activities allows DOD to circumvent the more stringent oversight requirements of the congressional intelligence committees.<sup>7</sup>

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<sup>3</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington, DC: GPO, 2004). p. 419.

<sup>4</sup> *The 9/11 Commission Report*. pp. 105-106.

<sup>5</sup> The HPSCI has taken more limited steps than the SSCI in implementing oversight reform measures. For example, term limits for Members of the House Permanent Committee on Intelligence (HPSCI), originally intended to prevent co-optation by the intelligence community (IC), may actually present an obstacle to the development of deep expertise. See CRS Report R45421, *Congressional Oversight of Intelligence: Background and Selected Options for Further Reform*, by Michael E. DeVine.

<sup>6</sup> See Andru E. Wall, “Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities and Covert Action,” *Harvard National Security Journal*, December 2, 2011, <https://harvardnsj.org/2011/12/demystifying-the-title-10-title-50-debate-distinguishing-military-operations-intelligence-activities-covert-action/>.

<sup>7</sup> DOD defines *operational preparation of the environment* (OPE) as the “conduct of activities in likely or potential areas of operations to prepare and shape the operational environment,” with *operational environment* defined as a “composite of the conditions, circumstances, and influences that affect the employment of capabilities and bear on the decisions of the commander.” Joint Publication 3-05, “Special Operations,” a doctrine issuance of the Joint Staff, describes *preparation of the environment* as an “umbrella term for operations and activities conducted by selectively trained special operations forces to develop an environment for potential future special operations,” with “close-target reconnaissance ... reception, staging, onward movement, and integration ... of forces ... [and] infrastructure development” cited as examples of such activities. See Joint Staff, “DOD Dictionary of Military and Associated

Despite these challenges, congressional oversight remains an important check on policy and decisions of the executive branch, to insure intelligence programs and activities are ethical, legal and properly aligned with U.S. national security and foreign policy objectives. Congressional oversight of *covert* action can be organized around a framework of five issue areas: (1) the activity's statutory parameters, (2) U.S. national security interests, (3) U.S. foreign policy objectives, (4) funding and implementation, and (5) risk assessment. These categories enable Congress to analyze and assess the specific elements of each activity from a strategic point of view. By extension, Congressional oversight of anticipated *clandestine* intelligence activities that might also shape the political, economic or military environment abroad can apply the same framework and, as with oversight of covert action, address the risk of compromise, unintended consequences, and loss of life.

A conceptual framework for congressional oversight of covert action begins with its statutory definition: Covert action is codified as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”<sup>8</sup> There are a number of exceptions in the statutory definition of covert action; these include some activities that could use clandestine methodology. Exceptions include activities primarily intended to collect intelligence; traditional counterintelligence activities; traditional military activities, or support to traditional military activities; traditional law enforcement activities, or routine support to law enforcement; and traditional diplomatic activities.<sup>9</sup> How these exceptions are defined and applied to actual practice is not always straightforward and can complicate congressional oversight. For example, Congress has expressed concern that DOD too frequently applies the term *traditional military activities* to describe operations that in many respects resemble covert action.<sup>10</sup> This is important insofar as it results in different committees being informed of the activity and different standards for the timeliness of notification.<sup>11</sup>

Oversight also requires a solid grasp of the U.S. national security interests and foreign policy objectives that each administration details its National Security Strategy, National Defense

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Terms,” June 2017 revision, available at [http://www.dtic.mil/doctrine/new\\_pubs/dictionary.pdf](http://www.dtic.mil/doctrine/new_pubs/dictionary.pdf). See also Joint Staff, “Special Operations,” Joint Publication 3-05, July 16, 2014, available at [http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_05.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_05.pdf), and Joint Staff, “Joint Operations,” Joint Publication 3-0, January 17, 2017, available at [http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_0\\_20170117.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_0_20170117.pdf).

<sup>8</sup> 50 U.S.C. §3093 (e).

<sup>9</sup> *Ibid.*

<sup>10</sup> See U.S. Congress, House of Representatives, *Intelligence Authorization Act, Fiscal Year 1991*, conference report to accompany H.R. 1455, 102<sup>nd</sup> Cong., 1<sup>st</sup> sess., July 25, 1991, H.Rept. 102-166, pp. 29-30:

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

<sup>11</sup> For more on the statutory requirements for the executive branch to notify Congress of covert action and selected other sensitive intelligence and military activities, see CRS Report R45191, *Covert Action and Clandestine Activities of the Intelligence Community: Selected Congressional Notification Requirements in Brief*, by Michael E. DeVine.

Strategy, and other strategy and policy documents. Covert action statutorily must support “identifiable foreign policy interests of the United States.”<sup>12</sup> Although not required by statute, it would be logical for clandestine intelligence (and military) activities that do not constitute covert action but have in common a high risk of compromise of sources and methods, a high impact on U.S. foreign relations, and a potential for the loss of life also to support identifiable (clearly articulated, documented) foreign policy objectives expressly. Moreover, congressional overseers may wish to identify or have expressly identified for them, the executive branch’s assumptions about the international environment since these assumptions influence policy that in turn, influences decisions on covert action and clandestine activities.

## **A Framework for Oversight; Lines of Inquiry for Congress**

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

If the committees do not support a particular operation or have concerns about aspects of it, an administration would have to think twice about proceeding with it as planned. If it is disclosed or ends in disaster, the administration will want to have had Congress on board. If it is going to last more than a year, the committees’ support will be needed for continued funding. The committees are also likely to be better indicators of how the public would react if the program were disclosed than the administration’s in-house pundits.<sup>13</sup>

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

1. the activity’s statutory parameters;
2. U.S. national security interests;
3. U.S. foreign policy objectives;
4. funding and implementation; and
5. risk of compromise, failure, loss of life, and unintended consequences.

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

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<sup>12</sup> 50 U.S.C. §3093(a).

<sup>13</sup> L. Britt Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004*, CIA Center for the Study of Intelligence, p. 311, posted May 9, 2008, at [https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill\\_Book\\_1May2008.pdf](https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill_Book_1May2008.pdf). See also Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Los Angeles: CQ Press, 2015), p. 234.

## Statutory Parameters of the Activity

Section 3093(a)(5) of Title 50, *U. S. Code* specifies that “a finding [for a covert action] may not authorize any action that would violate the Constitution or any statute of the United States.” Congressional oversight, then, ensures a covert action does not violate the law, to include any domestic law enacted to fulfill the terms of a non-self-executing treaty.<sup>14</sup>

### Questions for Congress

- Does the covert action or clandestine intelligence activity violate domestic U.S. law?
- Does the activity violate any domestic law connected to a non-self-executing treaty?
- Is the activity likely to violate international law? What are the national security implications of conducting a covert action that may violate international law? Is the risk justified by the operation’s importance to U.S. national security?<sup>15</sup>
- Would Congress likely choose to provide limitations on the covert action through legislation?<sup>16</sup>
- Does the covert action or clandestine activity, if conducted during hostilities, comply with the laws of armed conflict in accordance with DOD policy?<sup>17</sup>

## National Security Interests

Congressional oversight of covert action is generally recognized to be especially important to ensuring proper checks and balances, particularly under circumstances in which it is likely that no

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<sup>14</sup> A non-self-executing treaty requires the enactment of domestic legislation for the treaty to enter into force.

<sup>15</sup> Caroline D. Krass, “Covert Action v. Traditional Military Activities,” *Prehearing Questions for the Record for Ms. Caroline D. Krass*, at <https://www.intelligence.senate.gov/sites/default/files/hearings/krasspost.pdf>. In her answers to prehearing questions related to her nomination as CIA General Counsel, Ms. Krass wrote “[T]he United States respects international law and complies with it to the extent possible in the execution of covert action activities.” See also Paul G. Ericson, *The Need for Ethical Norms* (CIA Center for the Study of Intelligence, posted 2007), at [https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/volume-36-number-1/html/v36i1a02p\\_0001.htm](https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/volume-36-number-1/html/v36i1a02p_0001.htm). Ericson quotes former CIA Director, William Webster, responding to a query from a foreign leader who questioned the legality of the agency’s operations: “In the United States, we obey the laws of the United States. Abroad we uphold the national security interests of the United States.”

<sup>16</sup> During the Iran Contra Affair, the Reagan Administration, by using funds obtained from the sale of arms to Iran for the purchase of military aid for the Nicaraguan Contras, violated the Boland Amendments to the Continuing Appropriations Act of 1983 (P.L. 97-377). There were three Boland Amendments, which were directed at preventing the provision of military assistance to Contra rebels who were fighting to overthrow the Sandinista government. The first Boland Amendment specified that “[n]one of the funds provided in this act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country’s armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.” P.L. 97-377, FY1983 Continuing Appropriations Act (96 Stat. 1830) §793.

<sup>17</sup> See Joint Publication 3-12(R), *Cyberspace Operations*, February 5, 2013. See also *Department of Defense Law of War Manual* (Washington, DC: DOD Office of the General Counsel, December 2016), pp. 50-65. DOD policy on the conduct of hostilities, to include cyberspace operations, requires the U.S. Armed Forces adhere to the principles of the law of war, in particular, last resort, military necessity, prevention of unnecessary suffering, proportionality, and distinction.

one outside of a small number of authorized intelligence professionals will know anything about the covert action or clandestine activity.<sup>18</sup> Yet, the 9/11 Commission observed,

Congress had a distinct tendency to push questions of emerging national security threats off its own plate, leaving them for others to consider. Congress asked outside commissions to do the work that arguably was at the heart of its own oversight responsibilities.<sup>19</sup>

Oversight, in accordance with notification requirements of Title 50, enables Congress to provide a timely check on the development of a covert action or clandestine intelligence activity that might have serious flaws. Maintaining necessarily tight security surrounding planning for intelligence activities may present a challenge, because the few individuals outside the intelligence community with access may offer only limited perspective, overlook essential details, and too easily accept premises that might not bear up against broader scrutiny.<sup>20</sup>

### Questions for Congress

- What are the underlying premises of the threat and the international or regional environment that justify the covert action or clandestine activity?
- Is there any precedent for the particular covert action outlined in the presidential finding? If so, what were the similarities and differences with the covert action described in the current finding that may give perspective regarding the risk to U.S. personnel, unintended consequences, and implications for U.S. national security?
- What are the implications of involving third parties or countries in the covert action?<sup>21</sup>
- Does the covert action or clandestine activity conform to American and democratic values,<sup>22</sup> and promote free and fair elections?<sup>23</sup>

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<sup>18</sup> “Where covert action is concerned, the two intelligence committees have, since their inception, provided the only significant check and balance outside the executive branch. The appropriations committees occasionally weigh in on the funding levels for these programs, but the intelligence committees are where the policy issues are weighed and adjudicated.” L. Britt Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004*, CIA Center for the Study of Intelligence, p. 310. Posted May 9, 2008, at [https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill\\_Book\\_1May2008.pdf](https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill_Book_1May2008.pdf). See also Cohen, p. 240.

<sup>19</sup> *The 9/11 Commission Report*, p. 107.

<sup>20</sup> “...hard-to-detect CIA operations against suspect individuals tend to develop an organizational momentum that carries them well beyond legal and diplomatic limits—and beyond executive and congressional controls.” Stephen R. Weissman, “Accountability for CIA’s Cover Acts,” *POLITICO*, August 26, 2010.

<sup>21</sup> See §3093(a)(4), Title 50, *U. S. Code*: “Each finding shall specify whether it is contemplated that any third party which is not an element of, or a contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the covert action concerned, or be used to undertake the covert action concerned on behalf of the United States.”

<sup>22</sup> Conforming to “*American values*” is a subjective standard denoting each Member’s understanding of what their constituents can tolerate in the conduct of covert action and other sensitive intelligence activities.

<sup>23</sup> L. Britt Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004*, CIA Center for the Study of Intelligence, posted May 9, 2008, at [https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill\\_Book\\_1May2008.pdf](https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill_Book_1May2008.pdf).

- What are plausible long-term unintended consequences of the covert action? Do these possible long-term effects challenge the premises for conducting the covert action in the first place?<sup>24</sup>
- What might be some plausible second/third order effects of *not* conducting the covert action?

## Foreign Policy Objectives

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

### Questions for Congress

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

## Funding and Implementation

Congress can provide another level of review to ensure important details for successfully implementing the activity are not overlooked. Moreover, Congress’s constitutional responsibility for appropriating funds extends to its oversight of sensitive intelligence activities like covert action.<sup>25</sup> As former CIA Director and former Member of Congress Leon Panetta once remarked, “I do believe in the responsibility of the Congress not only to oversee our operations but to share in the responsibility of making sure that we have the resources and capability to help protect this country.”<sup>26</sup>

### Questions for Congress

- Is the department or agency named in the presidential finding as the lead agency for the covert action best suited to achieve the objectives?
- Are the operational elements planned for the covert action comprehensive and developed to achieve tactical success?

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<sup>24</sup> For example, a short-term perspective of the benefits of CIA’s covert action that instigated the 1953 coup in Iran that overthrew the democratically elected government of Mohammad Mossadegh, failed to allow for plausible long-term scenarios that might have suggested an alternative policy.

<sup>25</sup> William S. Cohen, “Congressional Oversight of Covert Actions,” *International Journal of Intelligence and Counterintelligence*, vol. 2, no. 2 (1988), pp. 239-240.

<sup>26</sup> Amy B. Zegart, “The Domestic Politics of Irrational Intelligence Oversight,” *Political Science Quarterly*, vol. 126, no. 1 (Spring 2011), p. 5.

- Is the covert action or clandestine activity sufficiently funded over its projected duration to achieve the objectives?

## **Risk Assessment**

“The executive branch is chiefly concerned with achieving the objectives of the president, whatever they might be. Because of this, it is sometimes tempted to downplay the risk and accentuate the gain.”<sup>27</sup> Congress’s relative distance from conceiving and planning the activity may enable it to provide more dispassionate risk assessment and more tempered analysis of likely outcomes.

## **Questions for Congress**

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

## **An Iterative Process**

Statute requires the President update Congress with notifications of changes in conditions from those described in the original notification of a covert action. Congressional oversight consequently extends to periodically reviewing changes in the operational environment on the ground that may suggest a different outcome, a change in strategy, a shift in U.S. interests, or the development of unintended consequences. Along these lines, §3093(d)(1) and (2) of Title 50 *U. S. Code* includes the following provision:

The President shall ensure that the congressional intelligence committees, or, if applicable, [the Gang of Eight],<sup>28</sup> are notified in writing of any significant change in a previously

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<sup>27</sup> Snider, p. 307.

<sup>28</sup> Section 3093(c)(2) of Title 50, *U.S. Code*, provides for limited notification to eight Members of Congress, colloquially known as the “Group of Eight”: “If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.”

approved covert action, or any significant undertaking pursuant to a previously approved finding, in the same manner as findings are reported pursuant to subsection (c).

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

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

Former CIA Inspector General L. Britt Snider has suggested that Congress, in carrying out its oversight responsibility, might be vulnerable to failure to review the premises and conditions for the covert action that may have changed, perhaps significantly, subsequent to the initial notification. The risk, as articulated by Snider is that “If members are satisfied with what they hear from administration witnesses [during the initial notification], not only will they acquiesce in the implementation of the operation, they are apt to devote less attention to it down the road.”<sup>29</sup> To guard against this outcome, this provision of the covert action statute underscores the importance of being alert to the possible tactical, political, and environment changes that warrant continued oversight to ensure the activity continues to be in the U.S. national interest.

### **Questions for Congress**

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

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<sup>29</sup> L. Britt Snider, *The Agency and the Hill: CIA's Relationship with Congress, 1946-2004*, CIA Center for the Study of Intelligence, p. 307, posted May 9, 2008, at [https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill\\_Book\\_1May2008.pdf](https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/agency-and-the-hill/The%20Agency%20and%20the%20Hill_Book_1May2008.pdf).

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