

**NOTE: WHO AUTHORIZED THIS?!: AN ASSESSMENT OF
THE PROCESS FOR APPROVING U.S. COVERT ACTION**

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I. INTRODUCTION.....	1112
II. HISTORY OF COVERT ACTION.....	1113
A. <i>National Security Act of 1947</i>	1113
B. <i>Hughes-Ryan Amendment</i>	1114
C. <i>The Church Committee Report</i>	1115
D. <i>The Intelligence Oversight Act of 1980</i>	1116
E. <i>Executive Orders 12,036 and 12,333</i>	1117
F. <i>Intelligence Oversight Act of 1988</i>	1118
G. <i>Intelligence Authorization Act of 1991</i>	1119
III. AUTHORIZATION PROCESS FOR COVERT ACTION.....	1122
A. <i>The Reagan Administration</i>	1123
B. <i>The George H. W. Bush Administration</i>	1124
C. <i>The Clinton Administration</i>	1125
D. <i>George W. Bush and the Current Process</i>	1126
1. <i>Pre-9/11 Covert Action Policy</i>	1127
2. <i>The Post-9/11 Finding—A New Scope of Covert Action</i>	1129
3. <i>The Bush Covert Action Authorization Process Today</i>	1133
a. <i>GST and the Use of Lethal Force</i>	1133
b. <i>The Iraq Elections</i>	1135
IV. RECOMMENDATIONS FOR GREATER TRANSPARENCY AND ACCOUNTABILITY IN THE COVERT ACTION APPROVAL PROCESS.....	1137
A. <i>Retrospective and Independent Congressional Review</i>	1137
B. <i>Composition of the Congressional Intelligence Committees</i>	1139
V. CONCLUSION.....	1141

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I. INTRODUCTION

In the wake of the attacks of September 11, 2001, every conceivable government activity relating to the war on terror and the war in Iraq has been explored, analyzed, and criticized.¹ One of the most elusive and effective tools in this war is covert action,² whereby the executive branch can take cloaked action and “fight the terrorists overseas so we do not have to face them here at home.”³ While the reasons for not disclosing the specifics of a covert action to the American public are obvious, the process used to initiate such actions can reasonably be held to a higher standard of transparency.

Despite the existence of statutes and executive orders attempting to clarify the responsibility of the executive branch to disclose its plans for initiating a covert action,⁴ too much of the process remains in the shadows of bureaucracy. None of the existing law provides an accurate picture of how the President, National Security Council (NSC), and Central Intelligence Agency (CIA) come to a decision to engage in a covert action. With whom did the Executive Branch consult when it proposed to send covert aid to influence the Iraq elections?⁵ Who gave the “go” order to launch an American Predator drone and fire a Hellfire missile on a group of Al Qaeda militants in Yemen that included an American citizen?⁶ What was the role of senior congressional leaders in determining whether such actions were aligned with the will of the American public?

This article will assess the transparency and balance of the current administrative process in place for developing and executing a covert action. This assessment is conducted in four parts. First, the article presents the history of the evolution of

1. See, e.g., FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 200 (2004) [hereinafter 9/11 COMMISSION REPORT].

2. See *infra* Part II.G. (stating the current definition of covert action in U.S. statute).

3. President George W. Bush, Address to the American Legion National Convention (Aug. 31, 2006), <http://www.whitehouse.gov/news/releases/2006/08/20060831-1.html>.

4. See generally 50 U.S.C. §§ 413, 413a, 413b (2000); Exec. Order No. 12,333, 46 Fed. Reg. 59941 (Dec. 4, 1981).

5. Douglas Jehl & David E. Sanger, *Plan Called for Covert Aid in Iraq Vote*, N.Y. TIMES, July 17, 2005, at A6.

6. Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike*, WASH. POST, Nov. 8, 2002, at A1.

covert action in America from 1947 to the present.⁷ Second, this article reviews the processes used by recent administrations in approving covert action.⁸ Third, the article provides a comprehensive assessment of the process used by the current administration to approve covert activity by analyzing current trends and the execution of recent covert actions.⁹ Finally, changes to the current system are recommended to increase the transparency and oversight of the covert action process in the best interests of the American public.¹⁰

II. HISTORY OF COVERT ACTION

A. *National Security Act of 1947*

The CIA was created, and covert action was first authorized by statute, through the National Security Act of 1947.¹¹ The language of the act was widely understood to authorize the chief executive to approve covert actions at his discretion.¹² While information on authorized covert actions was available to Congress after the passage of this act, few legislators showed an interest in covert activities or requested briefings regarding their implementation and execution until the 1970s.¹³ Most members of Congress believed that the conduct of secret actions was completely at the discretion of the President.¹⁴ Covert actions were primarily

7. *See infra* Part II.

8. *See infra* Parts III.A–C.

9. *See infra* Part III.D.

10. *See infra* Part IV.

11. 50 U.S.C. § 403 (2000). The act stated that the CIA, under the direction of the NSC, had the duty to “perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.” *Id.* § 403(d)(5). The CIA was the successor to the Office of Strategic Services and other small, World War II-era intelligence organizations. *See also* U.S. Department of State, *National Security Act of 1947*, <http://www.state.gov/r/pa/ho/time/cwr/17603.htm> (last visited Feb. 6, 2007).

12. W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION* 118 (1992). It has also been argued that the authority for conducting covert action can be found in various statutes dealing with specific situations, such as the Hostage Act of 1868. *Id.* *See also* 22 U.S.C. § 1732 (2000) (“[w]henver it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government . . . the President shall use such means, not amounting to acts of war . . . proper to obtain or effectuate the release”).

13. WILLIAM J. DAUGHERTY, *EXECUTIVE SECRETS: COVERT ACTION AND THE PRESIDENCY* 91 (2004).

14. *Id.* at 91–92.

understood to be programs aimed at preventing the spread of communism (in light of the Soviet threat), and Congress operated under the assumption that such actions would be conducted in a risk-minimizing manner.¹⁵

B. Hughes-Ryan Amendment

The landscape of congressional oversight of covert activities changed significantly in the 1970s. In the wake of the Vietnam War and the Watergate scandal, combined with reports concerning the conduct in previous covert actions, general mistrust of the executive branch began to permeate American politics.¹⁶ Congress responded to the executive branch's apparent abuse of power by passing, in 1974, the Hughes-Ryan Amendment (Hughes-Ryan) to the Foreign Assistance Act of 1961.¹⁷ Hughes-Ryan added significant parameters and checks on the process of approving covert action.

First, the amendment added the express requirement that any covert action authorized by the President must be important to the national security of the United States.¹⁸

Second, Hughes-Ryan attempted to significantly standardize the process of issuing a covert action order by requiring a "presidential finding."¹⁹ A finding is a written document signed by the President describing a contemplated action and listing all governmental agencies and third parties to be involved.²⁰

15. *Id.* at 92.

16. *Id.* at 92-93.

17. 22 U.S.C. § 2422 (1982) (repealed 1991).

No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of Section 501 of the National Security Act of 1947.

Id.

18. *See supra* note 17 (quoting Hughes-Ryan language). *See also* AMERICAN BAR ASSOCIATION, WORKING GROUP ON INTELLIGENCE OVERSIGHT AND ACCOUNTABILITY, OVERSIGHT AND ACCOUNTABILITY OF THE U.S. INTELLIGENCE AGENCIES: AN EVALUATION 20 (1985) [hereinafter ABA INTELLIGENCE EVALUATION].

19. *See supra* note 17 ("unless and until the President *finds*") (emphasis added).

20. 50 U.S.C. § 413b(a) (2000) (defining a finding, which is essentially the same as what was stated in Hughes-Ryan).

Information disclosed in the finding was to be “reported to the congressional intelligence committees as soon as possible.”²¹ While disclosure of information to Congress regarding covert actions became required through Hughes-Ryan, the statute explicitly excluded the report from being construed as a condition precedent to the President’s power to authorize covert activities.²² The real control conveyed to Congress by the advent of the presidential finding was the creation of what amounted to a congressional veto.²³ By receiving information on covert actions in advance of their execution (in most cases), Congress could execute veto power over actions they deemed inappropriate by exercising their constitutional right to approve or deny public funding for the proposed action.²⁴

Finally, Hughes-Ryan marked the practical end of presidential plausible deniability.²⁵ Prior to the Amendment’s passage in 1974, presidents dating back to Harry S. Truman “sought to strictly limit the [executive branch’s] knowledge of covert action programs” so the U.S. government could plausibly deny any covert action that might be compromised or disclosed to the American public.²⁶ This was perhaps the most pivotal change in the process governing covert action moving forward as a culture of deniability was replaced with a more formalized system of accountability.

C. *The Church Committee Report*

An extensive investigation of all United States intelligence agencies was conducted between 1975 and 1976 by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, known as the “Church Committee” after its chairman, Idaho Senator Frank Church.²⁷ The committee’s final

21. *Id.* § 413b(c)(1). The Hughes-Ryan Amendment required a presidential finding to be reported to eight different congressional committees: Appropriations, Armed Services, and Foreign Affairs Committees of both the House and Senate, as well as the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence. *Id.* See also DAUGHERTY, *supra* note 13, at 94.

22. 50 U.S.C. § 413(a)(2) (2000) (“Nothing in [the Intelligence Oversight Act] shall be construed as requiring the approval of the congressional intelligence committees as a *condition precedent*.”) (emphasis added).

23. DAUGHERTY, *supra* note 13, at 94.

24. *Id.*

25. *Id.* at 93–94.

26. *Id.*

27. The Church Committee published numerous reports during its tenure,

report was Volume 7, entitled "Covert Action."²⁸ The Church Committee expressed concern over the amount of legislative oversight involved in the approval of covert activities and recommended that a permanent committee be established to oversee the process.²⁹ The Senate responded by creating the Senate Select Committee on Intelligence.³⁰ This committee was given full authority to oversee the intelligence activities of the U.S. and to authorize the appropriate funds.³¹

The Church Committee's findings led to a brief period of inactivity by the executive branch. The Ford Administration's covert action record is limited, based both on a reduced number of actions influenced by the Church Committee's scrutiny, as well as the inconsequential nature of the actions that were undertaken.³² The Church Committee's report, combined with the changes implemented by Hughes-Ryan, led to a period of increased congressional oversight of the process for approving covert action. But that process would soon be limited by the next piece of intelligence legislation.

D. The Intelligence Oversight Act of 1980

The process of authorizing covert action was streamlined through the Intelligence Oversight Act of 1980.³³ This act reduced the number of congressional committees that the executive branch

all produced during the 94th Congress of the United States. The Assassination Archives and Research Center's Public Library, Church Committee, <http://www.aarclibrary.org/publib/church/reports/contents.htm> (last visited Oct. 31, 2006) (publishing all fourteen released reports of the Church Committee). The topics of the reports ranged from "Unauthorized Storage of Toxic Substances" (Volume 1) to "Mail Opening" (Volume 4). *Id.* The Committee's 7th volume was "Covert Action" and centered on the U.S.-influenced overthrow of Chile's democratically elected socialist government in 1970. S. Rep. No. 94-755 (1976).

28. S. Rep. No. 94-755 (1976).

29. ABA INTELLIGENCE EVALUATION, *supra* note 18, at 7-8.

30. S. Res. 400, 94th Cong. (1976) (enacted). This committee is "composed of 15 members drawn from the Appropriations, Armed Services, Foreign Relations and Judiciary Committees, and from the Senate at large." ABA INTELLIGENCE EVALUATION, *supra* note 18, at 8. The House Permanent Select Committee on Intelligence was not created until the 95th Congress and "consists of 16 members, with membership drawn from the Appropriations, Armed Services, Foreign Affairs and Judiciary Committees, as well as the House at large." *Id.* See also H.R. Res. 658, 95th Cong. (1977) (enacted).

31. ABA INTELLIGENCE EVALUATION, *supra* note 18, at 8.

32. DAUGHERTY, *supra* note 13, at 178.

33. Pub. L. No. 96-450, § 407, 94 Stat. 1975, 1981-82 (codified at 50 U.S.C. § 413 (1982)) (adding Title V to the National Security Act of 1947).

needed to contact with a presidential finding.³⁴ Hughes-Ryan required that eight different congressional committees³⁵ be contacted and the Act changed the requirement to include only the intelligence oversight committees.³⁶ Presumably, this amendment to the covert action approval procedure reduced the ultimate number of Senators and Congressmen who were informed in advance of a covert action. By limiting the number of people informed of the action, this amendment undoubtedly increased both the secrecy of the approved action and the speed and efficiency of the notification process.

The Intelligence Oversight Act of 1980 also changed the timeline under which the President needed to operate in notifying the congressional intelligence committees of the President's intent to execute a covert action. Under Hughes-Ryan, the President was required to inform Congress "in advance" of the execution of a covert action.³⁷ The 1980 Act changed the requirement of disclosure to notification in a "timely fashion."³⁸ This "opaque phrase" was not further defined in the Act and was interpreted by some, including the Reagan Administration, as providing the President with unrestricted discretion in choosing when to inform Congress of a covert program.³⁹

This Act, and its application by the executive branch in the 1980s, marked a brief departure from the trend of increased control by the legislative branch over covert activities.

E. Executive Orders 12,036 and 12,333

This shift away from increased congressional oversight of covert actions was also mirrored by a subtle change in the extent of executive branch oversight of "special activities."⁴⁰ In 1978, the Carter Administration issued Executive Order 12,036 to more accurately define the role of the executive branch and other

34. *Id.*

35. *See supra* note 21 (listing eight congressional committees).

36. DAUGHERTY, *supra* note 13, at 94. The intelligence oversight committees are the House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence. *Id.*

37. *Id.* at 93–94.

38. *Id.* at 97.

39. *Id.*

40. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,953–54 (Dec. 4, 1981); Exec. Order No. 12,036, 43 Fed. Reg. 3674, 3675 (Jan. 24, 1978) (repealed 1981) (both orders defined covert actions as "special activities").

United States agencies in intelligence collection activities.⁴¹ In section 1-302, the 1978 order listed specifically those members of the NSC's Special Coordination Committee (SCC) that were to be involved with all decisions concerning special activities.⁴² Included in this list of committee members were the Attorney General and the Chairman of the Joint Chiefs of Staff.⁴³

In 1981, the Reagan Administration issued Executive Order 12,333.⁴⁴ This order repealed Executive Order 12,036 and amended many of the procedures the Carter Administration had created. Most noticeably, Executive Order 12,333 removed the specific listing of the members of the executive branch to be involved in committee decisions regarding special activity (i.e., covert action) policy.⁴⁵ Instead of maintaining a specific committee containing specific members for handling such activities, the Reagan Administration simply designated to the NSC the power to "establish such committees as may be necessary to carry out its functions and responsibilities" under the new order.⁴⁶ By instituting this change, the NSC could effectively include or exclude anyone it chose from decisions and analysis of covert activities. This change in the operation of the executive branch is also indicative of the prevailing trend at the time of limiting the amount of congressional oversight involved in the approval process of covert actions.

F. *Intelligence Oversight Act of 1988*

The fallout after the Iran-Contra Affair led Congress to reassert legislative control over covert action.⁴⁷ The Intelligence Oversight Act of 1988 more strictly reigned in the President's need to communicate with Congress concerning proposed covert actions.

As mentioned earlier, the Reagan Administration liberally

41. *See generally* 43 Fed. Reg. 3674.

42. When considering special activity policy initiatives, the SCC was to include "the Secretary of State, the Secretary of Defense, the Attorney General, the Director of the Office of Management and Budget, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff, and the Director of Central Intelligence." *Id.* at 3675.

43. *Id.*

44. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,941 (Dec. 4, 1981).

45. *See* REISMAN & BAKER, *supra* note 12, at 120.

46. 46 Fed. Reg. at 59,942.

47. DAUGHERTY, *supra* note 13, at 96-97.

construed the meaning of the “timely fashion” language in the Intelligence Oversight Act of 1980.⁴⁸ This liberal use of the notification requirement resulted in a ten-month delay between President Reagan’s decision to sell arms to Iran in exchange for American hostages and the President’s notification to Congress that these activities had taken place.⁴⁹

In response to the Reagan administration’s ultimate use of discretion regarding congressional notification, Congress imposed a forty-eight-hour time limit for the President to notify Congress of a finding for covert activity.⁵⁰ This finite hour requirement eliminated the “timely fashion” language and placed more pressure on the executive branch to communicate with Congress within the confines of a hard deadline.⁵¹ The forty-eight-hour requirement was a more restrictive policy for the executive branch to follow, but it did not eliminate the ability of the President to act in emergency situations to protect the national interest without congressional consultation.⁵²

G. *Intelligence Authorization Act of 1991*

The abuses committed by the executive branch in the Iran-Contra affair led to Congress’s most significant modification of the authorization process for covert actions. The Intelligence Authorization Act of 1991 (IAA of 1991) repealed Hughes-Ryan and amended the National Security Act of 1947, imposing more stringent requirements for the President to meet to execute a covert action plan.⁵³

Despite the legislation passed regarding covert action before 1991, a statutory definition of covert action never reached U.S.

48. See *supra* text accompanying note 38.

49. DAUGHERTY, *supra* note 13, at 97.

50. *Id.* The forty-eight-hour requirement was reluctantly supported by fellow Reagan Republicans such as Senator Arlen Specter (R-Pa.), who concluded that the practice of prior notice had not worked in the past. Loch Johnson, *Controlling the CIA: A Critique of Current Safeguards*, 12 HARV. J.L. & PUB. POL’Y 371, 394 (1989). But at the time the Intelligence Oversight Act of 1988 was passed, only four violations of the prior-notice requirement had actually occurred since the passage of the Intelligence Oversight Act of 1980. *Id.* at 395 n.138.

51. DAUGHERTY, *supra* note 13, at 97.

52. *Id.*

53. Paul Gumina, *Title VI of the Intelligence Authorization Act, Fiscal Year 1991: Effective Covert Action Reform or “Business as Usual”?*, 20 HASTINGS CONST. L.Q. 149, 177 (1993).

Code until passage of the 1991 Act.⁵⁴ The IAA of 1991 defined covert action as:

[A]n activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, but does not include—

- (1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;
- (2) traditional diplomatic or military activities or routine support to such activities;
- (3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or
- (4) activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad.⁵⁵

The passage of this statutory definition created the requirement that the President comply with its provisions and align proposed covert actions within the legal and factual framework of the statute.⁵⁶

Unlike previous legislation, the IAA of 1991 created affirmative actions for the President to take before executing a covert action.⁵⁷ The affirmative requirements of Title VI⁵⁸ were passed to

54. REISMAN & BAKER, *supra* note 12, at 123. Before 1991, covert action was loosely defined through Executive Order No. 12,333 as “special activities,” which meant

activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent 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 and do not include diplomatic activities or the collection and production of intelligence or related support functions.

Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,953–54 (Dec. 4, 1981).

55. 50 U.S.C. § 413b(e) (2000) (the statutory language passed in 1991 is identical to present language).

56. Gumina, *supra* note 53, at 181.

57. *Id.*

58. Title VI of the Intelligence Authorization Act of 1991 amended Title V of the National Security Act of 1947. Intelligence Authorization Act of 1991, Pub. L.

specifically address particular abuses that had arisen out of the Iran-Contra Affair.⁵⁹ First, the IAA of 1991 required that the President “keep the congressional committees fully and currently informed of all covert actions.”⁶⁰ Second, Title VI required that the President promptly inform the intelligence committees of any illegal intelligence activity and provide an explanation of corrective action taken to alleviate such illegal activity.⁶¹ Finally, the Act reaffirmed the Hughes-Ryan provision that a presidential finding for a covert action must be in writing.⁶² Under the Act, the finding was still subject to the forty-eight-hour reporting provision, providing for instances when circumstances may not allow for an advanced, published finding.⁶³ An additional wrinkle was also added to ensure that these presidential findings did not function to authorize actions that had already occurred.⁶⁴

The passing of the IAA of 1991 solidified and expanded the shared powers arrangement enveloped in the original National Security Act of 1947 and the amendments that followed.⁶⁵ Through passage of the IAA of 1991, the U.S. Government reasserted the requirement of legislative involvement and public representation in the approval of covert action. Adequate safeguards were included to allow the Commander-in-Chief to make split-second decisions pivotal to the safety of the nation under his executive power,⁶⁶ but

No. 102-88, § 602, 105 Stat. 429, 441–44 (codified at 50 U.S.C. §§ 413, 413a, 413b (2000)).

59. DAUGHERTY, *supra* note 13, at 97; Gumina, *supra* note 53, at 177.

60. 50 U.S.C. § 413b(b)(1) (2000). This portion of the act was a response to the delinquency with which President Reagan had acted in informing anyone outside of the executive branch of the plan to trade arms with the Iranians in exchange for the release of American hostages. See Gumina, *supra* note 53, at 168–74 (recounting the specifics of the Iran-Contra Affair and subsequent executive cover-up).

61. Gumina, *supra* note 53, at 177. The inclusion of this clause in the original act was at the recommendation of the Iran-Contra Committee. See Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, House Select Committee to Investigate Covert Arms Transactions with Iran, Report of the Congressional Committees Investigating the Iran Contra Affair with Supplemental, Minority, and Additional Views, S. Rep. No. 216, H.R. Rep. No. 433, 100th Cong., 1st Sess. 375 (1987) [hereinafter Iran-Contra Committee Report].

62. 50 U.S.C. § 413b(a)(1) (2000).

63. *Id.*

64. *Id.* § 413b(a)(2). The elimination of post hoc authorization of covert actions by presidential finding was the result of a finding of the Iran-Contra Investigative Committee. Iran-Contra Committee Report, *supra* note 61, at 424 (Recommendation No. 7). See also Gumina, *supra* note 53, at 178 n.182.

65. Gumina, *supra* note 53, at 183.

66. See 50 U.S.C. § 413b(a)(1) (2000) (stating that “[e]ach finding shall be in

the frustration inherent in past failures and abuses of power were affirmed in statutory language that increased the role of Congress in the execution of covert activity.

III. AUTHORIZATION PROCESS FOR COVERT ACTION

The IAA of 1991 was the last piece of major legislation passed that significantly amended the process for authorizing and executing a covert action.⁶⁷ As history has shown,⁶⁸ the regulations passed via statute for approving covert action only provide a general framework under which the executive branch is to operate when determining how to carry out its plans for secretive, non-military activity. To decipher the more intricate process followed by the Commander-in-Chief, NSC, and CIA to execute a covert plan, it is necessary to investigate the procedures developed by past presidential administrations. While it is difficult to uncover exactly what occurs behind the closed doors of the West Wing and CIA headquarters in Langley, Virginia, events transpiring under the watch of America's four most recent presidents (and covered by journalists) have shed some light on the process leading to the execution of covert activity.⁶⁹

After a brief look back at the processes used by the Reagan, George H. W. Bush, and Clinton Administrations, this article will attempt to piece together a comprehensive picture of the process in place under the current George W. Bush presidency. The events of September 11, 2001 and the war on terror have revitalized the use of covert action. At the time of this writing, no thorough

writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding"); § 413b(c)(2) (limiting the number of people to be informed through a finding of a planned covert action if "extraordinary circumstances affecting vital interests of the United States" exist).

67. All other amendments to the National Security Act of 1947 were minor changes in verbiage and had no significant effect on the operation of the statute. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 1071(a)(1), 118 Stat. 3638 (2004) (substituting "Director of National Intelligence" for "Director of Central Intelligence"); Intelligence Authorization Act for Fiscal Year 2003, Pub. L. 107-306, § 353(b), 116 Stat. 2383, 2402 (2002) (striking "Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives" and replacing it with "congressional intelligence committees," which is defined as).

68. See *supra* Part II.

69. Prominent journalists consistently covering the government's activity in covert channels include Dana Priest (Washington Post), Douglas Jehl (New York Times), James Risen (New York Times), and Seymour M. Hersh (The New Yorker).

analysis of the process in place has been assembled in available legal literature.

A. *The Reagan Administration*

The advent of the presidential finding and other regulations mandated by Hughes-Ryan led to the institution of official, standardized, and specific processes for approving covert activities starting with the Carter Administration.⁷⁰ A President could no longer deny knowledge of covert actions, necessitating a process of review by intelligence experts and other members of the President's cabinet to ensure that actions undertaken would withstand possible future legal and social scrutiny.⁷¹

The momentum generated through the covert action authorization process implemented by President Carter motivated the Reagan Administration to also formulate formal authorization measures.⁷² In 1985, National Security Decision Directive-159 (NSDD-159), *Covert Action Policy Approval and Coordination Procedures*, was passed, formally implementing the internal process adopted by the Reagan Administration.⁷³ As has been the case since 1974, the President was the catalyst for starting the process of researching a proposed covert action.⁷⁴ After the President's request, the planning stages of the proposed action would pass through the White House's Planning and Coordination Group (PCG)⁷⁵ and the National Security Planning Group (NSPG).⁷⁶ Until the Iran-Contra Affair, the final execution order for a covert action plan could be given by either the President or a member of

70. See DAUGHERTY, *supra* note 13, at 99; ZBIGNIEW BRZEZINSKI, *POWER AND PRINCIPLE: MEMOIRS OF THE NATIONAL SECURITY ADVISOR, 1977-1981*, 59-63 (1983); Loch Johnson, *Covert Action and Accountability: Decision-Making for America's Secret Foreign Policy*, 33 INT'L STUD. Q. 81, 97-98 (1989).

71. DAUGHERTY, *supra* note 13, at 98-99.

72. *Id.* at 100.

73. *Id.* at 101. This directive was implemented on January 18, 1985. *Id.* NSDD's are confidential documents, but certain of these directives have been declassified, at least in part. See Russell J. Bruemmer & Marshall H. Siverberg, *The Impact of the Iran-Contra Matter on Congressional Oversight of the CIA*, 11 HOUS. J. INT'L L. 235 (1988) (providing an excerpted version of NSDD-286).

74. DAUGHERTY, *supra* note 13, at 110-11.

75. See DAUGHERTY, *supra* note 13, at 101. The PCG, "which was composed of high-level representatives (often the deputies) from the Departments of State and Defense and other relevant agencies, was to review all covert action programs current and proposed." *Id.*

76. The NSPG was essentially the NSC and the heads of any other departments involved in the project. *Id.*

the NSC staff.⁷⁷ The abuses of Iran-Contra led to NSDD-286, *Approval and Review of Special Activities*, which eliminated the NSC's participation in covert action operations and reserved the power to execute these activities in the hands of the CIA or another department empowered by the President in compliance with the National Security Act of 1947.⁷⁸

The Reagan Administration was the first to fully implement a formalized procedure, and that procedure is still very much in effect today.⁷⁹

B. The George H. W. Bush Administration

As the successor to the Reagan Administration in which he served as Vice President,⁸⁰ George H. W. Bush did little to change the process of approving covert action. Bush essentially carried on the process created during the Reagan Administration and attempted to remove himself from the abuses of Iran-Contra.⁸¹ The end of the Cold War allowed President Bush to terminate many covert operations because the Soviet threat had subsided.⁸² The majority of the covert actions executed during this period remain classified and have not been officially acknowledged.⁸³

77. *Id.*

78. *Id.* See also 50 U.S.C. § 413b (2000). The current statute reflects the codification of the covert action process by the IAA of 1991, and the statute has not since been amended. *Id.*

79. See DAUGHERTY, *supra* note 13, at 101. The George H. W. Bush Administration followed the Reagan Administration's model of approval almost exactly. *Id.* Only the names of the established committees were changed. *Id.* The PCG became the "Deputies Committee" and the NSPG became the "Principals Committee." *Id.*

80. Bush served as Vice President to Ronald Reagan from 1981–1989 before winning the presidential election in 1988. *Biography of George H. W. Bush*, THE WHITE HOUSE, <http://www.whitehouse.gov/history/presidents/gb41.html> (last visited Feb. 14, 2007).

81. Bush testified during Iran-Contra investigations that he was "out of the loop" with regard to arms transactions with Iran, but that he did know that such transactions had occurred. See *Excerpts from the Iran-Contra Report: A Secret Foreign Policy*, N.Y. TIMES, Jan. 19, 1994, at A10 (reprinting excerpts from the final report by Independent Counsel for the Iran-Contra Affair, Lawrence E. Walsh).

82. DAUGHERTY, *supra* note 13, at 216. The number of presidential findings issued annually dropped from more than thirty to less than ten during the first Bush administration. *Id.*

83. *Id.*

C. *The Clinton Administration*

The Clinton presidency adopted many of the same procedures developed and followed by the Reagan and Bush Administrations, but continued to build on the process already in place by adding additional checks and balances to the approval process of covert actions.⁸⁴

All directives to generate proposals from the Clinton White House came from either President Clinton or the National Security Advisor.⁸⁵ The request was then forwarded to CIA headquarters, where numerous internal reviews would take place, depending on the nature of the proposed action.⁸⁶ During the CIA's approval process, attorneys from the CIA's Office of General Counsel (OGC) would review the proposed action at every step of its approval and address any legal issues that arose.⁸⁷ After the proposal had been addressed (and amended as needed) by two high-level committees at the CIA,⁸⁸ the proposed action plan would be given to the OGC for one final assessment of legal issues before being transferred back to the White House by either the Director of Central Intelligence or his deputy.⁸⁹

After the proposal returned to the White House, another

84. *See id.* at 216–17; ROBERT M. GATES, FROM THE SHADOWS: THE ULTIMATE INSIDER'S STORY OF FIVE PRESIDENTS AND HOW THEY WON THE COLD WAR 379 (1996); Johnson, *supra* note 70, at 94–95. Clinton formally adopted many of the existing approval procedures through Presidential Decision Directive-2, *Organization of the National Security Council* on January 20, 1993. DAUGHERTY, *supra* note 13, at 216.

85. *See* DAUGHERTY, *supra* note 13, at 101. Excluding the CIA, any executive agency with responsibilities in foreign policy or national security could suggest possible actions to the NSC, but only the President or National Security Director could set the CIA in motion to start the actual planning process. *Id.* at 101–02.

86. *See id.* at 103–04. The CIA would incorporate those operatives that would eventually be in charge of managing the execution of the proposed action, taking into account location, specific issues, and the possible need for department of defense assistance. *Id.* at 103.

87. *See id.* at 103–05.

88. The two primary review groups in the CIA are the Covert Action Planning Group (CAPG) and the Covert Action Review Group (CARG). *See id.* at 104. The CAPG is defined as the top of the CIA's "directoriate" level; this committee refines the proposal based on operational concerns, cost-benefit analysis, the risk of failure, and other functional concerns. *Id.* The CARG does much of the same, but takes into consideration the reactions of Congress, more nuanced legal issues, and the compliance of the proposal with administration policy. *Id.* at 105. The CARG has been referred to as "the top echelon of CIA management." JEFFREY T. RICHELSON, THE U.S. INTELLIGENCE COMMUNITY 431 (3d ed. 1995).

89. DAUGHERTY, *supra* note 13, at 105.

multi-layered review process would take place.⁹⁰ The proposal was first analyzed by the Interagency Working Group for Covert Action (IWG), a collection of representatives from major executive branch agencies, who would review the major policy objectives, legality, and coordination of agencies needed to execute the planned action.⁹¹ After the IWG finished multiple screenings of the proposed action and finding, the proposal would move through the Deputies and Principals Committees for final approval.⁹² The proposed presidential finding and attached details were then sent to the President for his signature and passed on to Congress within the mandated forty-eight-hour period required by statute.⁹³

The process in the Clinton White House was regimented and relatively straightforward. Great importance was placed on thorough analysis and the participation of all relevant agencies to the proposed action.⁹⁴ At present, there appears to be no evidence alleging that this process was not followed for any particular action of record.

D. George W. Bush and the Current Process

Shortly after taking office in 2001, George W. Bush signed a presidential directive that retained the majority of the covert action approval process used by President Clinton.⁹⁵ From the outset, it

90. *Id.*

91. *Id.* at 105–06. The Clinton Administration followed the guideline passed in the Reagan administration’s NSDD-286 that required as many thirteen different agencies to participate in this planning process. *Id.* Included were representatives from the Department of State, Office of Secretary of Defense, Joint Chiefs of Staff, Office of Management and Budget, CIA, and the Justice Department. *Id.* at 106.

92. *Id.* at 106–07. The Deputies Committee was a “grouping of the number-two officials” in each department relevant to the proposed action; the Principals Committee was chaired by the National Security Advisor and included the heads of all relevant departments. *Id.*

93. *Id.* at 107. The finding itself was usually no more than two pages in length and contained the reason that the action was in the national interest, the foreign policy goals to be achieved, and scope of the proposed action. *Id.* at 109–10. The supporting document was where the details of the operation were found. *Id.* at 110.

94. Richard Clarke assessed and contrasted the different review habits of President Clinton and George W. Bush. See RICHARD A. CLARKE, AGAINST ALL ENEMIES 243 (2004). Clarke describes Clinton “plowing” through documents well past midnight and calling universities for additional information after exhausting the knowledge of his staff. *Id.* Clarke recounts that Bush, on the other hand, was “not a big reader,” received his briefings from a small group of senior advisers, and went to bed by 10:00 p.m. *Id.*

95. Memorandum from George W. Bush (Feb. 13, 2001), <http://www.fas>.

appeared that the Bush Administration would continue the current trend of regimented oversight and approval for covert activity. But the world changed dramatically just seven months after the signing of this directive and the focus shifted immediately to the securing of America's borders from a new and evolving threat. In the wake of the war on terror and the war in Iraq, little time has been spent analyzing exactly how the current Administration is authorizing the covert activity it deems necessary to confront these new conflicts. This section aims to shed some light on that policy and to illustrate the covert action approval process as it exists today.

1. *Pre-9/11 Covert Action Policy*

The Bush Administration's process for authorizing covert action started to form before the attacks of September 11, 2001. The threat of al Qaeda and Osama bin Laden was a fear communicated to the Bush Administration by Clinton holdovers such as National Counterterrorism Coordinator Richard Clarke.⁹⁶ The terrorist threat posed by al Qaeda eventually prompted President Bush to tell his top aides: "I want to take the fight to the terrorists."⁹⁷ After this general directive, the responsibility of asking the CIA to prepare plans for an expansive covert action plan to deter terrorist activities fell on President Bush's new National Security Adviser, Condoleezza Rice.⁹⁸ Rice requested that the CIA "prepare a new series of authorities for covert action in Afghanistan" to deter the al Qaeda threat.⁹⁹ This request, according to Rice, was based on a proposition by Richard Clarke and NSC senior director for intelligence Mary McCarthy.¹⁰⁰

org/irp/offdocs/nspd/nspd-1.htm (National Security Presidential Directive-1, entitled Organization of the National Security System). Bush eliminated the Interagency Working Groups and replaced them with a network of Policy Coordinating Committees (PCC). DAUGHERTY, *supra* note 13, at 240-41 n.21.

96. CLARKE, *supra* note 94, at 227-32. Clarke recounts telling Condoleezza Rice, Steven Hadley, Dick Cheney, and Colin Powell in January 2001 that al Qaeda was at war with the U.S. and that an appropriate offensive response to al Qaeda's planned terrorist activities was necessary to U.S. security. *Id.* at 227. Clarke kept the title of National Counterterrorism Coordinator in the Bush Administration, but his authority was diminished and he was required to report to the Deputies Committee rather than directly to the Principals Committee. 9/11 COMMISSION REPORT, *supra* note 1, at 200.

97. Barton Gellman, *A Strategy's Cautious Evolution*, WASH. POST, Jan. 20, 2002, at A1.

98. 9/11 COMMISSION REPORT, *supra* note 1, at 210.

99. *Id.*

100. *Id.* The idea of extended covert activity against terrorists in Afghanistan

The CIA came back to Rice and the NSC with options for covert action in Afghanistan, including the launching of an unmanned Predator drone operated by the CIA.¹⁰¹ This proposed covert action was discussed within the Deputies Committee upon its return to the White House, but technical issues with the drone kept the planned action from being launched.¹⁰² Because the project was never actually executed, a presidential finding was never signed and congressional notification never took place.

This first example of the Bush Administration's approval process for a covert action highlights some similarities to the process followed by previous administrations, but there are also some marked differences. The general structure of the process appears to be similar to that of the Clinton Administration, with the directive to the CIA coming from the National Security Adviser by way of the President.¹⁰³ The planning stages for the proposed Predator drone missions started with the CIA and were then passed back to the White House to undergo review by the NSC deputies and, eventually, by the principals.¹⁰⁴

A peculiar difference in the process appears to be the lack of direct involvement by the President in the initial tasking of the CIA to pursue the planning stages of covert activity. The proposed missions against al Qaeda in Afghanistan were largely hatched during the previous administration, and it was the pitch of those plans (by Clinton holdovers) to National Security Adviser Rice that

was in conjunction with an earlier strategic proposal to provide covert aid to the Northern Alliance in Afghanistan after fighting broke out in the country, as well as aid to Uzbekistan to achieve similar goals. *Id.* at 202–03. The peculiar part of Clarke's involvement at this point in the process was the fact that he had essentially been demoted to a position subordinate to the deputies committee. *Id.* at 200. Involvement by an individual with this level of authority, at this point in the process, was rare in previous administrations. *Id.* See *supra* Parts III.A.–C. See also CLARKE, *supra* note 94, at 230 (describing the change in the chain of command in the Bush administration and to whom Clarke was to report).

101. 9/11 COMMISSION REPORT, *supra* note 1, at 210–12. The drone was a prototype produced by the Air Force for reconnaissance purposes. CLARKE, *supra* note 94, at 220–22. The Predator drone was developed to carry a Hellfire missile at the behest of the NSC and Department of Defense. 9/11 COMMISSION REPORT, *supra* note 1, at 211. A debate also occurred as to whether the CIA would have the legal authority to operate the drone, equipped with a missile, to kill members of al Qaeda and still be in compliance with the assassination ban stated in Executive Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981). 9/11 COMMISSION REPORT, *supra* note 1, at 211–12.

102. 9/11 COMMISSION REPORT, *supra* note 1, at 212.

103. *Id.* at 202–12.

104. *Id.*

set the project in motion.¹⁰⁵ As stated earlier, President Bush gave the general authorization to go on the offensive, but any further involvement by the President in the planning of the goals of the action appears limited.¹⁰⁶

Another characteristic of the Bush Administration's covert action approach highlighted by this early activity was the expansive scope such actions were intended to take. The growing momentum for an initiative against al Qaeda led to the drafting of a National Security Presidential Directive, including extensive covert programs, in June 2001.¹⁰⁷

From the beginning, the Bush Administration planned to push the limits of what covert action was classically authorized to accomplish. In September 2001, the CIA was told to draft new "legal authorities for the 'broad covert action program' envisioned by the draft presidential directive."¹⁰⁸ These new legal parameters were to include the "'authority to capture or to use lethal force' against al Qaeda."¹⁰⁹ This legal posturing was necessary in order to absolve the CIA from any liability based on the ban against assassinations in Executive Order 12,333.¹¹⁰ The Bush Administration intended to blur the lines of what could be accomplished through covert action as long as the legal authority could be found.

2. *The Post-9/11 Finding—A New Scope of Covert Action*

After dealing with the immediate aftermath of 9/11, President Bush assembled his "war council" at Camp David.¹¹¹ This war

105. *Id.* at 210; CLARKE, *supra* note 94, at 237–38.

106. 9/11 COMMISSION REPORT, *supra* note 1, at 202–12. President Bush's dependence on his cabinet for information and to make decisions is also highlighted by Vice President Dick Cheney's attendance at NSC Principals meetings starting in January 2001 (something no previous vice president had ever done). CLARKE, *supra* note 94, at 228. Cheney was also appointed by President Bush in May 2001 to head a task force aimed at assessing terrorist threats and attacks by weapons of mass destruction. 9/11 COMMISSION REPORT, *supra* note 1, at 204.

107. 9/11 COMMISSION REPORT, *supra* note 1, at 204.

108. *Id.* at 214.

109. *Id.*

110. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981) (stating in section 2.11 that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination").

111. 9/11 COMMISSION REPORT, *supra* note 1, at 332. President Bush's war council consisted of Vice President Dick Cheney, National Security Advisor

council meeting set into motion the U.S. response to the al Qaeda-led attacks on September 11, including an extensive covert action program.¹¹² On September 17, 2001, the NSC convened in the White House and President Bush pushed his advisers to put the CIA into covert action operations immediately, stating, "I want to sign a finding today. I want the CIA to be first on the ground."¹¹³

Acting on the President's directive, Bush's cabinet amended a pre-9/11 presidential directive for actions against al Qaeda into National Security Presidential Directive 9 (NSPD-9), entitled "Defeating the Terrorist Threat to the United States."¹¹⁴ This new directive expanded the previous directive to encompass a worldwide war on terrorism, not just activities against al Qaeda alone.¹¹⁵ Included in this directive was a presidential finding for covert action, drafted by the CIA and approved by CIA director George Tenet.¹¹⁶ The finding formally expanded the CIA's power to include the use of lethal force against suspected terrorists when engaging in global counterterrorism activities.¹¹⁷ This finding

Condoleezza Rice, Deputy National Security Advisor Stephen Hadley, Secretary of State Colin Powell, Deputy Secretary of State Richard Armitage, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, FBI Director Robert Mueller, CIA Director George Tenet, Deputy Secretary of Defense Paul Wolfowitz, and Cofer Black, Director, DCI Counterterrorism Center. *Id.* This meeting of the war council took place September 15–16, 2001. *Id.*

112. *Id.* CIA Director George Tenet proposed inserting CIA teams into Afghanistan to work with opposition to the Taliban to try to find Osama bin Laden and fight against al Qaeda. *Id.*

113. BOB WOODWARD, *BUSH AT WAR 97* (2002).

114. 9/11 COMMISSION REPORT, *supra* note 1, at 333.

The NSPD called on the Secretary of Defense to plan for military options 'against Taliban targets in Afghanistan, including leadership, command-control, air and air defense, ground forces, and logistics.' The NSPD also called for plans 'against al Qida [sic] and associated terrorist facilities in Afghanistan, including leadership, command-control-communications, training, and logistics facilities.'

Press Briefing by White House Press Secretary Scott McClellan, Apr. 1, 2004, <http://www.whitehouse.gov/news/releases/2004/04/20040401-4.html#16>. Aside from the White House's depiction of NSPD-9 and general testimony received by the 9/11 Commission, NSPD-9 is a classified document. Federation of American Scientists, Intelligence Resource Program, *NSPD-9: Combating Terrorism*, <http://www.fas.org/irp/offdocs/nspd/nspd-9.htm> (last visited Feb. 17, 2007) [hereinafter FAS Intelligence Resource Program].

115. 9/11 COMMISSION REPORT, *supra* note 1, at 333.

116. WOODWARD, *supra* note 113, at 76.

117. *Id.* This presidential finding was not the first authorization of lethal force through covert action issued by a President. President Clinton authorized the use of lethal force against al Qaeda in 1998. Barton Gellman, *CIA Weighs 'Targeted Killing' Missions; Administration Believes Restraints Do Not Bar Singling Out Individual*

provided the CIA with the “broadest and most lethal authority in its history.”¹¹⁸

The process leading to the final approval of the post-9/11 covert action finding was relatively similar to the process followed by previous administrations. First, the proposal of new covert activity was presented by the head of the CIA and expanded on a plan that had already been submitted for presidential approval on September 4, 2001.¹¹⁹ As discussed previously, the original proposal from the CIA was requested by National Security Advisor Rice after discussions with President Bush.¹²⁰ Thus, the authority for researching and developing this plan for covert action started with a request from the White House. The start of the process for approving the broad post-9/11 finding was, therefore, similar to the process followed in the Reagan, George H. W. Bush, and Clinton Administrations.¹²¹

Second, the plan for covert action and the proposed presidential finding were reviewed and approved by principals and deputies of the presidential cabinet. But the review by the deputies and principals in this case occurred in a slightly different fashion. The approval of the finding signed by President Bush on September 17, 2001 only underwent the review of the war cabinet principals and their deputies during the Camp David briefings of September 15–16, 2001.¹²² It does not appear that the final finding

Terrorists, WASH. POST, Oct. 28, 2001, at A1.

118. WOODWARD, *supra* note 113, at 78. The authority was viewed as broader than the force authorized by Clinton in 1998 because it expanded the CIA’s power to use lethal force in all aspects of a “secret global war on terror,” and not just against al Qaeda. *Id.* See also Gellman, *supra* note 117, at A1 (“Bush’s directive broadens the class of potential targets beyond bin Laden and his immediate circle of operational planners, and also beyond the present boundaries of the fight in Afghanistan, officials said.”). The finding also allowed for the narrower planning of the death of an individual, something that had not been expressed in findings by previous presidents. *Id.*

119. Testimony of U.S. Secretary of Defense Donald H. Rumsfeld Prepared for Delivery to the National Commission on Terrorist Attacks Upon the United States (Mar. 23, 2004), at 7, http://www.9-11commission.gov/hearings/hearing8/rumsfeld_statement.pdf [hereinafter Rumsfeld Testimony].

120. See *supra* Part III.D.1.

121. See *supra* Parts III.A.–C.

122. See WOODWARD, *supra* note 113, at 101. The finding was actually included in a Memorandum of Notification which served to modify an intelligence finding on worldwide counterterrorism signed by President Reagan in 1986. *Id.* at 76. See also *supra* note 111 (listing the members of the war council). The author could not find the actual title and number of the Reagan finding, likely a National Security Decision Directive (NSDD), probably because this document is still

was ever formally resubmitted to the Principals and Deputies Committees for comment (as was commonly the process for approval in previous administrations). But given the abbreviated timeline created by 9/11 and the impromptu meeting of the war council, it is not surprising that this seemingly bureaucratic process of reconvening the Principals and Deputies Committees was not followed in this particular phase of the finding's authorization.¹²³

The final statutory component of the covert action approval process, congressional notification, was less clear in this instance. President Bush addressed a joint session of Congress and the American people on September 20, 2001, proclaiming that "covert operations, secret even in success" would be utilized to defeat the terrorist threat.¹²⁴ After this point, if not before, the intent of the Bush administration to use covert action as a weapon against the terrorist threat was obvious. But precisely when the appropriate members of Congress were notified of the confidential specifics of the planned covert activity is hard to determine. Officials from the first four years of the Bush Administration have gone on record to say that congressional leaders were notified of approved covert actions within the required forty-eight-hour period specified by statute.¹²⁵ At this point, there is no evidence leading to the conclusion that the Administration did not follow the proper congressional reporting procedures required by the National Security Act of 1947.¹²⁶ It is unlikely that such a reporting violation occurred, given the scrutiny the Bush Administration has been

classified. See FAS Intelligence Resource Program, *supra* note 114, at <http://www.fas.org/irp/offdocs/nsdd/index.html> (listing all known NSDDs of the Reagan Administration) (last visited October 31, 2006). It appears that NSDD 217 is a likely candidate; NSDD 217 is the only NSDD issued in 1986 that is still completely confidential, and no other listed titles allude to the nature of the described directive. See *id.*

123. As already discussed, the presidential finding issued for covert activity after 9/11 was an addition and revision to NSPD-9, which had already gone through the standard approval process (including review by the principals and deputies committees). See 9/11 COMMISSION REPORT, *supra* note 1, at 212-14; see also Rumsfeld Testimony, *supra* note 119, at 7 (stating that NSPD-9 had been researched, prepared, and submitted to the President for approval on September 4, 2001).

124. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

125. See James Risen & David Johnston, *Threats and Responses: Hunt for al Qaeda*, N.Y. TIMES, Dec. 15, 2002, at A1.

126. See 50 U.S.C. § 413b (2000) (detailing proper congressional reporting procedures).

2007]

WHO AUTHORIZED THIS?!

1133

subject to with regard to pre- and post-9/11 national security activities.

3. *The Bush Covert Action Authorization Process Today*

Despite the structured process executed by the Bush Administration to authorize certain covert activity shortly after September 11, 2001, recent developments and investigative reporting have called into question the Administration's continued use of this process. Is all covert action planned and executed in the war on terror and the war in Iraq subject to the same layered analysis used in 2001?

a. *GST and the Use of Lethal Force*

The finding that President Bush signed on September 17, 2001 has expanded into a broad-based covert action program known by the initials GST.¹²⁷ The broad power granted to the CIA under the original finding has allowed the Administration, through extensive legal interpretation, to substantially increase the ability of GST operatives to engage in lethal activity against al Qaeda members in just about any part of the world.¹²⁸ Due to the broad nature of the finding and the Administration's interpretation of it, additional covert actions have been executed by the CIA without the need to seek further approval.¹²⁹

The elimination of the need to approve every covert activity is most evident in the execution of the Administration's "high-value target list," which authorizes the CIA to hunt down and kill specific terrorists.¹³⁰ In authorizing this list and the lethal authority associated with it, President Bush "provided written legal authority

127. Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005, at A1. GST "is an abbreviation of a classified code name for the umbrella covert action program" aimed at fighting the war on terror. *Id.*

128. *Id.* The Administration's primary legal justification for its lethal acts is one of self-defense based on the resolution passed by Congress on September 14, 2001, authorizing "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks." *Id.* (quoting the resolution).

129. Jonathan Ulrich, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1042-43 (2005).

130. Risen & Johnston, *supra* note 125. The target list includes roughly two dozen al Qaeda leaders, defined as the "worst of the worst," including Osama bin Laden and his chief deputies. *Id.*

to the CIA to hunt down and kill the terrorists without seeking further approval each time the agency is about to stage an operation.”¹³¹ Presumably, the written legal authority provided by the President was in the form of a presidential finding. But it is unclear whether the written authority is in the original finding issued in 2001, or another finding that defines the particular act of hunting down and killing specific terrorists.

Critics of the GST program are skeptical of the validity of the program’s legal justification, arguing that the Administration has essentially written itself a blank check “to do anything” in the war on terror.¹³² This wide-ranging power has given the CIA extensive power to execute covert actions without additional oversight, allegedly leading to extensive day-to-day decision making by the head of the CIA and others.¹³³ The delegation of power has allegedly filtered down to the point where the Director of the CIA can pass the authority to execute killings against al Qaeda members to the CIA’s Counterterrorist Center.¹³⁴

The distribution of authority to lower ranks raises the question of whether covert actions executed under the GST program comply with statutory requirements. When the National Security Act of 1947 refers to the President’s authority to conduct “a covert action,”¹³⁵ how broadly can such an action be construed? Does each individual act need to be reported to Congress?¹³⁶ Can the

131. *Id.*

132. Priest, *supra* note 127, at A1.

133. *Id.* According to congressional and intelligence officials, President Bush delegated much of the decision-making responsibility for covert actions, including targeted killings, to former CIA Director George Tenet. *Id.*

134. *Id.* One of the most controversial covert actions executed since September 2001 is the pilotless Predator drone missile strike in Yemen in November 2002 that killed an American citizen. Priest, *supra* note 6, at A1. The dissemination of power to those in lower-ranking CIA positions poses the question of whether the President had knowledge of this particular strike. If he did not, would the strike have been executed if the President was the one giving the order to fire and knew of the presence of a U.S. citizen with the target?

135. 50 U.S.C. § 413b(a) (2000).

136. Allegations have also been made that the Bush Administration limited the number of Congressional members informed of its covert plans to four: the chairmen and ranking Democratic members of the House and Senate intelligence committees. Priest, *supra* note 127, at A1. If this did occur, the administration would be in violation of the National Security Act of 1947, which requires, at minimum, that eight members of Congress be informed within forty-eight hours of the ordering of any covert action. 50 U.S.C. § 413b(c)(2) (2000).

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,

authority to execute any particular action under a finding be granted to anyone but the President himself? While the original finding for covert activity in 2001 was subject to an extensive review process, each individual action since the issuing of that finding appears to be subject to a decreasing standard of approval and review.

b. The Iraq Elections

A second situation eliciting questions about the Bush Administration's process for approving covert activity is the suspicion that the United States secretly influenced Iraq's first free elections in January 2005. In the months leading up to the January 30th election, President Bush approved a covert action plan to provide support to certain Iraqi candidates and political parties.¹³⁷ But this plan was met with considerable opposition starting in October 2004 when Congress was notified of the proposed finding.¹³⁸ Certain members of Congress opposed any secret influence by the United States in the Iraq election because such activity would, in their view, obviously compromise the U.S. Government's stated commitment to sponsoring a free, unfettered election.¹³⁹ The President rescinded the proposed finding in light of the congressional opposition, but allegations have persisted that the Bush Administration went forward with its plan to influence the Iraq election by hiring "retired CIA officers and other non-government personnel, and us[ing] funds that were not necessarily

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.

Id. (emphases added).

137. Jehl & Sanger, *supra* note 5.

138. *Id.* Timothy J. Berger & Douglas Waller, *Notebook: How Much U.S. Help?*, TIME, Oct. 4, 2004, at 17.

139. Seymour M. Hersh, *Get Out the Vote; Did Washington Try to Manipulate Iraq's Election?*, NEW YORKER, July 25, 2005, at 52, 55; Jehl & Sanger, *supra* note 5. House Democratic leader Nancy Pelosi was reported to be the most heated opponent of the planned election intervention. Berger & Waller, *supra* note 138, at 17. Pelosi allegedly had a heated phone conversation with then National Security Adviser Condoleezza Rice, in which Pelosi stated, in essence, "Did we have eleven hundred Americans die—the number of U.S. combat deaths as of September 2004—'so [Iraq] could have a rigged election?'" Hersh, *supra*, at 55; see also Jehl & Sanger, *supra* note 5.

appropriated by Congress.”¹⁴⁰

The original plan appears to have followed a method of review and approval similar to the Administration’s post-9/11 finding,¹⁴¹ culminating in a submission of the finding to the appropriate congressional intelligence committees for review. If an additional “off the books”¹⁴² plan was executed by third parties hired by the U.S. Government, such an action would be in direct violation of the National Security Act of 1947.¹⁴³ Some members of the White House and Pentagon are reported to believe that when an operation is kept secret and “off the books,” the action is not official and therefore does not require the congressional notification used in regular covert actions.¹⁴⁴ If this is a prevailing attitude within the current Administration and covert action was indeed executed in Iraq without credence to statutory regulations, this presents a disturbing trend. If the executive branch can execute any covert activity it deems necessary as long as it finds an outside source through which to carry out its plans, important oversight and regulation provided by governmental checks and balances are lost.

In summary, recent covert actions authorized by the Bush Administration appear to be creating a precedent of only a cursory review process for proposed activity. The power to execute proposed actions is becoming further removed from the direct oversight of the President, and when the Administration finds opposition to its plans, it appears that the executive branch is simply creating ways to circumvent that opposition. To ensure that the process leading to the approval of these very powerful actions is appropriately transparent and subject to proper scrutiny, certain changes should be made to the current system.

140. Hersh, *supra* note 139, at 55.

141. *See supra* Part III.D.2. But the exact approval process used before submission of the document to Congress has not been reported publicly.

142. Hersh, *supra* note 139, at 55.

143. 50 U.S.C. § 413b(a)(4) (2000) (“Each finding shall specify whether it is contemplated that any third party . . . will be used to fund or otherwise participate in any significant way in the covert action concerned . . .”).

144. *See* Hersh, *supra* note 139, at 55 (reporting that “[s]ome in the White House and at the Pentagon believed that keeping an operation off the books eliminated the need to give a formal briefing to the relevant members of Congress and congressional intelligence committees, whose jurisdiction is limited, in their view, to officially sanctioned CIA operations”).

IV. RECOMMENDATIONS FOR GREATER TRANSPARENCY AND ACCOUNTABILITY IN THE COVERT ACTION APPROVAL PROCESS

In his analysis of U.S. intelligence policies and safeguards against CIA abuses in 1989, long-time national security and political science scholar Loch Johnson opined: “Intelligence policy for the most part has become more of a partnership between the branches [of government] than ever before. American democracy works best as a partnership among the branches of government and not through reliance on the executive branch alone.”¹⁴⁵ Johnson’s assessment of the strengths of the American form of government is particularly prudent given the current state of affairs in the approval process for covert action. The execution of covert action has become unequivocally dependent upon the executive branch alone, and changes need to be made to ensure that balance, transparency, and accountability return to this very powerful intelligence tool. Two plausible ways to achieve these goals are an improved system of retrospective congressional review and better composition of the congressional intelligence committees.

A. *Retrospective and Independent Congressional Review*

For the power of the executive branch to be appropriately checked and for the will of the American people to be represented, Congress must play a crucial role in the process that governs the planning and implementation of covert actions. But given the evolving nature of the threats against which the United States must protect its citizens, a more cumbersome preliminary approval process could severely infringe upon the President’s ability to react quickly and effectively to imminent dangers. For this reason, and for reasons of congressional and executive efficiency, congressional oversight of the covert action process should be focused on retrospective analysis and judgment of executed covert actions.¹⁴⁶

In a great many cases, anticipated covert actions can undergo a thorough analysis and genuine democratic debate before their

145. Johnson, *supra* note 50, at 389. Johnson also quoted former Director of Central Intelligence William Colby as observing that “in the future, covert action mistakes ‘will be American mistakes. They will not be CIA mistakes, but mistakes of the administration and the Congress in power.’” *Id.* at 388–89.

146. REISMAN & BAKER, *supra* note 12, at 143. Reisman and Baker also postulated that “[c]overt actions . . . require an executive . . . [b]ut democracies also require that executive actions be subjected to oversight and appraisal.” *Id.*

implementation.¹⁴⁷ This is one of the reasons that the requirement of congressional notification before execution of a covert action exists in federal statute¹⁴⁸ and can only be delayed or limited in “extraordinary circumstances.”¹⁴⁹ But in the current environment of terrorist threats, the United States and its chief executive must operate under an ever-changing timeline to combat an enemy that President Bush characterized as one “that lurks and plots and plans and wants to hurt America again.”¹⁵⁰ To meet this new and evolving threat, every effort should be made by the President and his cabinet to inform Congress of planned covert activity, but it is unrealistic to think that each and every action will be open to debate. The effectiveness of many covert actions in the war on terror will be based on the ability to execute the actions quickly and without significant bureaucratic delay.

It is therefore vitally important that Congress, specifically the congressional intelligence committees, focus their energies on evaluating covert actions after they have occurred or during their execution. Through thorough retrospective evaluations and recommendations, perceived mistakes or abuses related to covert activity can be evaluated and changes can be made in the future. According to William Daugherty, former chief of the Covert Action [policy] Group in the CIA’s Directorate of Operations,¹⁵¹ from the Reagan Administration through the Clinton Administration, there was an extensive congressional review process of all covert actions.¹⁵² But it is unclear whether this process gave any significant power to the congressional committees to hold the executive

147. See Johnson, *supra* note 50, at 390 (stating that “[i]n ninety-nine percent of [the] cases the democratic safeguards of prior debate, consultation, established procedures, and close monitoring [of intelligence actions] can be honored”). But Johnson wrote his article in 1989, well before the advent of the current war on terrorism. It may be naïve to say that almost all actions can be subject to this level of debate and review, but the basic premise of the statement still has modern validity.

148. 50 U.S.C. § 413b(b)(1) (2000).

149. *Id.* § 413b(c)(2)–(3).

150. See Michael A. Fletcher, *Bush Defends CIA’s Clandestine Prisons*, WASH. POST, Nov. 8, 2005, at A15.

151. University Press of Kentucky: Biography of William J. Daugherty, http://www.kentuckypress.com/PRdaugherty_bio.cfm (last visited Feb. 17, 2007).

152. See DAUGHERTY, *supra* note 13, at 107 (listing multiple steps in the review process). Daugherty states that annual and quarterly reviews were made by the congressional intelligence committees of all covert actions both planned and in operation. *Id.* Daugherty also recounts that the congressional committees could request a briefing on any action at any time and that such requests “number[ed] literally in the hundreds every year.” *Id.*

2007]

WHO AUTHORIZED THIS?!

1139

branch accountable for perceived abuses of power. It is also questionable whether such a review process is still used extensively today.

An effective retrospective review process would undoubtedly include an extensive review of the legal aspects surrounding already executed covert actions and actions currently in process. This legal analysis would be most effective and unbiased if it were to come from lawyers not closely connected to the executive branch or closely affiliated with any particular political party.¹⁵³ In the Bush Administration, the legal analysis of intelligence activities tends to come from lawyers within the administration who maneuver around dissenting opinions rather than providing an objective, measured analysis.¹⁵⁴ By implementing and executing a more independent and retrospective congressional review process, the legal justifications provided by the current Administration can be checked without unduly hindering the ability of the executive branch to protect the American people.

B. Composition of the Congressional Intelligence Committees

The power and responsibility to review covert action plans rests with the House and Senate Select Committees on Intelligence.¹⁵⁵ The importance of secrecy in covert activities requires that only a limited number of members of Congress are kept informed of the specifics and status of planned actions.¹⁵⁶ For these committees to be effective in their review of covert action plans and other intelligence information, it is essential that the senators and representatives on these committees have adequate background on

153. See generally REISMAN & BAKER, *supra* note 12, at 141–42 (proposing the use of lawyers with appropriate backgrounds in international law, but outside the “chain of command” of the executive branch in assessing the legality of covert actions abroad).

154. See Priest, *supra* note 127, at A1 (quoting William Mitchell College of Law Professor A. John Radsan, a former CIA lawyer, who described the Bush Administration’s “inner circle of lawyers and advisers work[ing] around the dissenters in the Administration,” rather than having “a broad debate on whether commander-in-chief powers can trump international conventions and domestic statutes in our struggle against terrorism”).

155. Dana Priest, *Congressional Oversight of Intelligence Criticized*, WASH. POST, Apr. 27, 2004, at A1. See also *supra* Part II.C (describing the creation of the Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence and their purposes).

156. See, e.g., 50 U.S.C. § 413b(c)(1) (2000) (prescribing requirements for the President to promptly report covert actions to congressional intelligence committees).

the matters submitted for their review.

In the aftermath of 9/11, criticism has surfaced with regard to the ability of the congressional intelligence committees to perform their responsibilities.¹⁵⁷ Loch Johnson describes the oversight by the committees as “by and large feckless and episodic.”¹⁵⁸ The deterioration in the committees’ abilities has been linked to two main factors. First, the complexity and volume of intelligence information, including covert action, has increased substantially.¹⁵⁹ Committee members are inundated with immediate concerns and daily briefings and little time remains for the broader duties of analysis and review of proposed actions.¹⁶⁰ Second, eight-year term limits exist for all intelligence committee members.¹⁶¹ Committee members and outside experts say these term limits severely hinder the members’ ability to develop a firm understanding of the very complex world of intelligence.¹⁶² The learning curve for gaining an adequate grasp on the inner workings of the CIA and other intelligence agencies is apparently quite steep, and it is made steeper by a passive resistance from the agencies to requests to relinquish certain information.¹⁶³ The result is two committees that are under-experienced and ill-equipped to effectively execute all of the duties assigned to them.

In order for the congressional intelligence committees to serve effectively in the role of retrospective analyst and as a check on the powers of the executive branch, the members of these committees must be exceptionally capable.¹⁶⁴ Any power delegated to these committees becomes useless if those using the power are spending the majority of their time simply trying to understand intelligence information, rather than applying a broader analysis.¹⁶⁵ Covert

157. See generally Priest, *supra* note 155, at A1.

158. *Id.*

159. *Id.*

160. *Id.* One former committee member, Timothy J. Roemer (D-Ind.), said the committees’ role in oversight and investigation “has almost gone away,” because committee members are “so busy with the budget and keeping up with daily events.” *Id.*

161. *Id.*

162. *Id.* Senator Mike DeWine (R-Ohio), Representative Porter J. Goss (R-Fla.), and “most other members of both [intelligence] committees say the term limits should be abolished, at least for some members.” *Id.*

163. *Id.* The description of a steep learning curve and passive resistance came from Senate Select Committee on Intelligence member Senator Mike DeWine (R-Ohio). *Id.*

164. See generally *id.*

165. See generally *id.*

2007]

WHO AUTHORIZED THIS?!

1141

actions are often executed quickly. Any hope of the intelligence committees providing an additional voice to the process is completely dependent upon having members who are well versed in the specifics of intelligence operations.

To assure that the Senate and House intelligence committees are better equipped to handle a new and evolving era of intelligence, Congress should make certain changes. First, Congress should consider eliminating, or at least lengthening, term limits for members of these committees.¹⁶⁶ Eliminating term limits does pose the risk of entrenched thinking and lower turnover. But given the complexity of the issues involved, this risk is most likely outweighed by the additional experience and discretion provided by longer-term members. Second, Congress should consider increasing the number of people involved in the intelligence committees. This does not necessarily mean adding additional members of Congress. At present, members of the House and Senate intelligence committees do not have staffers available to help them synthesize the great amounts of complex information with which they must keep current.¹⁶⁷ This is obviously due to confidentiality concerns, but perhaps it is time to consider lowering the overall work load in order to assure a greater level of understanding and analysis.

V. CONCLUSION

The current state of U.S. foreign affairs, especially in the Middle East and Eastern Europe, leads to the conclusion that covert action will continue to be an important tool for the United States in combating a unique and ever-evolving enemy. The success of covert actions is undeniably linked to an effective policy of confidentiality to assure that planned actions are not compromised and can have the maximum effect on the intended target.

But as with any governmentally funded activity, covert actions must be executed with the interests and priorities of the American public in mind. The responsibility for ensuring that the executive branch makes decisions aligned with public sentiment naturally falls on members of the legislative branch. The congressional committees on intelligence must be composed of capable,

166. See generally *id.* See also *supra* notes 160–61 and accompanying text.

167. Priest, *supra* note 155, at A1.

knowledgeable, and experienced senators and representatives with the ability to assess the immediate and future impacts of America's covert actions. The members of these committees are the key to providing a regulatory component to a covert action planning process that will continue to change and evolve with each new conflict and every new administration.

To think that a standard, regimented, and completely transparent process could be demanded of the executive branch for approving and executing covert action is naïve. The current state of national affairs requires that the President have the latitude to act in the best interests of national security.¹⁶⁸ It is possible, however, to impress our republican form of government upon the covert action process by ensuring a measured system of checks and balances for even this most secretive of government activities.

168. *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).