

# SUPERVISING THE PENTAGON: COVERT ACTION AND TRADITIONAL MILITARY ACTIVITIES IN THE WAR ON TERROR

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## INTRODUCTION

The primary tools of American foreign policy include military force, diplomacy, and foreign aid. But when those tools are unavailable or inapplicable to a particular problem, policymakers traditionally have turned to covert action.<sup>1</sup> The statutory definition of covert action, stipulated in the

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1. See, e.g., JOHN J. CARTER, COVERT ACTION AS A TOOL OF PRESIDENTIAL FOREIGN POLICY: FROM THE BAY OF PIGS TO IRAN-CONTRA 222 (2006) (noting that “[a]n important part of the allure of covert action is that it seems to offer presidents a ‘silver bullet’ with which they can strike any enemy or defend any friend with perfect anonymity”); JOHN JACOB NUTTER, THE CIA’S BLACK OPS: COVERT ACTION, FOREIGN POLICY, AND DEMOCRACY 38-39 (2000) (discussing the institutional attractions of covert action as an alternative to military or diplomatic options, such as the fact that covert action provides a “simple, or ‘clean,’ solution to a problem,” particularly for presidents who lack experience with foreign

Intelligence Authorization Act, Fiscal Year 1991 (Intelligence Act), is “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>2</sup>

The legal controls on covert action are the product of an extensive combination of executive direction and statutory requirements.<sup>3</sup> The Intelligence Act, however, limits the types of actions that are subject to this regulatory scheme, explicitly exempting “traditional . . . military activities or routine support to such activities.”<sup>4</sup> Then-Secretary of Defense Donald Rumsfeld argued that the war in Afghanistan demonstrated the effectiveness of special operations forces (SOF) in the war on terror, and he aggressively sought greater authority to use SOF without following Intelligence Act procedures by interpreting the “traditional military activities” exception expansively.<sup>5</sup> The Bush Administration describes the “war on terror” as a traditional war and, thus, all activities in the war on terror qualify as traditional military activities.<sup>6</sup>

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policy); Marcus Eyth, *The CIA and Covert Operations: To Disclose or Not to Disclose—That is the Question*, 17 *BYU J. PUB. L.* 46-54 (2003) (examining the use of covert action by policymakers throughout American history, including President George Washington’s requests to Congress for appropriations of over \$1 million for secret intelligence activities, the creation of the Office of Strategic Services (OSS) during World War II and the Central Intelligence Agency (CIA) after the war, and the many CIA-led covert actions during the Cold War).

2. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429 (codified at 50 U.S.C. § 413b(e) (2000)). Other resources provide slightly different definitions of covert action. *See, e.g.,* CARTER, *supra* note 1, at 8 (defining covert action as “clandestine activity designed to influence foreign governments, events, organizations or persons in support of presidential objectives without the role of the United States government being apparent or acknowledged”) (internal citations omitted); NUTTER, *supra* note 1, at 73 (“[C]overt action is an act, operation, or program intended to change the political policies, leaders, institutions, or power structure of another country, performed in a way that the covert actor’s role is hidden or disguised, and if that role is discovered, the actor can deny responsibility.”); W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* 13 (1992) (explaining that the factual meaning of a covert action is an action accomplished in ways unknown to some parties, while the normative meaning is an action that is per se unlawful in the way it has been accomplished).

3. *See* REISMAN & BAKER, *supra* note 2, at 120 (detailing the statutory requirements for covert action—most importantly, the necessity of a presidential “Finding” and congressional notification—and the executive requirements, including CIA and White House review mechanisms); ALFRED CUMMING, *CONG. RESEARCH SERV., STATUTORY PROCEDURES UNDER WHICH CONGRESS IS TO BE INFORMED OF U.S. INTELLIGENCE GATHERING ACTIVITIES, INCLUDING COVERT ACTIONS* 5-6 (2006), <http://www.fas.org/sgp/crs/intel/m011806.pdf> (describing the statutory parameters by which the president may report covert action to Congress).

4. 50 U.S.C. § 413b(e)(2).

5. *See* Seymour M. Hersh, *The Coming Wars: What the Pentagon Can Now Do in Secret*, *NEW YORKER*, Jan. 24, 2005, at 41 (reporting that the President has signed a “series of findings and executive orders” authorizing various Special Forces actions and effectively placing the war on terror under the control of the Pentagon).

6. Jennifer D. Kibbe, *The Rise of the Shadow Warriors*, 83 *FOREIGN AFF.* 102, 108-09

Congress has begun to deal with this loophole by requiring the Secretary of Defense to authorize any special forces operations conducted pursuant to funding provided in the 2004 defense authorization bill.<sup>7</sup> This Article argues, however, that Congress should extend statutory regulation on covert action to include all actions apparently undertaken by the Pentagon that implicate the same policy concerns as do traditional covert actions. Part I defines covert action and its statutory scope. Part II outlines the types of operations SOF allegedly have undertaken and how they fit into the legal framework which regulates covert action. Finally, Part III recommends that Congress include these alleged SOF activities among the types of actions subject to regulation.

## I. COVERT ACTION

### A. *The Nature of Covert Action*

The defining characteristic of a covert action is the secrecy of its sponsor. Indeed, the fact of its occurrence may be public—for example, an American agent placing a propaganda article in a foreign newspaper—but the fact of United States sponsorship of the operation would remain secret. On the other hand, a clandestine operation is defined by the secrecy of the operation itself. However, should the operation be discovered, United States sponsorship would be apparent.<sup>8</sup>

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(2004). Some legal experts argue that the president has virtually unlimited authority through the Authorization of the Use of Force that Congress passed in response to the attacks on September 11, 2001, as long as the president determines that a target has some connection to al Qaeda. In addition, some Pentagon lawyers contend that because of the September 11th attacks, all of the war on terror is an act of self-defense and, therefore, a traditional military activity that does not require reporting to Congress. *Id.*

7. See ALFRED CUMMING, CONG. RESEARCH SERV., COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 3 n.9 (2006), available at <http://www.fas.org/sgp/crs/intel/RL33715.pdf> (describing § 1208 of Pub. L. No. 108-375 (2004), which authorizes \$25 million for the Secretary of Defense “to provide support to ‘foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism’”). To use this authority, the Secretary must “notify the congressional defense committees expeditiously” of the use of that authority. *Id.*

8. See, e.g., DEP’T OF DEF., DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 89 (2006), available at <http://www.dtic.mil/doctrine/jel/doddict/> (providing a definition of “clandestine operation” which places an emphasis on the concealment of the operation, rather than the identity of the sponsor like in a covert operation); Kibbe, *supra* note 6, at 104 (defining covert action as being “rooted in the notion of deniability” while “clandestine refers to the secrecy of the operation itself”); NUTTER, *supra* note 1, at 73 (defining covert action as an action where the “actor can deny responsibility” and a clandestine action as an action “in which the deed itself is hidden, so that only the people carrying out the action know that it is taking place”). An example of a clandestine, rather than covert, operation is a secret nighttime raid carried out by uniformed American soldiers—if the enemy discovered the soldiers, it would be obvious from the uniforms that the United States had sponsored the action.

By statute and executive order, primary responsibility for conducting covert operations traditionally has been granted to the Central Intelligence Agency (CIA).<sup>9</sup> Even before the CIA's founding in 1947,<sup>10</sup> there were several notable examples of American presidents employing covert action. In 1843, President Tyler dispatched an agent to Great Britain to meet privately with British opposition groups to attempt to influence public opinion there without disclosing that he was a representative of the U.S. government.<sup>11</sup> Similarly, in 1869, President Grant sent an agent, again without disclosure, to central and western Canada to encourage public sentiment for the separation of that region and for union with the United States.<sup>12</sup> Those examples of covert action fall under the categories of propaganda<sup>13</sup> and political action,<sup>14</sup> but experts have identified three other types of covert action:<sup>15</sup> asset development,<sup>16</sup> economic warfare,<sup>17</sup> and paramilitary action.<sup>18</sup> While the nature of each type of action is beyond the scope of this Article, a brief explanation of paramilitary action will be useful, as it is the type most commonly associated with covert action.<sup>19</sup>

Capture or assassination is a common and notorious form of paramilitary action.<sup>20</sup> Public information on CIA assassination attempts indicates that

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9. See 50 U.S.C. § 403-3(d)(5) (2000) (announcing the famous "Fifth Function" of the CIA director—to "perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct"). This provision has been interpreted as giving statutory authorization for the conduct of covert operations. REISMAN & BAKER, *supra* note 2, at 118; see also Exec. Order No. 12,333, 3 C.F.R. § 200 (1982) (naming the CIA as the lead agency in conducting covert operations unless the President finds that another agency is better equipped for the operation).

10. See CIA, ABOUT THE CIA (last visited Mar. 6, 2007) <https://www.cia.gov/cia/information/info.html> (noting that the CIA was founded in 1947 when President Truman signed the National Security Act).

11. STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 423 (3d ed. 2002).

12. *Id.*

13. See NUTTER, *supra* note 1, at 84 (explaining that propaganda and disinformation is "simply any information used to influence someone to do something").

14. See *id.* at 79 (explaining that political action usually involves "political advice, psychological operations . . . , subsidies to important individuals and organizations, non-monetary subsidies, and political training," all of which is "designated to directly influence political processes, decisions, and institutions").

15. See *id.* at 75 (listing five types of covert action). But see Eyth, *supra* note 1, at 55 (dividing covert action into only three categories: political action, propaganda and disinformation, and paramilitary action).

16. See *id.* at 76 (explaining that asset development most commonly involves a "single individual who holds some position that is or could be useful to a covert operation").

17. See *id.* at 89 (describing economic warfare as "a euphemism for vandalism, pillaging, and destruction of opposing economic targets").

18. See *id.* at 91 (listing assassination, sponsorship of coup d'etat, and support of guerrilla movements as the most notorious types of paramilitary action). Other types of paramilitary action include "providing intelligence to a friend or client (which they might use to make their own violence more successful)," and terrorist operations such as anonymous bombing, hijacking civilian aircraft, and hostage seizures. *Id.* at 90.

19. *Id.* at 90-91.

20. See *id.* at 91 (listing assassination of political enemies as one of the three types of paramilitary options that are most associated with covert action).

agents have worked actively to assassinate at least two heads of state,<sup>21</sup> and have been involved in three other assassination plots.<sup>22</sup> Executive Order 12,333 declared assassination illegal,<sup>23</sup> but scholars who have explored the domestic legal constraints on assassination in the context of the war on terror have found significant loopholes and flexibility that make the ban less than absolute.<sup>24</sup> Because the ban is contained in an executive order, it can be suspended by the president or revoked by a subsequent executive order.<sup>25</sup> Further, the term “assassination” was defined vaguely in Executive Order 12,333, leaving open various possibilities that would not violate the ban on assassination.<sup>26</sup>

The Final Report of the National Commission on Terrorist Attacks Upon the United States details elaborate pre-9/11 U.S. government efforts to employ covert action to counter the threat posed by Osama bin Laden and al Qaeda.<sup>27</sup> In 1996, when the Clinton Administration began to recognize that bin Laden was a considerable threat, the CIA created a special “bin Laden unit” to analyze intelligence on and plan operations against bin Laden.<sup>28</sup> This unit followed bin Laden from Sudan to Afghanistan, a move

21. See SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 255 (1975) [hereinafter CHURCH COMMITTEE REPORT] (listing the two heads of state as Congo Premier Patrice Lumumba and Cuban dictator Fidel Castro); NUTTER, *supra* note 1, at 111-14.

22. See CHURCH COMMITTEE REPORT, *supra* note 21, at 256 (listing CIA involvement in plots to assassinate Rafael Trujillo of the Dominican Republic, Ngo Dinh Diem of South Vietnam, and Rene Schneider of Chile).

23. See Exec. Order No. 12,333, 3 C.F.R. § 200, 213 (1982) (“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”).

24. See, e.g., Jonathan Ulrich, Note, *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, 1036 (2005) (explaining that the president may waive or rescind Executive Order 12,333 if he so desires, and may target a terrorist leader in anticipatory self-defense); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 725 (2003) (explaining that if the president clarified that a targeted killing of a terrorist leader was in anticipatory self-defense, it would be allowable under U.S. law, and, further, that the president may waive or rescind Executive Order 12,333 banning assassination if he so desires); Daniel B. Pickard, *Legalizing Assassination? Terrorism, The Central Intelligence Agency, and International Law*, 30 GA. J. INT’L & COMP. L. 1, 34-35 (2001) (concluding that assassinating known terrorists (who are not state leaders) in a foreign nation by CIA personnel arguably is not prohibited under U.S. or international law).

25. See Ulrich, *supra* note 24, at 1036 (arguing that the president has all the authority he needs to circumvent the assassination ban during a time of war).

26. See Banks & Raven-Hansen, *supra* note 24, at 725 (arguing that a targeted killing of a terrorist leader, like Osama bin Laden, in anticipatory self-defense would not be illegal).

27. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 108-34 (2004).

28. See *id.* at 109 (describing the establishment of the bin Laden unit as beginning with a “terrorist financial links unit,” but the unit’s focus was narrowed to bin Laden himself when the officer selected to run the unit noticed a “recent stream of reports about bin Laden and something called al Qaeda”).

that the unit's leader felt represented an advantage for the CIA, which knew the terrain well from its days of involvement in the anti-Soviet insurgency.<sup>29</sup> These covert associations led to the generation of near real-time intelligence about bin Laden's activities in Afghanistan,<sup>30</sup> although senior administration officials never received intelligence from these sources strong enough to support the authorization of a capture operation against bin Laden.<sup>31</sup>

### B. Statutory Controls on Covert Action

Congress implemented the primary statutory provision on CIA covert action as part of the Intelligence Act.<sup>32</sup> Part (a) of § 413b requires the president to make certain findings before authorizing a covert action.<sup>33</sup> These determinations must be set forth in a presidential finding.<sup>34</sup> Paragraph (b) of § 413b requires the Director of Central Intelligence and the heads of all agencies involved in the action to keep the intelligence committees of Congress "fully and currently informed of all covert actions . . ."<sup>35</sup> Section 413b(c)(2) allows the president to notify only the so-called "Gang of Eight," which includes the House and Senate majority and minority leaders, and the chair and ranking members of the House and Senate Intelligence Committees, when the president determines that it is essential to "meet extraordinary circumstances affecting vital interests of the United States."<sup>36</sup>

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29. *See id.* at 110 (adding that although the CIA had abandoned Afghanistan after the Soviet withdrawal, "case officers had reestablished old contacts while tracking down Mir Amal Kansi, the Pakistani gunman who had murdered two CIA employees in January 1993").

30. *See id.* (detailing that by the fall of 1997, the bin Ladin unit had "roughed out a plan for these Afghan tribals to capture bin Laden and hand him over for trial either in the United States or in an Arab country").

31. *See id.* at 112-14 (noting that even though bin Ladin unit Director "Mike" thought the capture plan was "the perfect operation," Counterterrorist Center officers estimated that the operation only had a thirty percent chance of success, causing senior officers at the CIA to forego the operation).

32. 50 U.S.C. § 413b (2000).

33. *See* 50 U.S.C. § 413b(a) (forbidding the president from authorizing a covert action by any "departments, agencies, or entities of the United States Government" unless that action "is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States . . .").

34. *See id.* (requiring that the president's determination of necessity be set forth in a written finding "as soon as possible" or within forty-eight hours of making the decision).

35. *See* 50 U.S.C. § 413b(b)(1) (requiring the heads of all departments, agencies, and entities of the U.S. government involved in a covert action to "keep the [congressional] intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures . . ."); *see also* 50 U.S.C. § 413b(c)(2) (allowing congressional notification to be limited to the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and other members included by the president in extraordinary circumstances).

36. *See* CUMMING, *supra* note 3, at 5 (noting that the president may, when he

Paragraph (e) of § 413b defines the types of actions subject to this statutory provision.<sup>37</sup> The definition also specifies activities that are explicitly excluded from this definition, and it is the second of these exclusions that provides an opening for Pentagon activity.<sup>38</sup> This exclusion states that “traditional diplomatic or military activities or routine support to such activities”<sup>39</sup> are not included within the purview of § 413b.<sup>40</sup>

### C. Traditional Military Activities and Legislative Intent

The committee reports related to the Intelligence Act provide some detail regarding Congress’s intent in exempting traditional military activities and routine support to such activities from the covert action reporting requirements.<sup>41</sup> The exact language states that if an activity “immediately precede[s] or take[s] place during the execution of a military operation” and is executed under a military commander, the activity falls outside of the covert action reporting requirements.<sup>42</sup>

A gray area arises, however, when an apparent military operation is not ongoing or does not immediately follow the activity—in other words, when an activity is undertaken well in advance of a military operation.<sup>43</sup> For

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determines it is necessary to meet extraordinary circumstances, report a covert action to the “Gang of Eight” and “any other member or members of the congressional leadership that the President may designate”).

37. See 50 U.S.C. § 413b(e) (defining the applicable covert actions 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 . . .”).

38. See *id.* (defining activities that are not covert action as “(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 . . .”).

39. 50 U.S.C. § 413b(e)(2).

40. See H.R. REP. NO. 101-928, at 28-29 (1989) (Conf. Rep.) (indicating that traditional military activity includes military activities undertaken by military personnel under the command of a “United States military commander . . . which *immediately precede or take place during the execution of a military operation*” that is publicly acknowledged) (emphasis added); S. REP. NO. 101-358, at 55 (1990) (stating that whether activities undertaken well in advance of a possible military operation constitute “routine support” to such an operation depends on whether “support to a possible military contingency operation involves other than unilateral efforts by U.S. agencies in support of such operation, to include covert U.S. attempts to recruit, influence, or train foreign nationals, either within or outside the target country, to provide witting support to such an operation, should it occur”).

41. S. REP. NO. 101-358, at 53-56; H.R. REP. NO. 101-928, at 27-29. See generally William E. Conner, *Reforming Oversight of Covert Actions After the Iran-Contra Affair: A Legislative History of the Intelligence Authorization Act for FY 1991*, 32 VA. J. INT’L L. 871, 905-06 (1992) (arguing that the Intelligence Act was a response to the Iran-Contra Affair, in that the main changes prescribed by a piece of legislation that later became the Intelligence Act were “direct consequences” of the Iran-Contra affair).

42. H.R. REP. NO. 101-928, at 29.

43. *Id.*

such an activity to be exempted from the covert action reporting requirements of § 413b, it would have to be considered “routine support to a traditional military activity.”<sup>44</sup> The Senate Report on the Intelligence Act details its views on what might constitute routine support, such as providing clandestine assistance to persons who may be involved in an acknowledged military operation.<sup>45</sup> The report also identifies examples of “other-than-routine” support, such as the recruitment and training of foreign nationals to participate in a U.S. military contingency operation.<sup>46</sup>

## II. SOF ACTIVITY IN THE WAR ON TERROR

### A. Alleged SOF Activities

Early in 2003, then-Secretary of Defense Donald Rumsfeld called for an expanded role for SOF in the war on terror, saying “[t]he global nature of the war, the nature of the enemy and the need for fast, efficient operations in hunting down and rooting out terrorist networks around the world have all contributed to the need for an expanded role for the Special Operations Forces.”<sup>47</sup> Special Operations Command (SOCOM) in Tampa, Florida is the hub of the military’s efforts in the war on terror,<sup>48</sup> and comprises SOF units, including the Army Rangers and Green Berets, the Navy SEALs, and the Air Force Special Operations Command.<sup>49</sup> SOCOM also contains the Joint Special Operations Command (JSOC), which is the command at the

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44. *Id.*

45. See S. REP. NO. 101-358, at 54 (suggesting that routine support to traditional military activities could include such activities as “providing false documentation, foreign currency, special communications equipment, maps, photographs, etc., to persons to be involved in a[n acknowledged] military operation”). It could also include the “caching,” procurement, or storage of equipment to be used in an acknowledged operation. *Id.* at 54-55.

46. See *id.* at 55 (describing “other-than-routine” support as including “clandestinely recruiting and/or training of foreign nationals . . . to participate in and support a U.S. military contingency operation [sic]” and “clandestine efforts to influence foreign nationals [or officials] of the target country to take . . . action[] in the event of a U.S. military contingency operation . . .”).

47. Paul de la Garza, *The Shadow Warriors*, ST. PETERSBURG TIMES, Apr. 28, 2003, at 1A. See generally Michael McAndrew, *Wrangling in the Shadows: The Use of United States Special Forces in Covert Military Operations in the War on Terror*, 29 B.C. INT’L & COMP. L. REV. 153, 156-57 (2006) (describing the Department of Defense’s rationale for using special operations forces (SOF) in the war on terror, including that SOF’s elite training and greater numbers makes them more effective than either conventional military forces or CIA paramilitary troops).

48. See Kibbe, *supra* note 6, at 110-12 (explaining that because former-Secretary of Defense Rumsfeld believed the Special Forces would play a central role in combating terror, SOCOM was given lead responsibility for the military aspects of the war on terror); see also Gil Klein, *Special Operations Is Getting Special Attention*, TAMPA TRIB., Aug. 10, 2003, at 4 (reporting that then-Secretary of Defense Rumsfeld had announced that Special Operations Command in Tampa could both plan its own operations and call on the other military commands for assistance when needed).

49. See Kibbe, *supra* note 6, at 109 (listing the most important elements of Special Operations Command).

heart of the planning and execution of the non-traditional SOF activities.<sup>50</sup> Many observers believe JSOC comprises three primary units that the Pentagon does not publicly acknowledge:<sup>51</sup> the Army's Delta Force,<sup>52</sup> the Naval Special Warfare Development Group (DEVGRU),<sup>53</sup> and the Air Force's 24th Special Tactics Squadron. Experts believe that JSOC's primary mission is to identify and destroy terrorists and terror cells around the world.<sup>54</sup> To meet these needs, defense personnel likely are already operating overseas using false names and nationalities.<sup>55</sup>

In 2004, President Bush reportedly signed a series of classified findings and executive orders authorizing SOF units to conduct secret operations against suspected terrorist targets in as many as ten Middle Eastern and South Asian countries, the identities of which have not been publicly released.<sup>56</sup> Pentagon leaders apparently run these operations free from the legal controls imposed on CIA covert operations, without having to report

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50. See *id.* at 109-10 (describing Joint Special Operations Command (JSOC) as a "smaller" command that "specializes in 'black' direct-action operations such as hunting terrorists and rescuing hostages"). See generally Sean D. Naylor, *SpecOps Unit Nearly Nabs Zarqawi*, ARMY TIMES, Apr. 28, 2006, available at <http://www.armytimes.com/legacy/new/1-292925-1739387.php> (describing the role of Task Force 145, made up of forces from JSOC units, in chasing Abu Musab al-Zarqawi in Iraq).

51. See, e.g., Kibbe, *supra* note 6, at 110 (listing the three units she believes are part of JSOC). But see Joint Special Operations Command (JSOC) <http://www.globalsecurity.org/military/agency/dod/jsoc.htm> (last visited Mar. 18, 2007) (listing nine units as part of JSOC: 1st Special Forces Operational Detachment - Delta, Intelligence Support Activity (ISA), Naval Special Warfare Development Group (SEAL Team Six), 24th Special Tactics Squadron, Joint Communications Unit (JCU), Joint Aviation Unit, Technical Intelligence Unit, Task Force 11, and Signals Intelligence Branch); ANDREW FEICKERT, CONG. RESEARCH SERV., U.S. SPECIAL OPERATIONS FORCES (SOF): BACKGROUND AND ISSUES FOR CONGRESS 4 (2006), <http://www.fas.org/sgp/crs/natsec/RS21048.pdf> (listing five units believed to be part of JSOC: the Army's Delta Force, the Navy's SEAL Team Six, the 75th Ranger Regiment, the 160th Special Operations Aviation Regiment, and the Air Force's 24th Special Tactics Squadron).

52. See generally 1st Special Forces Operational Detachment (Airborne) Delta, <http://www.globalsecurity.org/military/agency/army/sfod-d.htm> (last visited Mar. 18, 2007) (describing Delta Force, the full name of which is the Army's 1st Special Forces Operational Detachment-Delta, which has the primary goal of conducting "missions requiring rapid response with surgical applications of a wide variety of unique skills, while maintaining the lowest possible profile of U.S. involvement"). Delta Force was secretly created in 1977 in response to the increasing terrorist threat during the 1970s to specialize in hostage rescue, barricade operations, and reconnaissance. *Id.*

53. See Naval Special Warfare Development Group, <http://www.globalsecurity.org/military/agency/navy/nswdg.htm> (last visited Mar. 18, 2007) (describing DEVGRU as possessing responsibility for "U.S. counterterrorism activities in a maritime environment," and estimating that there are about 200 operators in the Group).

54. FEICKERT, *supra* note 51, at 4; see also Barton Gellman, *Secret Unit Expands Rumsfeld's Domain*, WASH. POST, Jan. 23, 2005, at A1 (describing the increased activities of JSOC under Rumsfeld in the war on terror and the legal interpretations the Pentagon has used to support this expanded activity).

55. Gellman, *supra* note 54.

56. See Hersh, *supra* note 5, at 41 (describing the authority President Bush gave to Secretary Rumsfeld, and stating that the public does not know the countries for which covert operations have been approved).

to Congress.<sup>57</sup> These new orders reportedly will enable SOF to set up “action teams” to find and eliminate terrorist organizations in countries with which we are not at war.<sup>58</sup>

One recent example of this activity involved SOF operations in Ethiopia and Somalia.<sup>59</sup> Following the Ethiopian military offensive in early 2007, a task force from JSOC planned direct strikes against terrorist suspects who had fled to southern Somalia.<sup>60</sup> U.S. forces launched attacks from bases in Ethiopia into southern Somalia to find and kill high-value terrorist leaders.<sup>61</sup> A report described these operations as examples of a more aggressive strategy that involves dispatching SOF troops around the world to hunt high-level terrorism suspects, a task formerly in the CIA’s domain but that President Bush has now assigned to the Pentagon.<sup>62</sup>

Another recent news article reported increased efforts at the highest levels of the current Bush Administration to counter the potential Iranian threat by authorizing covert operations against Shiite interests across the Middle East.<sup>63</sup> The alleged covert operations, conducted in Iran, as well as Lebanon and Syria, are reportedly being conducted without any reporting to Congress.<sup>64</sup> Notwithstanding the exact details of these alleged activities, it is clear that the Pentagon is aggressively pursuing its authority to conduct SOF missions that skirt the line between covert action and traditional military actions.<sup>65</sup>

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57. *See id.* (quoting a high-ranking official as saying that the Pentagon does not call it “covert ops,” but rather “black reconnaissance” so as to distance it from CIA actions that require reporting).

58. *See id.* at 42-43 (describing the Pentagon’s plans to recruit locals in target countries into action teams to find and eliminate terrorist organizations); *see also* Gellman, *supra* note 54 (“[T]he Defense Department sometimes has to work undetected inside ‘a country that we’re not at war with, if you will, a country that maybe has ungoverned spaces, or a country that is tacitly allowing some kind of threatening activity to go on.’”).

59. *See* Michael R. Gordon & Mark Mazzetti, *U.S. Used Base in Ethiopia to Hunt Al Qaeda in Africa*, N.Y. TIMES, Feb. 23, 2007, at A1 (describing SOF collaborations with the Ethiopian military and operations that SOF forces undertook in Somalia from bases in Ethiopia).

60. *See id.* (reporting that American forces used intelligence from Ethiopian and U.S. sources to plan operations). Those operations involved two AC-130 gunships transported to a small airport in eastern Ethiopia; SOF troops, in conjunction with the Kenyan military, setting up positions along the Somalia-Kenya border to catch fleeing terrorists; a Navy flotilla in the Indian Ocean searching for ships that might be carrying fleeing terrorist suspects; planes based in Djibouti; and F-15 planes based in Qatar. *Id.*

61. *See id.* (reporting that the U.S. Government carried out these direct attacks using the legal authority that President Bush gave the military in a “classified directive that gave the military the authority to kill or capture senior Qaeda operatives if it was determined that the failure to act expeditiously meant the United States would lose a ‘fleeting opportunity’ to neutralize the enemy . . .”).

62. *Id.*

63. *See* Seymour M. Hersh, *The Redirection*, NEW YORKER, Feb. 25, 2007, at 54 (describing the Bush Administration’s new strategy to counter growing Iranian influence in the region as a result of failing U.S. efforts in Iraq).

64. *See id.* at 65 (“The Bush Administration’s reliance on clandestine operations that have not been reported to Congress and its dealings with intermediaries with questionable agendas have recalled [the Iran-Contra scandal].”).

65. *See* Gellman, *supra* note 54 (reporting that “[t]hose missions, and others

*B. On the Line Between Covert Action and Traditional Military Activities*

The Pentagon easily can show that an SOF action is being taken in a country in which an acknowledged military operation will “immediately”<sup>66</sup> follow or already exists. Because military forces must be assembled for—and planning must take place months in advance of—an overt military operation, ample evidence would exist to show that an overt action would immediately follow a proposed secret action.<sup>67</sup> It is also relatively straightforward, however, for the Pentagon to claim that acknowledged military operations may occur in a target country sometime in the future. Particularly in this age of terror—where military forces are deployed, or plausibly could be deployed, to virtually any country in the world<sup>68</sup>—the Pentagon easily can claim that future overt military engagements are likely to arise nearly anywhere.

When conducting operations that are “well in advance”<sup>69</sup> of a future overt operation, the issue becomes whether the operations are “routine” or “other-than-routine.”<sup>70</sup> Whether these alleged SOF actions are traditional military activities or covert actions ultimately will depend on whether the activities can be reasonably categorized as routine.<sup>71</sup> The wide latitude for interpretation of what constitutes “routine support,” however, suggests that this regulatory framework is not up to the task of providing sufficient oversight of a military aggressively expanding its role in a global conflict such as the war on terror that, by definition, has no end date.<sup>72</sup>

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contemplated in the Pentagon, skirt the line between clandestine and covert operations” because covert actions are subject to “stricter legal requirements”).

66. H.R. REP. NO. 101-928, at 29 (1989) (Conf. Rep.).

67. See, e.g., MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, *COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ 75-82* (2006) (describing in detail the many iterations of war planning that occurred in the U.S. government in the months preceding the 2003 invasion of Iraq, including extensive discussion of how to “flow” troops to the region and political planning to gain access to various ports in the region, most notably in Turkey, to facilitate the arrival of American forces to prepare for attack and also for bases on the Iraqi border to use as launching points for inserting SOF, Army, and Marine forces into Iraq). See generally Bruce Berkowitz, *Fighting the New War*, 2002 HOOVER DIG. 39, 43 (arguing that “[t]he rule of thumb [U.S. leaders should use when deciding when to use covert action] should be whether the United States plans to send armed forces into combat” because, otherwise, we are using the same tactics and methods as the terrorists, and it is important to maintain clear distinctions between the United States and terrorists).

68. See, e.g., ANDREW FEICKERT, CONG. RESEARCH SERV., *U.S. MILITARY OPERATIONS IN THE GLOBAL WAR ON TERRORISM: AFGHANISTAN, AFRICA, THE PHILIPPINES, AND COLOMBIA I* (2005), available at <http://www.fas.org/sgp/crs/natsec/RL32758.pdf> (describing the global nature of the military deployments required in fighting the war on terrorism, and focusing on the deployments in the four regions that have been particularly crucial to that fight thus far).

69. H.R. REP. NO. 101-928, at 29.

70. S. REP. NO. 101-358, at 54-55 (1990).

71. See H.R. REP. NO. 101-928, at 29 (stipulating that any activity that constitutes routine support to traditional military activity is not covert action and is thus exempt from existing reporting requirements).

72. See generally Roger Cohen, *No Clear Victory, or End, to U.S. ‘War on Terror’*, INT’L HERALD TRIB., Dec. 21, 2005, at 2 (arguing that there can be “no clear moment of

### III. REGULATING SOF OPERATIONS

#### A. *The Need for Regulation*

The Senate Report on the Intelligence Act indicates a key policy reason for regulating other-than-routine support to traditional military activities.<sup>73</sup> When the Pentagon undertakes an activity that is routine in nature, such activities do not need close oversight from Congress.<sup>74</sup> However, activities that are beyond such routine responsibilities, by definition, create new “substantial policy issue[s]”<sup>75</sup> and call for increased congressional oversight because they become operations with objectives independent of those of an acknowledged military operation.<sup>76</sup>

Furthermore, experts have noted that the need to regulate covert actions derives from their very nature: Their deniability precludes the type of accountability required of a government in a democratic society.<sup>77</sup> The democratic system, premised on the ability of the public to debate the policies of the government and to hold the government accountable for its actions, cannot function when the government hides its actions from public view.<sup>78</sup> The executive’s expanded ability to conduct covert operations,

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victory” in the war on terror, no moment when Osama bin Laden will surrender or when al Qaeda is “vanquished,” and arguing that because the Bush Administration has defined this as an endless war, it is particularly important that it be cautious about the war powers it asserts because the “talk of the ‘exceptional’ nature of such measures becomes meaningless”); *Experts Fear ‘Endless’ Terror War*, MSNBC, July 9, 2005, <http://www.msnbc.msn.com/id/8524679/> (quoting experts such as former CIA Osama bin Laden tracker Michael Scheuer, University of North Carolina’s Cynthia Combs, and Bruce Hoffman of the RAND Corp. as saying that al Qaeda has the capacity to wage an endless war because of its adaptable “virtual network” organizational structure and its self-sustaining cycle of recruitment). This article also reported on a survey of “longtime students of international terrorism” which predicted that “the world has entered a long siege in a new kind of war” and that “al Qaeda is mutating in a global insurgency, a possible prototype for other 21st-century movements, technologically astute, almost leaderless . . . compartmentalized groupings, in touch electronically but with little central control.” *Id.*

73. See S. REP. NO. 101-358, at 55 (stating that when an activity is other-than-routine, “the risks to the United States and the U.S. element involved have, by definition, grown to a point where a substantial policy issue is posed, and because such actions begin to constitute efforts in and of themselves to covertly influence events overseas (as well as provide support to military operations)”).

74. See H.R. REP. NO. 101-928, at 29 (stipulating that routine support to traditional military activities is not subject to covert action reporting requirements).

75. S. REP. NO. 101-358, at 55.

76. See Berkowitz, *supra* note 67, at 43-44 (arguing that covert action should be regulated closely because it is more similar to the type of fighting utilized by the terrorists, and that by fighting as they do, the United States undermines its credibility and effectiveness in the war on terror).

77. See, e.g., Kibbe, *supra* note 6, at 104 (“Because covert operations are hidden from the public, neither the thinking behind such missions nor their consequences can be publicly debated.”); Berkowitz, *supra* note 67, at 42 (arguing that because covert actions “hide the visible signs of U.S. responsibility . . . we need special provisions to maintain control, oversight, and accountability through other—classified—channels”).

78. See ROBERT D. BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* 9 (2001) (arguing that the reason we worry about holding government officials accountable “through

combined with a highly charged political climate, endangers Congress's ability to provide effective oversight of covert action because the intelligence community conducts these operations without Congress's knowledge.<sup>79</sup> With the Pentagon aggressively asserting its role in the war on terror under a cloud of secrecy, the need for accountability extends to these actions regardless of whether they are technically "covert" under the Intelligence Act because the new SOF actions raise the same policy and political concerns as covert actions.<sup>80</sup>

In fact, Congress has recognized the need for regulation of SOF activities before.<sup>81</sup> During the debates over the Intelligence Authorization Act for Fiscal Year 2004, the Senate Intelligence Committee consulted with Stephen Cambone, the Undersecretary of Defense for Intelligence, and tentatively agreed that SOF activities in countries where there is not a publicly acknowledged American military presence would not be excluded

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compliance with tightly drawn rules and regulations" is that we fear they will abuse their power, so, "as citizens, we seek to constrain the behavior of public officials, to limit their discretion, to prevent them from abusing their power"); MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 7 (2002).

[E]xecutive privilege . . . lacks any constitutional foundation, that the Framers of the Constitution were too fearful of executive branch tyranny to have allowed for such a power, that Congress and the public have a 'right to know' and a need to know what the executive is doing, and that the right to withhold information has become a convenient cloak for presidents who abuse their powers.

ROZELL, *supra*, at 7. *But see* MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 21 (1994) (summarizing the primary argument in favor of executive privilege, writing that although the Framers did intend to limit executive power, they did not intend to destroy it altogether; rather, they "sought to devise institutional mechanisms to counterbalance the abuse of power," and "[t]he case for executive privilege is based on the view that such a presidential power has clear constitutional, political, and historical underpinnings").

79. *See* CARTER, *supra* note 1, at 223 (arguing that in our system which depends on a "pro-active Congress to effectively limit usurpations of power by the executive[,] a shifting "domestic political climate" combined with "the intelligence community's expanded capacity for covert action, renders the apparatus of congressional oversight designed in the 1970s ineffective as a constraint on executive abuses of power").

80. *See generally* Eyth, *supra* note 1, at 61-71 (debating the idealist and pragmatist approaches to regulation of covert action in a democratic society). The idealist argues that unilateral covert actions—those carried out only by the executive branch with no oversight—do not serve the essence of democracy because democracy depends on the consent of the governed, who are unable to consent if they do not have sufficient information. *Id.* at 61-62. The pragmatist argues, first, that the national security interests of the state alone justify covert actions even if they may blur absolute democratic principles. *Id.* at 63. Second, because the public's interest is represented through presidential elections in which voters can observe how a candidate would conduct his foreign policy, a pragmatist argues a president's orders to carry out covert actions do serve democratic principles. *Id.* at 64. The author concludes that "the balance weighs in favor of allowing the executive to conduct covert operations without the need to receive permission from another source . . ." *Id.* at 71; *see also* William M. Arkin, Op-Ed., *The Secret War*, L.A. TIMES, Oct. 27, 2002, at M1 (arguing that "[t]hrough covert action can bring quick results, because it is isolated from the normal review processes it can just as quickly bring mistakes and larger problems").

81. *See* Bill Gertz, *Congress to Restrict Use of Special Ops*, WASH. TIMES, Aug. 13, 2003, at A1 (discussing the congressional debate over whether to require reporting for certain SOF actions).

from covert action reporting as traditional military activities.<sup>82</sup> The House version did not contain such a provision, however, and the statute regulating SOF action apparently was never adopted.<sup>83</sup>

Congress has, however, implemented a separate change, requiring the President or Secretary of Defense to authorize any Special Operations Command led mission, as part of the National Defense Authorization Act for Fiscal Year 2004.<sup>84</sup> The law also gives the Secretary of Defense \$25 million through 2007 to provide support to “foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism,” however, the law states that it does not grant authority to conduct covert operations.<sup>85</sup> Further, the law requires the Secretary of Defense to notify congressional defense committees of such operations.<sup>86</sup>

### B. A Means of Regulation

One alternative means of regulating SOF activities in the war on terror involves Congress to modifying the statutory definition of covert action in the Intelligence Act to encompass potential SOF activities, an option that Congress already has considered, as described above.<sup>87</sup> A better option, however, would be for Congress to create a new statutory scheme of regulation with its own definition of the types of activities subject to congressional regulation.

The first option has the benefit of involving only cosmetic changes to an existing regulatory structure. Congress could effect this change with legislation modifying the current definition of the types of actions that are subject to covert action regulatory requirements.<sup>88</sup> The downside of this option is that SOF activities may be arguably clandestine rather than covert.<sup>89</sup> Attempting to fit those SOF activities that may be clandestine but

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82. *See id.* (reporting that the new regulation would require a presidential “finding” for SOF activities conducted in a country without an acknowledged American military presence).

83. *See id.* (detailing that conferees would discuss this issue in a hearing to be held following publication of the article and that the author, after examining news reports and public sources after the fact, found no report of any such requirement of a presidential finding when deploying SOF in countries with no acknowledged American military presence).

84. *See* CUMMING, *supra* note 7, at 3 n.9 (noting that, while Congress has not modified the covert action statute, it has addressed some of the related issues through other legislation, such as the fiscal year 2004 defense authorization law).

85. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (codified as amended in the U.S. Code).

86. *Id.*

87. *See* Gertz, *supra* note 81 (describing legislation that Congress considered to regulate SOF activities).

88. *See* 50 U.S.C. § 413b(e) (2000) (giving the current definition of covert action).

89. *See generally* Kibbe, *supra* note 6, at 104 (describing the difference between covert and clandestine operations).

not covert into a law establishing regulation of covert action may leave an opportunity for the avoidance of the very congressional regulation that such a change would attempt to preclude. In other words, if Congress placed oversight of these SOF actions under covert action regulation, the Pentagon could still ignore the system by arguing that its operations are clandestine rather than covert.

The second alternative creating a new regulatory scheme for all such activities in the war on terror is more desirable. Indeed, Congress has begun to implement this alternative as part of the National Defense Authorization Act for Fiscal Year 2004—however that is not sufficient. The terms of this law only apply specifically to SOCOM-led operations, and this limitation opens as many loopholes as it may close. This language would allow the structure of an operation to be altered slightly to place another military command in the lead to avoid the reporting requirement while still implicating the same policy concerns. Congress ought to draft more inclusive language that creates the best chance of requiring reporting of all operations that implicate such policy concerns. The well-established system of regulating covert action may be an instructive model; indeed, large portions of the statutory requirements for a new bill may be copied wholesale from § 413b. However, a new law would reflect the fact that whether the activities are technically covert action or SOCOM-led, is largely irrelevant. This is a class of activities that needs to be regulated, and a new law would provide for such regulation.

The problem, however, is that, because of both the classified nature of these SOF activities and the fact that there are many “black” budgetary sources from which money can be drawn to fund such activities, Congress will encounter difficulty when attempting to track accurately the full range of Pentagon operations.<sup>90</sup> This argument creates a major obstacle to Congress’s ability to craft a new law that, while not overly broad, still requires reporting of SOF activities that skirt the line between covert action and traditional military activity. Congress, however, managed to construct a definition of covert action for the Intelligence Act despite this difficulty and should be able to do so again in a new law.

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90. See Hersh, *supra* note 63, at 65 (quoting a Pentagon consultant as saying that a major difficulty in the oversight of covert operations is that “[t]here are many, many pots of black money, scattered in many places and used all over the world on a variety of missions . . .” and suggesting that the same is the case for the budgetary chaos in Iraq, where billions of dollars are unaccounted).

## CONCLUSION

Covert action has long played a prominent role in American foreign policy,<sup>91</sup> but never more so than in the current war on terror.<sup>92</sup> Accordingly, Pentagon leaders have claimed increasingly broad authority to conduct activities that are on the line between covert action and traditional military activities. The Pentagon has reportedly done this with little or no consultation with Congress.<sup>93</sup>

The regulations on covert actions under the Intelligence Act point toward a possible regulatory scheme for SOF activities that may or may not be technically covert actions. Most likely, the second alternative for regulation—adopting a new set of regulations for SOF activities with a new definition of the types of activities the regulations would cover—would be most effective in sealing the loopholes in the current regulatory scheme. This new regulatory structure would serve the purposes of democratic accountability and, ultimately, the welfare of the nation.

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91. See NUTTER, *supra* note 1, at 47 (giving a brief history of covert action, both before and after the founding of the CIA and characterizing covert action “as American as apple pie”).

92. See generally Arkin, *supra* note 80 (describing the rationale of senior Bush Administration officials that “the magnitude of the [terrorist] threat requires, and thus justifies, aggressive new ‘off-the-books’ tactics”).

93. See Gellman, *supra* note 54 (discussing the types of operations the Pentagon is alleged to run and its intention to do so with minimal congressional oversight).