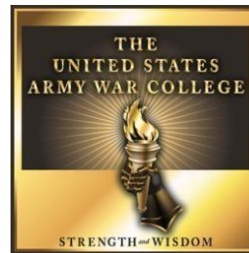


**Civilian Research Project
Army War College Fellow**

Enhancing Congressional Oversight
of DOD Clandestine Activities:
A Case Study of SOF CT
Paramilitary Operations

by

Colonel Joshua Rudd
U.S. Army



United States Army War College
Class of 2015

DISTRIBUTION STATEMENT: A

Approved for Public Release
Distribution is Unlimited

This manuscript is submitted in partial fulfillment of the requirements of the U.S. Army War College Fellowship. The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government.

The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

REPORT DOCUMENTATION PAGE

Form Approved--OMB No. 0704-0188

The public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. **PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.**

1. REPORT DATE (DD-MM-YYYY) 01-03-2015		2. REPORT TYPE CIVILIAN RESEARCH PROJECT		3. DATES COVERED (From - To)	
4. TITLE AND SUBTITLE Enhancing Congressional Oversight of DOD Clandestine Activities: A Case Study of SOF CT Paramilitary Operations				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) Colonel Joshua Rudd U.S. Army				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Professor David Schanzer Duke University				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) Dr Steve Metz U.S. Army War College, 122 Forbes Avenue, Carlisle, PA 17013				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION / AVAILABILITY STATEMENT Distribution A: Approved for Public Release. Distribution is Unlimited.					
13. SUPPLEMENTARY NOTES Word Count: 5532					
14. ABSTRACT In the post 9/11 world, both the CIA and DOD must counter threats to national security with flexibility and agility in their respective efforts. These circumstances have resulted in concerns from lawmakers and legal scholars alike over the 'blurriness' of lines between CIA and DOD activities in the clandestine and covert arenas. These activities often appear functionally similar, but come from different authorities and follow different oversight processes. The questions raised by lawmakers on the distinction between clandestine and covert typically center on who – CIA or DOD – is doing what and under what authority. Analyzing congressional oversight of SOF CT Paramilitary Operations provides a case study to draw and apply lessons to clandestine activities broadly from an activity that is conducted by DOD (and functionally similar to) but under separate authorities and different oversight processes than that of CIA Paramilitary Operations.					
15. SUBJECT TERMS Congressional Oversight, Covert Action, Clandestine Activities, Paramilitary Operations					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 21	19a. NAME OF RESPONSIBLE PERSON
a. REPORT UU	b. ABSTRACT UU	c. THIS PAGE UU			19b. TELEPHONE NUMBER (w/ area code)

USAWC CIVILIAN RESEARCH PROJECT

**Enhancing Congressional Oversight of DOD Clandestine Activities:
A Case Study of SOF CT Paramilitary Operations**

by

Colonel Joshua Rudd
U.S. Army

Professor David Schanzer
Duke University
Project Adviser

Dr Steve Metz
U.S. Army War College Faculty Mentor

This manuscript is submitted in partial fulfillment of the requirements of the U.S. Army War College Fellowship. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the United States Government.

U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

Abstract

Title: Enhancing Congressional Oversight of DOD Clandestine Activities:
A Case Study of SOF CT Paramilitary Operations

Report Date: 1 March 2015

Page Count: 21

Word Count: 5532

Key Terms: Congressional Oversight, Covert Action, Clandestine Activities,
Paramilitary Operations

Classification: Unclassified

In the post 9/11 world, both the CIA and DOD must counter threats to national security with flexibility and agility in their respective efforts. These circumstances have resulted in concerns from lawmakers and legal scholars alike over the ‘blurriness’ of lines between CIA and DOD activities in the clandestine and covert arenas. These activities often appear functionally similar, but come from different authorities and follow different oversight processes. The questions raised by lawmakers on the distinction between clandestine and covert typically center on who – CIA or DOD – is doing what and under what authority. Analyzing congressional oversight of SOF CT Paramilitary Operations provides a case study to draw and apply lessons to clandestine activities broadly from an activity that is conducted by DOD (and functionally similar to) but under separate authorities and different oversight processes than that of CIA Paramilitary Operations.

Enhancing Congressional Oversight of DOD Clandestine Activities: A Case Study of SOF CT Paramilitary Operations

Introduction

In the post 9/11 world, both the CIA and DOD must counter threats to national security with flexibility and agility in their respective efforts. These circumstances have resulted in concerns from lawmakers and legal scholars alike over the ‘blurriness’ of lines between CIA and DOD activities in the clandestine and covert arenas. These activities often appear functionally similar, but come from different authorities and follow different oversight processes. The questions raised by lawmakers on the distinction between clandestine and covert typically center on who – CIA or DOD – is doing what and under what authority. These concerns are viable; blurry lines can lead to redundancy of effort, gaps in oversight, and issues of trust. However, attempts to clear up these lines should not come at the expense of the effectiveness of both the CIA and DOD to combat terrorism. Ultimately, protecting national security requires a partnership between the legislative and executive branches based on a high degree of trust. The oversight process that informs Congress must foster this trust and increase effectiveness in national security efforts.

One area where Congress appears to be comfortable with CIA and DOD sharing the load is paramilitary operations. The portfolio has been split between CIA and DOD’s Special Operation Forces (SOF) since WWII.¹ There is no indication that this will change anytime soon even though one of the recommendations of the 9/11 commission report was to give sole ownership to DOD.² Both CIA and SOF have continued to carry out these types of operations very effectively despite the separate authorities and

divergent oversight processes. In the modern day post 9/11 era they have been critical to the overall counterterrorism (CT) strategy.³

This paper explores how congressional oversight of is executed. It compares DOD's processes with that of the CIA and seeks to identify best practices from both that may be applied to the broader clandestine activities of DOD. Like the paramilitary example, the broader clandestine activities portfolio is likely to remain split for the foreseeable future given the effectiveness of both CIA and DOD and ever increasing requirements. Discussion should therefore focus on how to best keep Congress informed of such activities and in doing so increase trust. Trust is a key component and natural byproduct of a strong relationship between the two entities. A high degree of trust on the part of Congress fosters authorities that will promote the actions necessary to combat the continuing and imminent threats to our national security.

Background: Authorities, Actors and Activities

The essential elements of this discussion include authorities (Title 10 and Title 50), actors (CIA and DOD), and activities (Covert Action and Clandestine Activities (the latter of which is a broad term that includes Intelligence Activities (IA) and Traditional Military Activities (TMA)). Examining the history of the terms and the Congressional committees that oversee them is a useful starting point.

Covert Action

The National Security Act of 1947 established the CIA and along with it the initial procedures for Congressional oversight of intelligence activities.⁴ That Act has been amended several times since its original drafting, including changes to the oversight process. Initial jurisdiction for intelligence activities was exercised by the House and

Senate Armed Services Committees (HASC/SASC). New committees in both houses were formed in the wake of the Church (Senate) and Pike (House) Committee investigations.⁵ The Senate established the Senate Select Committee on Intelligence (SSCI) in 1976 and the House followed in 1977 with the formation of the House Permanent Select Committee on Intelligence (HPSCI).⁶ These committees assumed the role of legislating with respect to activities carried out the by CIA and eventually the rest of the Intelligence Community (IC).⁷ The current procedures of drafting and passing the intelligence authorization acts were set forth in a 1980 amendment.⁸ These acts outline how the IC may spend money as well as the process for notification and reporting to Congress on intelligence activities, including covert action.

The most significant intelligence reform related to covert action came in 1991 when the term was actually defined in statute. Despite opposition from President George H.W. Bush, he a former director of the CIA who thought a strict definition was unnecessary.⁹ That law defines covert action as “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”.¹⁰

A key aspect of covert action that differentiates it from IA is the word ‘influence’. Covert action by design and definition is intended to be active. Conversely, IA span a multitude of collection tasks that are passive and are not meant to influence the intended target. The notion of active versus passive is helpful when trying to distinguish between covert and clandestine activities since they can be carried out by the same actor, a point that often causes confusion. Simply put, the CIA conducts both active and

passive operations and therefore its activities can be either covert or clandestine.

Covert actions can be generally categorized into three types of activities: propaganda, paramilitary operations, and political action. Covert actions are usually carried out by the CIA, but not exclusively. By statute the President may authorize any government department or agency to conduct covert action. The raid to kill UBL is an example of the military conducting covert action. There is no distinction among the three categories for authority and oversight. They are authorized under Title 50 regardless of the actor carrying it out and are reported to the congressional intelligence committees. Equally important to this discussion is what the statute defines as not being covert action. The law specifically calls out four categories that are not covert:

- (1) Activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of the United States Government programs, or administrative activities;
- (2) *Traditional* diplomatic or *military activities* or routine support to such activities; (emphasis added)
- (3) Traditional law enforcement activities conducted by the United States Government law enforcement agencies or routine support to such activities;
- (4) Activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad.¹¹

Paragraph 2 very clearly excludes “traditional military activities” from being covert action.¹² Though there is no further clarification in statute, the committee report that accompanied this discussed the criteria for determining what qualifies as TMA.¹³ These activities are derived from Title 10 authorities and oversight belongs to the HASC/SASC.

Clandestine Activities

Clandestine is an overarching term for a number of activities that are also carried out by multiple governmental departments or agencies.¹⁴ Unlike covert action, clandestine activities are not defined in statute. However, DOD Joint Doctrine uses the term “clandestine operations” (not ‘activities’) and defines them as operations:

sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment. A clandestine operation differs from a covert operation in that emphasis is placed on the concealment of the operation rather than on the identity of the sponsor.¹⁵

The term encompasses both IA and TMA and includes passive and active efforts. Clandestine operations may include human intelligence collection conducted by CIA and DOD, as well as a range of activities carried out by SOF to include operational preparation of the environment (OPE) and other sensitive military operations (SMO) such as capture/kill operations. The authorities for these can come from both Title 50 and Title 10 depending on if they are IA (Title 50) or TMA (Title 10). Because of this, the Congressional oversight for these activities is split between the intelligence committees (IA) and the armed services committees (TMA). A large portion of DOD clandestine activities are considered TMA. A test to determine TMA consists of the following criteria: if they are conducted by the military, under the command and control of U.S. military, in support of anticipated or on-going operations, and the role of the U.S. in the overall operation is intended to be acknowledged (or at a minimum not denied), then activities are TMA.¹⁶ DOD often refers to these as OPE, and they can include intelligence related tasks - such as human intelligence (HUMINT) - if they have been tasked by the SECDEF and meet the above test for TMA. Clandestine IA carried out by DOD are tasked by the DNI, rather than the SECDEF, and are derived from Title 50

authorities. Trying to determine if an activity is an IA or TMA can be one of the most difficult areas of the discussion because of the functional similarity of the action.

Paramilitary Operations

Another functionally equivalent activity that can be performed by multiple actors and is subject to different oversight processes is paramilitary operations. These are operations carried out by a surrogate or partner force on behalf of the U.S. in an effort to achieve a common objective. The DOD definition includes “forces or groups distinct from the regular armed forces of any country, but resembling them in organization, equipment, training or mission”.¹⁷ Both CIA and SOF conduct paramilitary operations through training, equipping, advising and employing the partner or surrogate force. Some notable CIA examples of covert action paramilitary operations include the failed Bay of Pigs operation in 1961, efforts to interdict North Vietnamese resupply lines in Laos in 1960s-1970s, and operations in Afghanistan in the 1980s and 2001.¹⁸ Many of SOF’s core missions outlined in statute have a paramilitary aspect to them.¹⁹ These include Unconventional Warfare (UW), Foreign Internal Defense (FID) and Counterterrorism (CT).²⁰

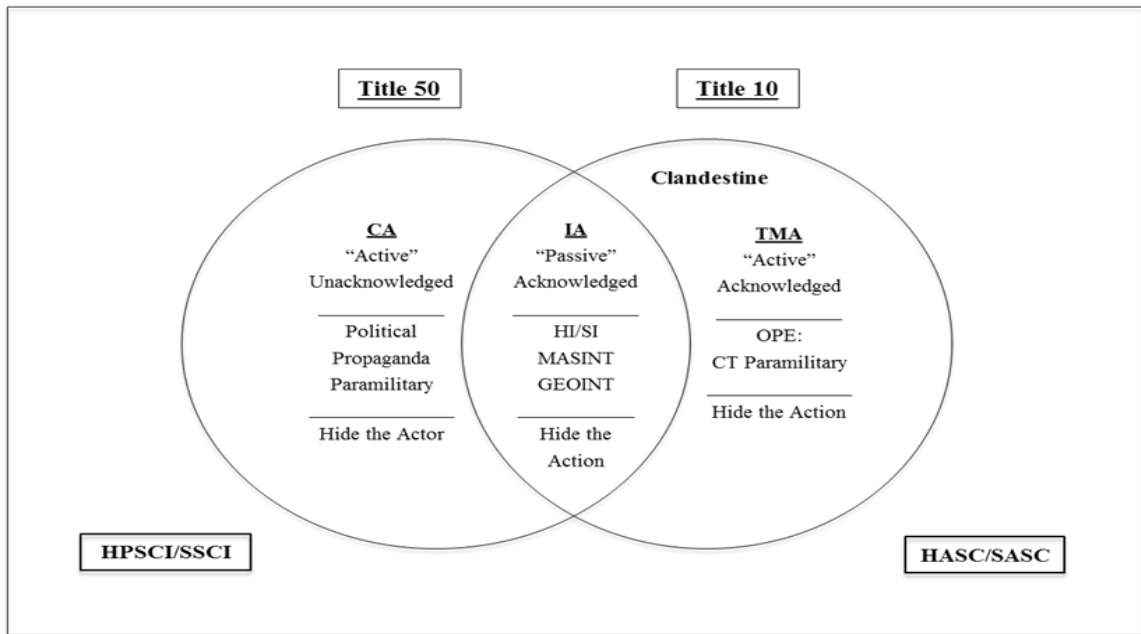


Figure 1²¹

Building from this we will explore SOF paramilitary operations in the counterterrorism (CT) realm. These are a subset of OPE under the broader term clandestine activities. The authority for such activities is under Title 10, specified in the National Defense Authorization Act (NDAA) of 2005, and meet the test for TMA. This act authorized the SECDEF to expend up to \$25 million annually to “provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by U.S. special operations forces to combat terrorism”.²² Often referred to as “1208 ops” because of the section of code in the NDAA that outlines the specifics of the authorization. To be clear, these are not the only types of SOF paramilitary operations. They are a unique subset of CT related activities that fall under the broader active clandestine and paramilitary umbrella. The intent behind this law was to increase the flexibility and agility of CT efforts on the part of DOD. Since

the original authorization in 2005 the authority has continued to be extended and the dollar amount has increased from \$25 million to \$75 million (figure 2).²³

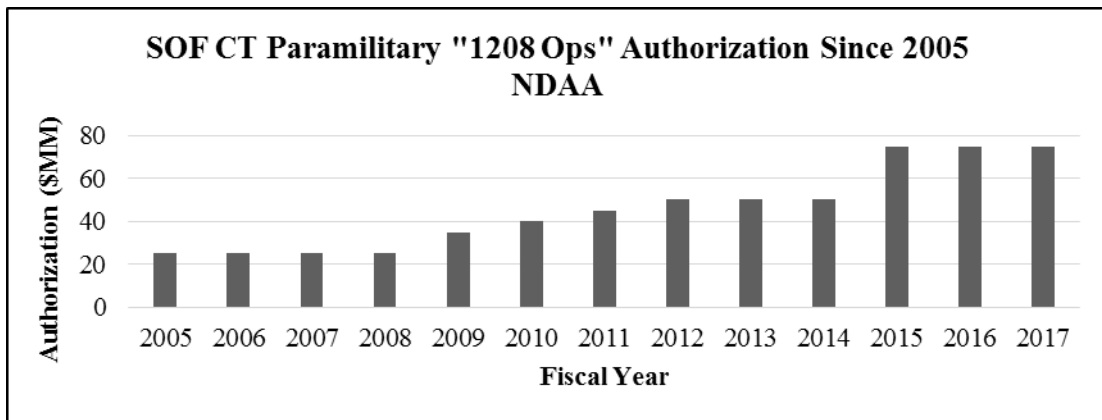


Figure 2

The approval process, coordination, and oversight for these types of operations provide a case study that is instructive in identifying ways to enhance trust in other areas of clandestine activities. Given the functionally equivalent aspects of these operations between the CIA and DOD, there are also lessons to be learned from the oversight process for covert action. Identifying these and applying them may help DOD clear up debate in Congress when it comes to distinguishing between IA and TMA.

Oversight

The oversight requirements for paramilitary operations under both covert and clandestine authorities differ in process and by who in Congress executes the oversight. CIA paramilitary operations require a presidential finding and are reported to the HPSCI/SSCI, while SOF paramilitary operations require SECDEF notification and are reported to the HASC/SASC. In both instances, the defense sub-committees of the appropriations committees (HACD/SACD) have a role to play since they appropriate money for both intelligence and defense budgets. The covert action oversight process is

outlined in 50 USC Section 413, and requires the CIA to be transparent from beginning to end. The requirements for DOD requiring notification originate in the 2005 NDAA but have been modified in subsequent NDAAs.²⁴

Oversight of covert action is clearly defined in statute.²⁵ Covert action starts with a finding that the President must provide to members of the HPSCI/SSCI before initiating the specific action.²⁶ The members of the HPSCI/SSCI that get briefed are entitled to information about, and the legal basis for, the covert action. The timing of notification in writing must occur before the initiation of the intended action. This is notification only and not approval. However, it does allow Congress the opportunity to voice concerns, and it is unlikely that a president would proceed with an action if Congress were truly opposed.

There are some instances where the president does have at his discretion the option to limit the scope of the reporting to a select few members of Congress.²⁷ This smaller group is referred to as the 'gang of eight' and is comprised of the chairman and ranking members of both the HPSCI and SSCI, as well as the Speaker and minority leader of the House and the majority and minority leaders of the Senate.²⁸ This limited scope notification is intended to be the exception, rather than the rule, and the president must provide in writing the reasons for limiting notification if he decides to do this.²⁹ The president then has 180 days to notify all members of the HPSCI/SSCI or provide additional reasoning why it is necessary to continue to limit access to the finding and the on-going details of the covert action.³⁰ Finally, if any significant changes occur to the original finding, whether notification is limited to the gang of eight or the entire committees, Congress must be notified again in writing about those changes.³¹

In addition to this formal process described above, there are informal processes that occur as the CIA prepares to execute paramilitary operations as covert actions. According to a CIA officer with paramilitary experience, once the CIA begins to plan a covert action and define the terms of the finding, they begin to 'socialize' the idea with the HPSCI/SSCI chairmen.³² This opens up a dialogue with Congress, albeit limited in its scope, which affords an opportunity to address any initial questions that arise. Once a finding is signed by the president and delivered, completing the formal notification requirement, the dialogue remains open. The CIA provides officers from the respective division executing the paramilitary operation to answer additional questions.³³ The dialogue remains open throughout the execution and CIA notifies Congress of any changes to the operation and if something goes wrong. The intent is transparency from beginning to end in an effort to ensure accountability and promote trust.

The armed services committees conduct oversight of all DOD TMA. The oversight of all SOF CT operations happens through routine written reports to the HASC/SASC. The 2012 NDAA specified the content as well as the frequency. This requires the SECDEF to provide quarterly briefings on CT operations and related activities involving special operations forces. The specific elements of these reports include the following:

- (1) A global update on activity within each geographic combatant command.
- (2) An overview of authorities and legal issues including limitations.
- (3) An outline of interagency activities and initiatives.
- (4) Any other matters the Secretary considers appropriate.³⁴

Within the Office of the Secretary of Defense (OSD), the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD-SOLIC), has lead

responsibility for managing all SOF operations. Preparation of the quarterly report on CT Operations mentioned above is his responsibility.

ASD-SOLIC is also the office responsible for preparing the notification and reporting requirements for SOF CT paramilitary operations (1208 ops). The reporting requirements for this specific CT activity are slightly different.³⁵ The SECDEF is required to notify Congress “expeditiously” upon using the authority provided in the NDAA.³⁶ Like a presidential finding for covert action, this must be done in writing prior to execution of the activity.³⁷ Additional written notification is required prior to making changes in the scope or funding level to existing operations.³⁸ Elements of these activities may be included in the quarterly CT report described above. The annual report must be received no later than 120 days after the close of each fiscal year and include the following specifics:

- (1) A description of supported operations.
- (2) A summary of operations.
- (3) The type of recipients that received support, identified by authorized category (foreign forces, irregular forces, groups, or individuals).
- (4) The total amount obligated in the previous year, including budget details.
- (5) The total amount obligated in the prior fiscal years.
- (6) The intended duration of support.
- (7) A description of support or training provided to the recipients of support.
- (8) A value assessment of the operational support provided.³⁹

Interviews with multiple staff officers within DOD indicate that this process is adhered to strictly.⁴⁰ An officer in ASD-SOLIC responsible for the 1208 portfolio described initial notification letters as a two page document, signed by the SECDEF. Prior to the 2015 Appropriations Act, SECDEF had up to 48 hours after initiating the execution of authority to deliver the notification letter to Congress. Under the most recent Appropriations Act, DOD must notify the HASC/SASC in writing “not less than 15

days before initiating such support”.⁴¹ This applies to the initiation of any new operations or the expansion of any existing programs.

Despite the different oversight processes for covert action and clandestine activities (conducted under Title 10 authorities), most notably reporting to different committees, there is relative parity in the formal process on how Congress is informed of paramilitary operations regardless of the actor, authority, and activity. The key difference is the informal process that exists for covert action that is not apparent on the clandestine process. The informal open dialogue is a key element to building and maintaining the trust of Congress.

Trust

The ability to remain agile, flexible, and effective in executing the overall CT strategy is ultimately all about trust. The oversight process and interaction between DOD and Congress should foster this trust. It is critical that Congress trust both the CIA and DOD to carry out covert and clandestine activities and generate a range of options for the president in support of his strategy. These activities are, and will continue to be, critical components of the National Security Strategy. Trust is fostered through transparency and a high degree of credibility. Trust will promote important discussions about how to best apply these capabilities against a number of challenging problems, rather than consuming time and resources with a debate on who is doing what and why.⁴²

When Congress is surprised or not adequately informed it is unable to perform its role as an overseer of executive branch activities. That is when trust breaks down. Congress is then forced to step in and assess whether or not reform is needed. Several

covert action cases illustrate this: most notable was the Bay of Pigs that resulted in worldwide embarrassment.⁴³ This caused a fundamental shift in how Congress viewed the CIA and led to more restrictive oversight with doubts as to the ability of the CIA to successfully carry out such activities.⁴⁴ This eventually led to the Church and Pike Committees, which in turn led to reform of how covert action was overseen by Congress. The actions of Congress to investigate these incidents and implement reform intended to prevent a similar U.S. loss of credibility in the future, had a positive impact on the executive branch. However, a significant negative impact is the amount of time it takes for a committee to investigate, legislate and implement reform. More significantly is the time it takes for the trust of the American people to be restored in a vital part of the national security apparatus. This was a hard lesson learned for the CIA that does not need to be relearned by DOD.

Ultimately the value and necessity of trust is manifested through transparency, which is achieved through a steady and open dialogue between Congress and DOD. Trust is also fueled by credibility. In his memoirs, General (R) Stanley McChrystal highlights that the credibility of SOF is based on three components: competence, integrity, and relationships.⁴⁵ The U.S. military routinely ranks as the most trusted entity within the government structure.⁴⁶ This is due in large part to its credibility. It is imperative that DOD's interaction with Congress perpetuates this trust.

The trust of Congress is paramount to the foundation of DOD's ability to achieve strategic goals. Trust is based on a continuous cycle that fuels authorities, appropriations, approvals, actions, and outcomes resulting in increased options (see figure 3). In order for SOF to remain effective, they need freedom of action and the

ability to achieve outcomes. This requires Congressional authority and resources, which then gives the President and SECEDF the ability to approve actions. Successful action demonstrates competency and increases SOF credibility. This then naturally presents an opportunity to discuss outcomes with Congress, through formal or informal reporting, thus improving the relationship aspect of credibility. Integrity is fostered and maintained through dialogue prior to an activity, when changes occur and when mistakes are made. The three pillars of credibility – competence, relationships, and integrity – are critical in building trust.

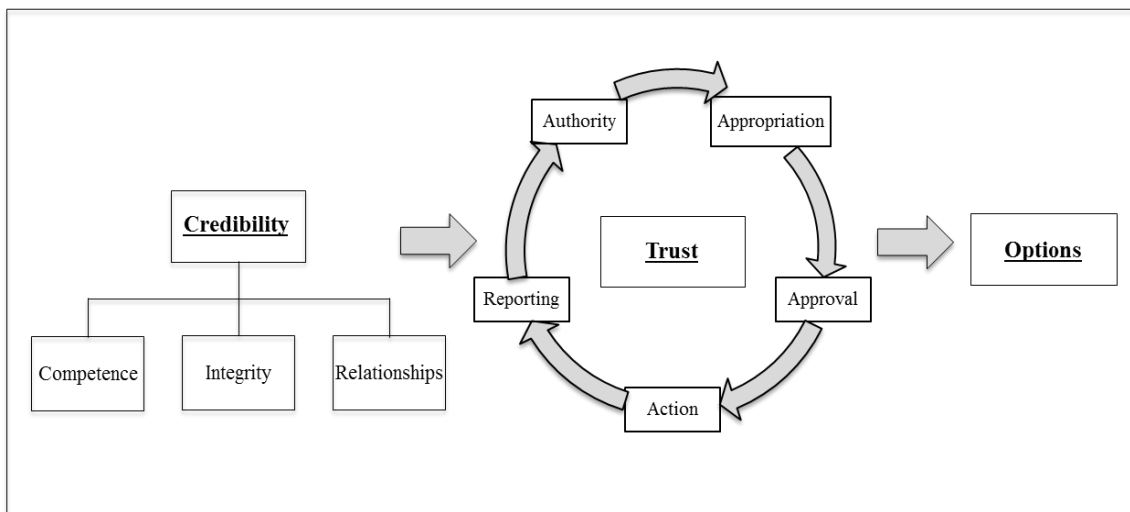


Figure 3

In addition to raising credibility levels, successful outcomes also generate increased options. Actions naturally tend to create a reaction by the enemy, as well as opportunities to improve capabilities based on lessons learned. This creates opportunities and therefore options. When decision makers are presented with multiple options, a more effective and comprehensive strategy is possible. The result is

achieving the desired end state of increased national security through addressing multiple threats on multiple fronts in the CT arena.

Analysis and Findings

Much of the debate when it comes to oversight of clandestine activities has historically centered on the DOD's use of the term OPE. Members of the HPSCI have accused DOD of applying this term too broadly.⁴⁷ When queried by members of Congress on why they were expanding clandestine capabilities and increasing operations without notifying the Intelligence Committees, DOD couched these efforts as TMA in support of on-going operations in the war on terror.⁴⁸ According to Michael Allen, former Majority Staff Director for HPSCI, this was particularly true under the Bush Administration.⁴⁹ Then SECDEF Donald Rumsfeld sought to expand capabilities within DOD that would increase capacity to execute CT operations globally against al Qaeda.⁵⁰ The very words "preparation of the environment" mesh nicely with the TMA test criteria of an activity that is in support of "anticipated or on-going operations."⁵¹

This was clarified in large part by a Memorandum of Understanding (MOU) between CIA and DOD that delineated areas of responsibility for clandestine activity.⁵² Additionally, Undersecretary of Defense for Intelligence (USD-I) Dr. Michael Vickers recognized this friction within Congress over what CIA and DOD were doing in the clandestine arena.⁵³ He took it upon himself to begin informally briefing the HPSCI on DOD's clandestine activities that were not squarely in the Title 50 realm and therefore gave them insight into the Title 10 side. This practice was eventually captured in quarterly reports on all DOD clandestine activities that are seen by members of the

HPSCI/SSCI and HASC/SASC. These collective actions seemed to quell critics in the HPSCI that were uncomfortable with DOD's role in clandestine activities.⁵⁴

The SOF CT paramilitary case offers additional evidence that Congress is satisfied with DOD's efforts. The 1208 authorization is a key aspect to achieving tangible effects across multiple fronts.⁵⁵ The authority has continued and funding has increased steadily since its inception as noted in figure 1. It is hard to imagine that Congress would continue the authorization and increase funding if it were not comfortable with such activities and satisfied with DOD's efforts to keep it appropriately informed.

The discussion should therefore focus on looking for ways to improve the relationship between Congress and DOD in an effort to increase trust. The CIA's efforts are instructive on this front. It has transformed itself and the process significantly since the 1970s when the trust of both Congress and the American public was almost non-existent. A comparison of paramilitary operations, under both covert action and TMA authorities, do not reveal major differences between what CIA is required to do and what DOD is doing. Aside from the Presidential finding, the real differences are that reports go to different committees and the CIA's informal reporting process, which works in parallel to the formal requirements. Rather than taking a minimalist approach, the CIA has embraced oversight of its activities.

The legislative reforms of the 70's, 80's and 90's have arguably helped establish this culture of reporting as covert action and congressional reporting requirements were codified in law. Much of the criticism that comes with clandestine activities is that the term is not defined in statute as covert is, and therefore DOD is able to circumvent the

oversight process.⁵⁶ My findings related to reporting by DOD were quite contrary to this. The requirements for notification and follow up reporting are clearly outlined in the NDAA. DOD is disciplined and detailed in its approach to capturing all requirements and then submitting them to the appropriate committees.⁵⁷ The officers within ASD-SOLIC who prepare these annual reports stated that there are examples of times when questions arise from Congressional staffers on items that were seemingly already addressed in the reports which leads to frustration on both parts.⁵⁸ This may indicate that the reports, while comprehensive, may be better served if they are broken down into smaller parts and submitted throughout the year. The same ASD-SOLIC officers do, however, concede that periodic informal oral briefings (in addition to the annual written report) that provide operational updates would help alleviate this issue and have the added benefit of strengthen this relationship.⁵⁹

The process shows evidence of a method that does build trust but still has room for improvement. However, despite this relative success in one area (1208 ops) of clandestine oversight, during the course of my research I encountered a thought process that lends itself towards being less proactive and thus fuels a lack of trust on the part of Congress. It does not appear that DOD typically looks for ways to facilitate more frequent and informal updates to Congress on clandestine activities. There are two principal arguments that DOD offers in response to this: 1) DOD is in compliance with the law and therefore does not need to go beyond what is already being done, and 2) increasing the frequency and amount of information related to clandestine activities could pose a risk to operational security (OPSEC) and therefore increase risk to mission and risk to force. Fundamentally, DOD does not want to do anything that could threaten

mission accomplishment, authorities or funding. Being cognizant of these risks is important, and this way of thinking has merit; however it presents an approach that views Congress as an adversary rather than a partner. This does little to improve or enhance trust, which, based on the cycle above, is an essential component in generating options.

Recommendations

The following recommendations are small, incremental, and feasible steps to strengthen relationships between DOD and Congress.

Recommendation: Establish/Improve Informal Processes

DOD should seek ways to establish and improve informal processes with Congress. Members of ASD-SOLIC responsible for the 1208 portfolio concede that DOD could do more to be proactive. One simple way is through informal updates on operational highlights and success throughout the fiscal year. SOF elements conducting these operations routinely produce “storyboards” that showcase significant tactical successes. These should be forwarded through ASD-SOLIC to Congress as a way to demonstrate the value of the programs. This would require little to no effort on the part of staff officers within OSD, but would create increased opportunities to interact with staffers and members, thus strengthening the relationship.

Recommendation: Establish Gang of Eight Process for Clandestine Activities

A second recommendation is to adopt a ‘gang of eight’ method of reporting to the HASC/SASC that mirrors the covert action process. There may be instances where DOD for OPSEC reasons will want to limit the scope of notification to Congress. In these cases, the same model exercised in the intelligence committees can be applied.

Notification would be limited to only the leadership of each chamber and the respective armed services committees. This will provide both DOD and Congress a means to actively discuss the most sensitive clandestine operations that fall under TMA. The DOD should not feel that there is any operation too sensitive to discuss for fear of risk to force and risk to mission. Adopting a 'gang of eight' notification method for TMA operations will increase opportunities to report on activities while mitigating risk to OPSEC.

Recommendation: Add Clandestine Activities to USSOCOM's list of core tasks

A third recommendation is to add 'clandestine activities' to USSOCOM's list of core tasks. Including clandestine as a core activity eliminates any doubt in the eyes of Congress as to the legitimacy of SOF to conduct such activities. The current list does not include clandestine activities even though a number of DOD's efforts in this arena fall to USSOCOM for execution.⁶⁰ The HPSCI raised this as a concern in a committee report accompanying the 2010 Intelligence Authorization Act.⁶¹ DOD addressed this concern by referencing the language in section 167, which states, "Such other activities as may be specified by the President or Secretary of Defense," as being sufficient justification to authorize these types of activities.⁶² This broad language does provide the executive branch maximum flexibility to be effective in this arena, and the addition of 'clandestine activities' should not be seen as a replacement for this language. Adding it will codify something USSOCOM is already doing, thus bringing clarity to the discussion while still preserving flexibility afforded under the "such other activities" clause.

Recommendation: Define the term 'clandestine activities' and the oversight process for it in statute

Part of the criticism over clandestine activities is that the term is not defined in statute, and DOD is therefore able to exploit this ambiguity to avoid oversight. By defining covert action in statute, Congress clarified what qualifies as covert action, as well as the oversight process. This did force CIA to be more deliberate in its action and reporting to Congress on covert action but it did not make it less effective in achieving its objectives. Consideration should be given to codifying clandestine activities in statute in the same way. This definition should also include the prescribed steps for the oversight process. This recommendation, along with the steps for oversight of that are already in effect, would lead to increased trust and start to eliminate the debate over blurry lines. DOD will naturally perceive this increased oversight as more restrictive, and therefore obstructive to agility and effectiveness. The covert action paradigm is instructive in countering this apprehension. In spite of a more restrictive oversight process, born originally out of mistrust, the CIA remains effective in carrying out operations to achieve strategic goals.

Conclusion

Trust is a critical component in the relationship between Congress and the Executive that works to foster an effective partnership between the two branches of government. This is especially true when it comes to CT efforts conducted as either covert action or clandestine activities. Having CT efforts split among different actors, activities and authorities can lead to questions of who is doing what and why in this arena. For DOD to ignore these concerns for reasons discussed above – legally sound

authorities, compliance with reporting requirements and OPSEC concerns – while understandable, ultimately runs the risk of perpetuating suspicion that is eroding the trust Congress has in the military to conduct such activities. This in turn endangers DOD's freedom of action to conduct such activities and jeopardizes a key component of the CT strategy.

This paper focused on one aspect of CT efforts where the relationship between Congress and DOD has been effective in fostering trust, resulting in increased authorities and opportunities to achieve strategic objectives. The examination of oversight for paramilitary operations was useful in identifying ways to enhance oversight of broader clandestine activities. The process CIA follows was born out of reforms based on events like the Bay of Pigs operation in the 60's. The CIA appears to have regained Congress' trust, at least as it relates to paramilitary operations, and actively seeks to maintain it through adherence to formal and informal processes. DOD follows a different oversight process for its SOF CT paramilitary operations but also effectively fosters trust. However, despite the established formal reporting procedures, there is still room to improve informal interactions and communication of success.

The recommendations combine practices from within DOD and the covert action oversight process that can be applied to clandestine activities. Implementing these changes should help increase trust, allow Congress to move beyond questions of 'who is doing what?' and ideally advance the national discussion towards where to best employ the collective capabilities of DOD and CIA. This will lay a foundation that will carry over to all clandestine activities, ultimately making both entities more effective at carrying out their efforts to improve national security.

Endnotes

¹ Richard A. Best Jr and Andrew Feickert, "Special Operations Forces (Sof) and Cia Paramilitary Operations: Issues for Congress," (2006). 1.

² Ibid. 3. This recommendation was rejected by the president based on input from the CIA director and Secretary of Defense (SECDEF).

³ William H. McRaven, "Posture Statement of Commander United States Special Operations Command," (2013). 9.

⁴ U.S. State Department, "Milestones: 1945-1952, National Security Act of 1947," <https://history.state.gov/milestones/1945-1952/national-security-act>.

⁵ Senator Frank Church, of the Senate Foreign Relations Committee, in 1975 led the *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*. The final report concluded, "Intelligence agencies have undermined the constitutional rights of citizens...primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied." The final report included 96 recommendations, legislative and regulatory, designed "to place intelligence activities within the constitutional scheme for controlling government power." This significantly changed how covert action was conducted and eventually led to changes in oversight of it. <http://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm>

⁶ Office of the Director of National Intelligence, "U.S. National Intelligence, an Overview 2013," (2013). 60.

⁷ Ibid.

⁸ Ibid.

⁹ "National Security Act of 1947, Public Law No. 235, 80th Congress (July 26, 1947), as Ammended by Public Law 102-88 (August 14, 1991), Section 503," (1991).

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Joshua Kuyers, ""Operational Preparation of the Environment": "Intelligence Activity" or "Covert Action" by Any Other Name?," *National Security Law Brief* Volume 4], no. 1 (2013). 31.

¹⁴ U.S. Joint Chiefs of Staff, "Dod Dictionary of Military and Associated Terms," in *Joint Publication 1-02* (Washington, DC: U.S. Joint Chiefs of Staff, 2008).

¹⁵ Ibid. The term 'sponsor' in this case refers to the country sponsoring the activity, not the specific actor conducting the activity, e.g. CIA or DOD.

¹⁶ Kuyers, "'Operational Preparation of the Environment': 'Intelligence Activity' or 'Covert Action' by Any Other Name?." 31.

¹⁷ Staff, "Dod Dictionary of Military and Associated Terms."

¹⁸ Feickert, "Special Operations Forces (Sof) and Cia Paramilitary Operations: Issues for Congress." 2.

¹⁹ U.S. Congress, "10 U.S.C. 167 - Unified Combatant Command for Special Operations Forces."

²⁰ Ibid.

²¹ Andru E. Wall, "Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action," *Havard National Security Journal* 3(2011). This diagram is a variation with slight modifications on a similar diagram that is depicted by in this article by Andru E. Wall. 103.

²² U.S. Congress, "National Defense Authorization Act of 2005, Public Law 108-375," (2004).

²³ U.S. Congress, "National Defense Auhorization Act of 2015, Public Law 113-66," (2014).

²⁴ "National Defense Authorization Act of 2005, Public Law 108-375."

²⁵ "National Security Act of 1947, Public Law No. 235, 80th Congress (July 26, 1947), as Ammended by Public Law 102-88 (August 14, 1991), Section 503."

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Conversation with CIA Officer, March 22, 2015.

³³ Ibid.

³⁴ U.S Congress, "National Defense Authorization Act of 2012, Public Law 112-81," (2011).

³⁵ Ibid.

³⁶ Congress, "National Defense Auhorization Act of 2015, Public Law 113-66."

³⁷ "National Defense Authorization Act of 2005, Public Law 108-375."

³⁸ "National Defense Authorization Act of 2015, Public Law 113-66."

³⁹ "National Defense Authorization Act of 2010, Public Law 111-84," (2009).

⁴⁰ Conversations with DOD staff officers from Office of the Secretary of Defense, Under Secretary of Defense for Intelligence and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, March 22, 2015.

⁴¹ U.S Congress, " Consolidated and Further Continuing Appropriations Act, 2015. Section 8134," (2014).

⁴² Frank Sanders, "Proactive Oversight as a Strategic and Operational Enabler," (2011). 5.

⁴³ L. Britt Snider, *The Agency and the Hill : Cia's Relationship with Congress, 1946-2004*, ed. Center for the Study of Intelligence (Washington, DC: Center for the Study of Intelligence, Central Intelligence Agency, 2008). 305.

⁴⁴ Ibid.

⁴⁵ Stanley A. McChrystal, *My Share of the Task : A Memoir* (New York: Portfolio, 2013).

⁴⁶ Rebecca Riffkin, "Public Faith in Congress Falls Again, Hits Historic Low; of Major U.S. Institutions, Americans Most Confident in the Military," <http://www.gallup.com/poll/171710/public-faith-congress-falls-again-hits-historic-low.aspx>.

⁴⁷ Marshall C Erwin, "Covert Action: Legislative Background and Possible Policy Questions," (2013). 9.

⁴⁸ Ibid. 9.

⁴⁹ Michael Allen. conversation with the author, March 2015

⁵⁰ Erwin, "Covert Action: Legislative Background and Possible Policy Questions."

⁵¹ Kuyers, "'Operational Preparation of the Environment': 'Intelligence Activity' or 'Covert Action' by Any Other Name?."; Wall, "Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action." 37.

⁵² Michael Allen. conversation with the author, March 2015

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ McRaven, "Posture Statement of Commander United States Special Operations Command." 9.

⁵⁶ Erwin, "Covert Action: Legislative Background and Possible Policy Questions." 5.

⁵⁷ Conversations with DOD staff officers from Office of the Secretary of Defense, Under Secretary of Defense for Intelligence and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, March 22, 2015

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Congress, "10 U.S.C. 167 - Unified Combatant Command for Special Operations Forces."

⁶¹ Kuyers, ""Operational Preparation of the Environment": "Intelligence Activity" or "Covert Action" by Any Other Name?." 37.

⁶² Ibid.