



National Security Law Report

Table of Contents

Note from the Standing Committee: This special double issue is the last print issue of The National Security Law Report, future issues will be distributed in Adobe PDF format.

Please visit <http://www.abanet.org/natsecurity> if you do not receive emails from the Committee.

In *The Golden Rule and the Laws of War*, Gabor Rona (Human Rights First) comments on the Detention Policy Task Force's Preliminary Report and the NDAA Amendments to the Military Commissions Act. Pages 2 - 6

In *Covert Action Policy and Procedure*, Jonathan M. Fredman (ODNI) outlines the key features of covert action, its limitations and successes. Pages 6 - 9

Ryan Lockman, an attorney in Washington D.C. reviews Louis Fisher's *The Constitution and 9/11*. Pages 9 - 11

In *Be Careful What You Wish For: A Review of Ibrahim Warde's The Price of Fear*, Jeff Breinholt (U.S. Department of Justice) offers a critique of Warde's book and provides a vigorous defense of U.S. counter-terrorism financing prosecutions. Pages 11 - 15

On September 10, 2009, Jeh Johnson, General Counsel for the Department of Defense addressed the Standing Committee on Law and National Security. His remarks are reprinted in The Report. Pages 15 - 18

The Standing Committee announces its new chair, Harvey Rishikof and new appointments to the Standing Committee and the Advisory Committee. We also announce the winner of the Student Writing Competition and preview four workshop reports now available on our website. Page 18 - 19

Gregory S. McNeal
Editor
gsmcneal@psu.edu

[...]

Covert Action Policy and Procedure

*By, Jonathan M. Fredman, Assistant Deputy Director of National Intelligence for Special Programs.**

Covert action is often viewed in a fundamentally different manner from more mainstream exercises of national power. Neither a military nor a law enforcement activity, covert action is cloaked in an aura of secrecy that endows any discussion with the allure of things concealed. But in many ways the similarities are stronger than the differences: all encompass both persuasive and coercive methods; all prefer to rely upon cooperation much more than compulsion; and all are designed to provide the American people with the means to preserve their liberty as well as the security upon which that liberty depends. As such, some core facts about covert action should be understood.

Covert action does not take place within the United States. Defined by the National Security Act as activities intended to influence events abroad without attribution to the United States, covert action may include paramilitary activities, dissemination of information, or the provision of financial support to nongovernmental organizations. All covert action must be approved in advance by the President, in writing, and no covert action may be directed at the American public, policymakers, or news media.

The National Security Act provides that traditional law enforcement, diplomatic, and military activities are excluded from the definition of covert action. As a practical matter, therefore, covert action refers to clandestine activities conducted by the Central Intelligence Agency to influence events abroad pursuant to the direction of the President and the National Security Council.

Covert action may not violate U.S. law. Pursuant to the Constitution, all Federal statutes, treaties, and the Constitution itself are the supreme law of the land, and nothing in the National Security Act or any other law provides any exemption for covert action. Accordingly, for a covert action to proceed there must be no U.S. Constitutional or other legal prohibition, and the means of its implementation must comply fully with U.S. law, including those provisions of customary international law that are binding

upon the United States, as well as treaty provisions that either are self-executing or have been legislatively implemented by the Congress.

But just as the clandestine collection of intelligence on a foreign nation's nuclear activities may violate that country's own law, as the conduct of espionage against the former Soviet Union violated Soviet law, the conduct of covert action may well violate the law of some foreign countries. Because the contours of U.S. law, including our obligations pursuant to treaties and customary international law, are complex and compliance with their requirements is essential, extensive legal review is incorporated into the design and implementation of covert action as well as military and law enforcement operations.

Covert action must be approved by the President. The President must sign a written Finding before any covert action may be initiated. Any significant change to a previously authorized covert action, as well as any significant new undertaking pursuant to an existing Finding, must be similarly approved in advance by the President in a written Memorandum of Notification.

Covert action is reviewed by the Congress. Pursuant to law, the President provides timely notification of all new covert action authorizations to the House and Senate intelligence oversight committees. The subcommittees on defense of the House and Senate appropriations committees also are briefed, as is the House Select Intelligence Operations Panel. The Director of National Intelligence and the Director of the Central Intelligence Agency keep the Congressional committees fully and currently informed of all significant intelligence activities, including significant anticipated intelligence activities.

The CIA does not advocate for covert action. CIA conducts covert action as directed by the President, advised by the National Security Council including the Director of National Intelligence, the Secretaries of State and Defense, and the Attorney General, and depends upon Congress for the necessary funds. As the executive agent of the President for covert action, CIA implements but does not make covert action policy decisions, and does not have an equal voice when discussing the policymaking aspects at the NSC. At the same time, by design the policy agencies remain detached from the design and conduct of actual operations.

Covert action activities must be consistent with U.S. policy. Paramilitary covert action complemented U.S. special forces in paving the way for U.S. operations against al-Qa'ida and the Taliban in Afghanistan. Covert action provided crucial financial support to Radio Free Europe and Radio Liberty during the Cold War, enabling non-violent opposition to Communist rule in Central and Eastern Europe. Even so, covert action is rarely either the first or the optimal option available, and both Executive and Legislative review, as well as advocacy from within the policy agencies and CIA itself, ensures that covert action proposals are consistent with U.S. policy objectives and complemented to the greatest extent possible by openly acknowledged U.S. activities.

Covert action practitioners are dedicated professionals. Applications to the CIA, and to the rest of the intelligence community, are at a record high. Upon arrival, new recruits are met by more senior officers who have dedicated their lives to protecting this country through changes in Administration and Congressional leadership, mindful of their responsibilities and the values they are sworn to defend. Reflecting this country's heritage, they display a wide variety of political views and diverse backgrounds. And they share a common commitment to excellence -- not as a catch phrase or a slogan, but as a necessary condition for the success of their work and the defense of the nation.

Covert action has saved lives and protected America. At the end of the day, none of this makes any

difference unless it is of value -- and it is. The historical record is replete with examples of covert action successes and failures, as it is with military and law enforcement activities. But with covert action necessarily cloaked in secrecy, subject to selective accurate and inaccurate disclosure and reporting, criticized -- or commended -- by an ever-expanding set of real or claimed experts, and dependent upon trust in an era of widespread skepticism, neither negatives nor positives can readily be proven.

* * *

What can be done? First, we can tone down the rhetoric and find common ground where it does exist:

We share common values. Most Americans, whether serving in the Executive Branch or Congress, working in the news media, or writing in the blogosphere, as well as the American people at large, share certain core values such as love of country, commitment to the Constitution and the rule of law, and protection of our homeland and our friends and allies abroad. No subset of Americans, regardless of their opinions about national policy matters, has a monopoly on these views.

We must comply with the law. People will differ, often vehemently, about the requirements of the law and the boundaries of lawful behavior. But we all agree that we must comply with the law and conduct our national affairs in a legal and proper manner. Controversy over legal requirements is a part of the democratic process and one reason we have an independent Legislature and Judiciary.

We must defend our country against attack. In a world of nuclear proliferation and decentralized threats, we cannot wish our problems away. There are those who would do us harm, and some of that harm would be catastrophic. But in meeting and countering the dangers, we must remember that the world is neither a completely hostile nor completely friendly place. There is a great reservoir of goodwill abroad for our country and our values, and we should keep that in mind as we consider our options.

Employed carefully, covert action can complement overt U.S. initiatives. The delivery of extensive U.S. assistance to the tsunami-ravaged areas of Asia produced a surge in favorable opinion abroad about the United States. So did the provision of emergency relief shortly thereafter to earthquake victims in Pakistan. The delivery of medical and educational supplies to rural Afghan villages has encouraged cooperation with the central Afghan government, and many militant organizations have relied significantly upon the provision of social services in developing support among local populations. And in an effort to influence American opinion, even Venezuela has provided low-cost energy to selected U.S. consumers.

Just as the delivery of assistance through openly acknowledged U.S. channels can produce positive perceptions of the United States, the delivery of assistance through third parties without apparent U.S. sponsorship may contribute to U.S. interests by enhancing the stature of those viewed as responsible. The covert provision of financial support to a foreign democratic opposition group can complement open U.S. diplomatic activity; the selective provision of covert paramilitary training to foreign security services where overt cooperation is not feasible can mean the difference between the rescue of U.S. hostages by indigenous forces and their continued detention by insurgents.

Congressional and Executive Branch oversight is critical. As with law enforcement and military operations, covert action requires review to ensure that its unique capabilities are employed only where necessary and in an appropriate and effective manner. This is not to suggest that those engaged in the implementation of covert action are not responsible or dedicated professionals -- they are. Rather, the use by the United States of clandestine means to affect events overseas is at least as important a subject of examination as the use of lethal force by domestic law enforcement agencies or the conduct of U.S. military operations.

The national debate over covert action will continue. The American people may determine that certain tools should be off the table, or that they should remain available for use should lesser options fail. But the debate should be grounded on a set of common understandings about the nature and scope of covert action, its design, and its implementation, as well as the shared desire of all Americans to protect and defend this nation, its people, and the liberty with which we have been entrusted. ***The views expressed here are solely those of the author.**

[. . .]

Standing Committee on Law and National Security

Chair: Harvey Rishikof

Members: James E. Baker, Mary DeRosa, Jessica Herrera-Flanigan, James McPherson, Judith Miller, Jill Rhodes, Jonathan Scharfen, Scott Silliman, Michael Smith, Ruth Wedgwood

Advisory Committee Chair: Al Harvey

Staff Director: Holly Stewart McMahon

740 15th St., NW

Washington, D.C. 20005-1009

(202) 662-1035 -- FAX: (202) 638-3844

***E-mail:* hcmahon@staff.abanet.org**

***Web page:* <http://www.abanet.org/natsecurity>**