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Covert Action and Clandestine Activities of the Intelligence Community: Selected Definitions in Brief

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SUMMARY

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Covert Action and Clandestine Activities of the Intelligence Community: Selected Definitions in Brief

This report provides background and definitions for covert action and clandestine activities carried out by the Intelligence Community (IC) and military. Congress has defined several of these terms in statute; others appear only in committee reports. Still others are military terms. These definitions describe activities that support U.S. national security policy, and are, therefore, important to Congress's intelligence and defense oversight responsibilities.

Confusion over the proper jurisdiction for congressional oversight can occur when covert action or clandestine intelligence activities appear similar to certain military operations that may employ clandestine methodology or have objectives similar to those for covert action. Intelligence and military matters fall under different authorities of the *U.S. Code*, and have, as a result, different statutory requirements for providing notification to Congress. Applicable statutes that govern intelligence activities under Title 50 of the *U.S. Code* emphasize *prior* notification to the congressional intelligence committees for each separate activity. Under its Title 10 *U.S. Code* authorities, however, the Department of Defense generally provides notification of certain types of secret or clandestine military operations to the Armed Services committees *after* their commencement, often by briefing Congress as part of a larger, supported military operation or campaign.

The IC, for example, in conducting a covert action, must generally provide prior notification to the congressional intelligence committees by means of a presidential *finding* describing plans to have an intelligence operation influence political, military, or economic conditions abroad while concealing U.S. sponsorship. The military, on the other hand, under Title 10, has the implicit authority to conduct operations that *resemble* covert action, but that DOD classifies as operational preparation of the environment (OPE). OPE is handled differently for oversight purposes, despite sharing with covert action a number of characteristics that heighten Congress's interest: a serious risk of exposure, compromise of information, loss of life, and a possible requirement to conceal U.S. sponsorship.

An understanding of how these terms are used can help Congress navigate potential challenges in conducting oversight. This report is the first of three reports on covert action and clandestine activities of the IC. The second, CRS Report R45191, *Covert Action and Clandestine Activities of the Intelligence Community: Selected Notification Requirements in Brief*, by Michael E. DeVine, describes the different statutory requirements for keeping Congress informed of these activities. The third, CRS Report R45196, *Covert Action and Clandestine Activities of the Intelligence Community: Framework for Congressional Oversight In Brief*, by Michael E. DeVine, is intended to assist Congress in assessing the premises justifying covert action and clandestine activities, their impact on national security, operational viability, funding requirements, and possible long-term or unintended consequences.

Contents

Introduction 1
Background 1
Defining Title 10 and Title 50 Authorities 3
Selected Terms, Definitions, and Descriptions 4
- Covert Action 4
- Clandestine Activities 5
- Traditional Military Activities and Routine Support 6
- Other-than-Routine Support 7
- Operational Preparation of the Environment 7
- Sensitive Military Operations 9
  - Sensitive Military Cyber Operations 9

Contacts

Author Information 10

Introduction

Congressional oversight of the intelligence community (IC)[1] enables Members to gain insight into and offer advice on programs and activities that can significantly influence U.S. foreign policy and its outcomes. This In Brief addresses Congress's ongoing interest in oversight of covert action and clandestine activities.

The distinction between government agency activities described as *covert* and *clandestine* can be confusing. Which agencies are authorized to conduct covert action and clandestine activities? What are their legal authorities for doing so? Which military terms describe activities that might seem similar but are distinct from covert action?

Covert action *is codified* as an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States will *not* be apparent or acknowledged publicly. Covert operations are "planned and executed as to conceal the identity of or permit plausible denial by the sponsor."[2]

While not defined by statute, DOD doctrine describes *clandestine activities* as "operations sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment" that may include relatively passive intelligence collection information gathering operations.[3] Unlike covert action, clandestine activities do not require prior notice to Congress via a presidential *finding,* but may still require notification of Congress. This definition differentiates *clandestine* from *covert*, using *clandestine* to signify the tactical concealment of the activity. By comparison, covert operations are "planned and executed as to conceal the identity of or permit plausible denial by the sponsor."[4]

Background

Prior to 1974, no statute existed that enabled Congress to conduct oversight of the IC. Congress exercised what some have described as "benign neglect" of intelligence.[5] In earlier instances, when it could have exercised greater oversight—such as over the CIA's orchestration of the 1953 coup in Iran—Congress trusted that the executive branch and IC were acting in accordance with the law. Congress also did not question whether particular covert actions or other sensitive intelligence activities were viable as a means of supporting U.S. national security.

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[1] The IC is a federation of 17 component organizations spread across two independent agencies and six separate departments of the federal government. Many IC components reside within the DOD organizational structure, including the DIA, the NGA, the NRO, the NSA, and the intelligence components of the military service branches. For more on the IC, see CRS In Focus IF10525, *Defense Primer: National and Defense Intelligence*, by Michael E. DeVine, as well as P.L. 108-458 (the Intelligence Reform and Terrorism Prevention Act of 2004, also known as IRTPA) and Executive Order 12333, as amended. See also Andru E. Wall, "Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action," *Harvard National Security Journal*, vol. 3, no. 1 (2011): 85-142.

[2] Central Intelligence Agency, *Glossary of Counterinsurgency Terms*, May 19, 1962, at https://www.cia.gov/library/readingroom/docs/CIA-RDP80B01676R003000050019-6.pdf.

[3] Joint Chiefs of Staff, *DOD Dictionary of Military and Associated Terms*, April 2019, p. 37, at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf.

[4] Central Intelligence Agency, *Glossary of Counterinsurgency Terms*, May 19, 1962, at https://www.cia.gov/library/readingroom/docs/CIA-RDP80B01676R003000050019-6.pdf.

[5] James S. Van Wagenen, *A Review of Congressional Oversight: Critics and Defenders* (Washington DC: Center for the Study of Intelligence, Central Intelligence Agency, 2007), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/97unclass/wagenen.html.

In the 1970s, controversy over public disclosure of the CIA's covert action programs in Southeast Asia and the agency's domestic surveillance of the antiwar movement spurred Congress to become more involved in intelligence oversight. In 1974, the Hughes-Ryan amendment of the Foreign Assistance Act of 1961 (§32 of P.L. 93-559) provided the first statutory basis for notification to Congress and congressional oversight of covert action operations. Investigations in 1975 by two congressional select committees—in the Senate, chaired by Senator Frank Church, and in the House, chaired by Representative Otis Pike—provided the first formal effort to understand the scope of past intelligence activities. These committees became the model for a permanent oversight framework that could hold the IC accountable for spending appropriated funds ethically and legally and on programs and activities that supported identifiable national security objectives. In 1976, Congress established the Senate Select Committee on Intelligence (SSCI), followed by the House Permanent Select Committee on Intelligence (HPSCI) in 1977.

Congress later refined its oversight of the IC when the executive branch directed covert action operations without notifying Congress in advance. In August 1980, out of concern for maintaining operational security, President Carter chose not to inform Congress prior to the attempt to rescue American hostages held by the Iranian regime. In the mid-1980s, the Reagan Administration did not inform Congress about a covert initiative to divert funds raised from the sale of arms to Iran to support the Contras in Nicaragua. Through the Intelligence Authorization Acts (IAA) of 1981 (P.L. 96-450) and 1991 (P.L. 102-88), Congress revised procedures to try to ensure that the executive branch would, in the future, provide timely, comprehensive notification of all covert action and other "significant anticipated intelligence activity."[6]

While congressional oversight emphasized the jurisdiction of SSCI and HPSCI over intelligence, seen as a matter separate and distinct from congressional defense committees' jurisdiction over military matters,[7] the evolution of practice in the field after 9/11 made it increasingly difficult to distinguish between intelligence and military activities. In an effort to increase the government's overall effectiveness in the post-9/11 environment, the military and intelligence communities increasingly integrated their activities. A reportable intelligence activity, therefore, was often of interest to the congressional defense as well as intelligence committees. Yet, in Congress, the intelligence and defense committees have different notification standards and processes. The cited and exercised statutory authority for a particular intelligence or defense activity has determined the jurisdiction thereof: Title 50 of the *U.S. Code* provides the statutory authority for intelligence activities, regardless of which department or agency carries them out; Title 10 of the *U.S. Code* provides the statutory authority for military activities, carried out, by definition, only by DOD.

These separate authorities have the potential for *artificially* defining *intelligence* activities as separate and distinct from *military* activities. Yet intelligence and military operations have become more integrated since 9/11, may have a similar impact on national security and foreign relations, share similar objectives, employ similar methodologies, and similarly risk the loss of life. The following sections provide an explanation of the distinctions between Title 10 and Title

[6] See Intelligence Authorization Act for FY1991, Title VI, §1325 (S. 1325, 102nd Congress); and Intelligence Authorization Act for 1981 (https://www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg1975.pdf). Specified "significant anticipated intelligence activities" and "significant intelligence failures" other than covert action that are reportable to Congress can be found in Intelligence Directive 112, *Congressional Notification*, June 29, 2017 (https://www.dni.gov/files/documents/71017/6-29-17_ICD-112_17-00383_U_SIGNED.PDF).

[7] The four congressional defense committees include the Armed Services and Appropriations committees of the Senate and House. See 10 U.S.C. §101(a)(16). One member from each of the House defense committees also is a member of the HPSCI. One member from each party from each of the Senate defense committees is also a member of the SSCI.

50 authorities, and definitions of key intelligence and military activities associated that can sometimes be confused, yet which have distinct requirements for congressional oversight.

Defining Title 10 and Title 50 Authorities

Understanding the statutory authorities for the intelligence and military activities defined in this report helps determine how these activities are categorized, how or whether Congress is notified, and which sub-set of Congress has jurisdiction and oversight. The *United States Code*, which compiles and codifies laws of the United States, is organized into *titles* by subject matter.[8] Title 10 of the *U.S. Code* provides much of the legal framework—sometimes referred to as *authorities*—for the roles, missions, and organization of DOD and the military services. Title 50 provides much of the legal framework for many of the roles and responsibilities of the IC, including the operations and functions of the CIA and the legal requirements and congressional notification procedures associated with covert action.

Observers and practitioners may refer to *Title 10 authorities* and *Title 50 authorities* to signify

- executive decision-making processes,
- congressional oversight structures,
- chains of command,
- legal authorizations to carry out certain types of activities, and
- legal constraints preventing certain types of activities that govern the respective operations and activities of DOD and the IC.[9]

Legal observers, however, have cautioned that such references reinforce a misperception that a clear distinction may be drawn between activities conducted under Title 10 authority and activities conducted under Title 50 authority. Some therefore assert that Title 10 and Title 50 authorities should instead be viewed as "mutually reinforcing" rather than "mutually exclusive" authorities.[10] Others further emphasize that Title 10 is not the sole source of legal authority for U.S. military operations, pointing to the President's authority under Article II of the Constitution as Commander in Chief of the U.S. Armed Forces, as well as laws enacted by Congress, such as the War Powers Resolution of 1973 (P.L. 93-148; 50 U.S.C. §1541-1548) and the 2001 Authorization for Use of Military Force (P.L. 107-40; 50 U.S.C. §1541 note).[11] Some also cite the

[8] For a discussion of the organization and contents of the U.S. Code, see U.S. House of Representatives, Office of the Law Revision Counsel, "Detailed Guide to the United States Code Content and Features," available at http://uscode.house.gov/detailed_guide.xhtml.

[9] Robert Chesney, "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate." *Journal of National Security Law & Policy* vol. 5, no. 2 (2012): p. 615-616; see also Joshua Kuyers, "'Operational Preparation of the Environment: 'Intelligence Activity' or 'Covert Action' by Any Other Name?" *American University National Security Law Brief*, vol. 4, no. 1 (2013): 21-40.

[10] See section with subheading "Covert Action" in "Questions for the Record for Admiral Dennis C. Blair upon Nomination to be Director of National Intelligence," Senate Select Committee on Intelligence, January 22, 2009, pp. 14-16, available at https://www.intelligence.senate.gov/sites/default/files/hearings/blairresponses2.pdf. See also Andru E. Wall, "Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action," *Harvard National Security Journal*, vol. 3, no. 1 (2011): 85-142.

[11] See CRS In Focus IF10534, *Defense Primer: President's Constitutional Authority with Regard to the Armed Forces*, by Jennifer K. Elsea, and CRS In Focus IF10535, *Defense Primer: Congress's Constitutional Authority with Regard to the Armed Forces*, by Jennifer K. Elsea. See also CRS Report R42699, *The War Powers Resolution: Concepts and Practice*, by Matthew C. Weed, and CRS Report R43983, *2001 Authorization for Use of Military Force: Issues Concerning Its Continued Application*, by Matthew C. Weed. See also Robert Chesney, "Military-Intelligence

dual role of the Secretary of Defense under Title 10 and Title 50 to exercise authority, direction, and control over those elements of the IC that reside within the DOD organizational structure as support for the argument that Title 10 and Title 50 should be viewed as "mutually reinforcing."[12]

Selected Terms, Definitions, and Descriptions

Covert Action

Covert action *is codified* in Title 50 *U.S. Code* 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 will *not* be apparent or acknowledged publicly. It does not include

- activities with the primary purpose of acquiring intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States government programs, or administrative activities;
- traditional diplomatic or military activities or routine support to such activities;
- traditional law enforcement activities conducted by United States government law enforcement agencies or routine support to such activities;
- activities to provide routine support of any other overt activities of other United States government agencies abroad.[13]

Covert action is generally intended to influence conditions as an alternative to an escalation by the United States that might lead to a sizable or extended military commitment.[14] Unlike traditional intelligence collection, covert action is not passive. It has a visible, public impact intended to influence a change in the military, economic, or political environment abroad that might otherwise prove counterproductive if the role of the United States were made known.[15]

Covert action also requires a *finding* by the President, providing written notification to Congress that the impending activity supports "identifiable foreign policy objectives."[16] Covert action cannot be directed at influencing the domestic environment: "No covert action may be conducted which is intended to influence United States political processes, public opinion, policies, or media."[17] While covert action is historically most closely associated with the CIA, the President

Convergence and the Law of the Title 10/Title 50 Debate." *Journal of National Security Law & Policy*, vol. 5, no. 2 (2012): pp. 615-616.

[12] Andru E. Wall, "Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action," *Harvard National Security Journal*, vol. 3, no. 1 (2011): 85-142.

[13] See 50 U.S.C. §3093(e).

[14] "[T]here are areas of the world where a little covert action can forestall much more serious problems later." William Colby, late Director of the CIA. Randall B. Woods, *Shadow Warrior: William Egan Colby and the CIA*, (New York: Basic Books, 2013), p. 472.

[15] The late Director of the CIA, William Colby, once observed that it should be assumed the U.S. role in a covert action will become public knowledge at some point. See Mark M. Lowenthal, *Intelligence: From Secrets to Public Policy* (Los Angeles: CQ Press, 2015), p. 231.

[16] 50 U.S.C. §3093(a).

[17] Ibid., §3093(f).

may authorize other "departments, agencies or entities of the United States Government," such as DOD, to conduct covert action.[18]

Offensive cyberspace operations—defined as operations "intended to project power by the application of force in and through cyberspace"— may also be called covert action if they are conducted under authority of Title 50 of the *U.S. Code*, Section 3093, which provides the statutory provisions for oversight of covert action.[19]

Historic examples of covert action include the CIA's orchestration of the 1953 coup in Iran; the 1961 Bay of Pigs invasion of Cuba; the Vietnam-era secret war in Laos; and support to both the Polish Solidarity labor union in the 1970s and 1980s and to the Mujahidin in Afghanistan during the 1980s. A number of these examples took place prior to the statutory requirement for issuing a presidential *finding* and highlight the mixed record and often unforeseen consequences of covert action historically.

Clandestine Activities

The term clandestine activity is *not defined by statute*. DOD doctrine defines *clandestine activities* as "operations sponsored or conducted by governmental departments in such a way as to assure secrecy or concealment" that may include relatively "passive" intelligence collection and information gathering operations.[20] Unlike covert action, clandestine activities do not require a presidential finding, but they may require notification of Congress.

This definition differentiates *clandestine* from *covert*, using *clandestine* to signify the tactical concealment of the activity. By comparison, covert activities can be characterized as the strategic concealment of the United States' sponsorship of activities that aim to effect change in the political, economic, military, or diplomatic behavior of an overseas target. Because clandestine activities necessarily involve sensitive sources and methods of military operations or intelligence collection, their compromise through unauthorized disclosure can risk the lives of the personnel involved and gravely damage U.S. national security.

Examples of clandestine activities include intelligence recruitment of, or collection by, a foreign intelligence asset, and military sensitive site exploitation (SSE) of, or surveillance of, a facility in a denied or hostile area. SSE is one of many military operations that can be conducted clandestinely, without the acknowledgement—at least initially—of U.S. sponsorship. These examples of clandestine activities can be further categorized as *traditional military activities* or *routine* or *other-than-routine* support for traditional military activities, *operational preparation of the environment (OPE)*, and *sensitive military operations*, all of which are discussed in more

[18] Ibid., §3093(a)(3), "Each finding shall specify *each department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such action*. Any employee, contractor, or contract agent of a department, agency, or entity of the United States Government other than the Central Intelligence Agency directed to participate in any way in a covert action shall be subject *either* to the policies and regulations of the Central Intelligence Agency, *or to written policies or regulations adopted by such department, agency, or entity, to govern such participation*." [emphasis added]

[19] See CRS In Focus IF10537, *Defense Primer: Cyberspace Operations*, by Catherine A. Theohary. See also Joint Pub 3-12, *Cyberspace Operations* (Washington DC: Joint Chiefs of Staff, June 8, 2018), pp. X, GL-5.

[20] Joint Staff, "Joint Operations," Joint Publication 3-0, January 17, 2017, change 1 of October 22, 2018, available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_0ch1.pdf?ver=2018-11-27-160457-910. See also U.S. Congress, Senate Committee on Armed Services, *Nominations Before the Senate Armed Services Committee, First Session, 110th Congress*, Nomination of James R. Clapper, Jr. to the position of Under Secretary of Defense for Intelligence, 110th Cong., 1st sess., March 27, 2007, S.Hrg. 110-370, available at https://www.gpo.gov/fdsys/pkg/CHRG-110shrg42309/pdf/CHRG-110shrg42309.pdf.

detail below. Clandestine activities can also include defensive or offensive operations in cyberspace, in which both the activity and U.S. sponsorship may be unacknowledged and classified.[21]

Traditional Military Activities and Routine Support

Since 9/11, when military and intelligence activities became increasingly integrated, Congress has taken renewed interest in the two military exceptions to the statutory definition of covert action: *traditional military activities* and *routine support* to traditional military activities. Though neither term is itself defined in statute, Congress's intent regarding *traditional military activities* and *routine support* to traditional military activities is relevant to understanding the range of military activities for which the notification requirements are less stringent than those for covert action. These terms, which were first cited as exceptions to covert action in P.L. 102-88, the Intelligence Authorization Act for FY 1991,[22] may include activities that are difficult to distinguish from covert and from clandestine intelligence activities, but for which the military retains responsibility under Title 10. In a joint explanatory statement attached to the conference report for P.L. 102-88, the conference committee provided an extended discussion of its intent as to the meaning of *traditional military activities*:

> It is the intent of the conferees that 'traditional military activities' include activities by military personnel under the direction and control of a United States military commander (whether or not the U.S. sponsorship of such activities is apparent or later to be acknowledged) preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities for the activities and or operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving United States military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly. In this regard, the conferees intend to draw a line between activities that are and are not under the direction and control of the military commander. *Activities that are not under the direction and control of a military commander should not be considered as "traditional military activities."*[emphasis added][23]

In the Senate Select Committee on Intelligence (SSCI) report for the FY1991 Intelligence Authorization Act, the SSCI provided an expanded definition of its intent for the concept of *routine support*, which was considered to be:

> …unilateral U.S. activities to provide or arrange for logistical or other support for U.S. military forces in the event of a military operation that is to be publicly acknowledged. Examples include caching communications equipment or weapons, the lease or purchase from unwitting sources of residential or commercial property to support an aspect of an

[21] See CRS In Focus IF10537, *Defense Primer: Cyberspace Operations*, by Catherine A. Theohary. Offensive cyberspace operations are defined in Joint Pub 3-12, *Cyberspace Operations*, p. GL-5, as operations "intended to project power in and through cyberspace." See also note to §111 of Title 10 U.S.C., P.L. 112-81, div. A, title IV, §954, 125 Stat. 1551: "Congress affirms that the Department of Defense has the capability, and upon direction by the President may conduct offensive operations in cyberspace to defend our Nation, Allies and interests subject to—(1) the policy principles and legal regimes that the Department follows for kinetic capabilities, including the law of armed conflict; and (2) the War Powers Resolution (50 U.S.C. §1541 et seq.)." JP 3-12 p. GL-4 defines defensive cyberspace operations as "missions to preserve the ability to utilize blue cyberspace capabilities and protect data, networks, cyberspace-enabled devices, and other designated systems by defeating on-going or imminent malicious cyberspace activity."

[22] See 50 U.S.C. §3093(e)

[23] See U.S. Congress, House of Representatives, *Intelligence Authorization Act, Fiscal Year 1991*, conference report to accompany H.R. 1455, 102nd Cong., 1st sess., July 25, 1991, H.Rept. 102-166, p. 29-30.

> operation, or obtaining currency or documentation for possible operational uses, if the operation as a whole is to be publicly acknowledged….

Other-than-Routine Support

Only the Senate Select Committee on Intelligence has definitively categorized *other-than-routine support* to military operations as a type of *covert* action that includes a range of activities in which the U.S. role is unacknowledged and that may be intended to influence political, military, or economic conditions abroad while concealing U.S. sponsorship of another country prior to commencement of the principal operation.

> [T]he Committee [Senate Select Committee on Intelligence] would regard as 'other-than routine' support *(requiring a finding and reporting to the committee)* such activities as clandestinely recruiting and/or training of foreign nationals with access to the target country actively to participate in and support a U.S. military contingency operation; clandestine efforts to influence foreign nationals of the target country concerned to take certain actions in the event a U.S. military contingency operation is executed; clandestine efforts to influence and effect public opinion in the country concerned where U.S. sponsorship of such efforts is concealed; and clandestine efforts to influence foreign officials in third countries to take certain actions in the event a U.S. military contingency operation is executed. (Traditional diplomatic activities would be excluded by other parts of this section.)
>
> In other words, the Committee believes that when 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 operation, should it occur, such support is not "routine." *In such circumstances, 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).[24] [emphasis added]

Congress's discussion of *other-than-routine* support is limited to general discussion of covert action and routine support in the conference reports accompanying the Intelligence Authorization Act for 1991 (P.L. 102-88). It is not defined in statute and is not a term in DOD's lexicon. From DOD's perspective, these kinds of operations fall within a category of traditional military activities termed operational preparation of the environment, or OPE. This distinction underscores the inherent tension between Title 10 and Title 50 authorities, insofar as the standards and processes for congressional notification of covert action—to include other-than-routine support— differ from those for traditional military activities, including OPE [See CRS Report R45191, *Covert Action and Clandestine Activities of the Intelligence Community: Selected Notification Requirements in Brief*, by Michael E. DeVine].

Operational Preparation of the Environment

Operational Preparation of the Environment is a DOD term for a category of traditional military activities conducted in anticipation of, in preparation for, and to facilitate, follow-on military operations. It is a term DOD frequently uses, though its definition does not exist in statute. The DOD defines *operational preparation of the environment* as the "conduct of activities in likely or potential areas of operations to prepare and shape the operational environment," with *operational*

[24] See S. Rep. No. 101-358, p. 55.

environment defined as a "composite of the conditions, circumstances, and influences that affect the employment of capabilities and bear on the decisions of the commander."[25]

Joint Publication 3-05, *Special Operations*, a doctrine issuance of the Joint Staff, describes *preparation of the environment* as an "umbrella term for operations and activities conducted by selectively trained special operations forces to develop an environment for potential future special operations," with "close-target reconnaissance … reception, staging, onward movement, and integration ... of forces ... [and] infrastructure development" cited as examples of such activities.[26]

Congress has expressed concern that the military overuses *OPE* to describe a range of military activities that can include, among other things, clandestine military intelligence collection that is neither subject to oversight by the congressional intelligence committees nor jurisdiction of the congressional defense committees.

In the "Areas of Special Interest" segment of the House Permanent Select Committee on Intelligence (HPSCI) report (H.Rept. 111-186) for its version of the Intelligence Authorization Act for FY2010 (H.R. 2701), the committee indicated that it

> … [noted] with concern the blurred distinction between the intelligence-gathering activities carried out by the [CIA] and the clandestine operations of the [DOD]…In categorizing its clandestine activities, DOD frequently labels them as [OPE] to distinguish particular operations as traditional military activities and not as intelligence functions. The Committee observes, though, that overuse of this term has made the distinction all but meaningless. The determination as to whether an operation will be categorized as an intelligence activity is made on a case-by-case basis; there are no clear guidelines or principles for making consistent determinations. The Director of National Intelligence himself has acknowledged that there is no bright line between traditional intelligence missions carried out by the military and the operations of the CIA.
>
> Clandestine military intelligence-gathering operations, even those legitimately recognized as OPE, carry the same diplomatic and national security risks as traditional intelligence-gathering activities. While the purpose of many such operations is to gather intelligence, DOD has shown a propensity to apply the OPE label where the slightest nexus of a theoretical, distant military operation might one day exist. Consequently, these activities often escape the scrutiny of the intelligence committees, and the congressional defense committees cannot be expected to exercise oversight outside of their jurisdiction.[27]

In a section titled "Jurisdictional Statement on Defense Intelligence" under the "Committee Priorities" segment of its report (H.Rept. 114-573) accompanying the Intelligence Authorization Act of 2017 (H.R. 5077), the HPSCI reiterated that it is

> ...concerned that many intelligence and intelligence-related activities continue to be characterized as 'battlespace awareness,' 'situational awareness,' and – especially – [OPE].... The continued failure to subject OPE and other activities to Committee scrutiny precludes the Committee from fully executing its statutorily mandated oversight role on behalf of the House and the American people, including by specifically

[25] See Joint Staff, "DOD Dictionary of Military and Associated Terms," April 2019, pp. 164 and 165 available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf. See also Joint Staff, Joint Publication 3-05, "Special Operations," July 16, 2014, available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_05.pdf?ver=2018-03-15-111255-653, and Joint Staff, Joint Publication 3-0, "Joint Operations," January 17, 2017 incorporating Change 1 of October 22, 2018, available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_0ch1.pdf?ver=2018-11-27-160457-910.

[26] Joint Staff, Joint Publication 3-05, "Special Operations," July 16, 2014, available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_05.pdf?ver=2018-03-15-111255-653.

[27] See U.S. Congress, House of Representatives, "Intelligence Authorization Act for Fiscal Year 2010," report together with minority and additional views to accompany H.R. 2701, 111th Cong., 1st sess., June 26, 2009, pp. 48-49.

> authorizing intelligence and intelligence-related activities as required by Section 504(e) of the National Security Act of 1947 (50 U.S.C. §3094(e)). Therefore, the Committee directs [DOD] to ensure that the Committee receives proper insight and access to information regarding all intelligence and intelligence-related activities of [DOD], including those presently funded outside the MIP. The Committee further encourages [DOD], in meeting this direction, to err on the side of inclusivity and not to withhold information based on arbitrary or overly technical distinctions such as funding source, characterization of the activities in question, or the fact that the activities in question may have a nexus to ongoing or anticipated military operations.[28]

Sensitive Military Operations

Sensitive military operations are defined in statute as (1) lethal operations or capture operations conducted by the U.S. Armed Forces outside a declared theater of active armed conflict, or conducted by a foreign partner in coordination with the U.S. Armed Forces that target a specific individual or individuals, or (2) operations conducted by the armed forces outside a declared theater of active armed conflict in self-defense or in defense of foreign partners, including during a cooperative operation.[29] This statutory definition allows Congress to provide oversight of the sort of military operations that have significant bearing on U.S. foreign and defense policy but are not clearly defined elsewhere in statutory oversight provisions.

Sensitive military operations, which can be clandestine, have become an increasingly common feature of the post-9/11 counterterrorism (CT) landscape involving U.S. military intervention in countries such as Yemen, Pakistan, or Somalia that are outside areas of active hostilities (i.e., outside of Afghanistan, Syria, and Iraq). Examples of these operations include a lethal CT drone operation, or a military *train, advise, and assist* mission where U.S. forces supporting the security forces of a foreign partner nation may have to act in self-defense.

Sensitive Military Cyber Operations

Sensitive military cyber operations are a subcategory of sensitive military operations. Congress defines *sensitive military cyber operations* under Title 10 *U.S. Code* as operations carried out by the armed forces of the United States that are intended to cause cyber effects outside a geographic location where the Armed Forces of the United States are involved in hostilities or where hostilities have been declared by the United States.[30] Sensitive military cyber operations have two subcategories. The first, offensive cyberspace operations, is not defined in statute, but by DOD, as "missions intended to project power in and through cyberspace." The second, defensive cyberspace operations, is defined in statute as operations "outside of Department of Defense information networks that are aimed at defeating an ongoing or imminent threat."[31] Sensitive military cyber operations do not include training exercises that have effects on foreign states so long as these states concur, nor are they considered covert action.[32]

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[28] U.S. Congress, House of Representatives, "Intelligence Authorization Act for Fiscal Year 2017," report together with minority views to accompany H.R. 5077, 114th Cong., 2nd sess., May 18, 2016, H.Rept. 114-573, p. 9-10.

[29] 10 U.S.C. §130f(d).

[30] 10 U.S.C. §395(c)(1)(A)-(B). Prior to reclassification and renumbering of the *U.S. Code*, the statute governing sensitive military cyber operations had been 10 U.S.C. §130(j).

[31] For the DOD definition of offensive cyberspace operations, see Joint Publication 3-12, *Cyberspace Operations*, June 8, 2018, p. GL-5, at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_12.pdf. Currently, statute does not define or describe offensive or defensive cyberspace operations consistent with DOD in JP 3-12.

[32] 10 U.S.C. §395(d)(1)-(2).

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