APPENDIX I

Congressional Authorization for the Central Intelligence Agency to Conduct Covert Action

In recent years the CIA has spent millions of dollars in countries all over the world for "covert action." Covert action, as the Central Intelligence Agency has defined it, is any "clandestine activity designed to influence foreign governments, events, organizations, or persons in support of the United States foreign policy conducted in such a manner that the involvement of the U.S. Government is not apparent." [1] In its purpose to influence events, covert action is distinguished from clandestine intelligence gathering—often referred to as espionage.[2]

In the last several years controversy has surrounded the conduct of covert action by the Central Intelligence Agency. Since covert action is not listed as a mission of the CIA in either its basic charter, the National Security Act of 1947, or in the Central Intelligence Agency Act of 1949, questions arise regarding the authority by which the Agency undertook it. This report addresses the question of congressional authorization for covert action. It does not attempt to analyze the inherent power of the President to make covert action the responsibility of one of the executive branch agencies.

At the outset, it should be noted that Congress is, in part, responsible for the ambiguity which clouds the CIA's authority. The National Security Act was designed to provide flexibility to the newly created CIA so that it could meet unforeseen challenges. Flexibility was provided through an undefined and apparently open-ended grant of authority to the National Security Council, and through it, to the CIA. Without any indication in the Act's history that the Congress anticipated covert action or intended to authorize it, and without any executive branch attempt to obtain from Congress specific authority for the conduct of covert actions such as sabotage or paramilitary activities, the NSC directed CIA to undertake these activities. Until 1974, Congress did not attempt to clarify the Agency's authority in this area, even after learning about such well-publicized covert actions as the invasion of the Bay of Pigs.

An analysis of congressional authorization for the conduct of covert action goes far beyond the study of 30-year-old legislative debates. It provides evidence of changes in the roles of the President and the Congress in the formulation, implementation, and review of foreign policy.

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[1] Testimony of Mitchell Rogovin, Special Counsel to the Director of Central Intelligence, House Select Intelligence Committee, 12/9/75, p. 1730. Covert action was originally defined by the National Security Council as "secret action to influence events in foreign countries which is so designed that, if discovered, official U.S. Government participation can be plausibly denied."

[2] Covert action also differs from clandestine collection and espionage in that the latter are designed to obtain intelligence without affecting the source or revealing the fact that the information has been collected.

It examines the procedures by which the President and the Congress have delegated power to the NSC and the CIA and the effect of those procedures. It illuminates the way the executive branch has interpreted undefined provisions of law. It raises questions about congressional oversight of covert action and particularly the ability of Congress, in the interest of security, to deny itself information. The result of the denial has been to allow small numbers of senior members to exercise the oversight function and to determine how much money the CIA was to receive and for what purposes.

Hopefully, this report will not only be useful to those interested in the past. An examination of the question of congressional authorization for the conduct of covert action may contribute to a better understanding of the relationship between the need for secrecy and the processes of constitutional government. Such an understanding is necessary as the United States moves into its third century.

Before turning to the National Security Act of 1947, two caveats are in order. The first and most important is that any attempt to understand the relationship between Congress and the executive branch in this area must be based on the evidence available, which is often quite sparse. For example, the Select Committee was able to locate the transcript of only one executive session of a congressional committee considering the National Security Act of 1947, although weeks of such sessions were held on this important legislation.

Covert action is now a well-defined and understood term. The second caveat is for the reader to remember that although the U.S. did undertake what would now be called covert action during World War II, the term, and its possible scope, were not clearly understood in the late 1940's.

A. The National Security Act of 1947

Although it has been cited as authority for the CIA to engage in covert action, the National Security Act of 1947 does not specifically mention covert action. A review of the hearings, committee reports and floor debates on the Act reveals no substantial evidence that Congress intended by passage of the Act to authorize covert action by the CIA. In addition, a contemporaneous analysis of the Act by the General Counsel of the CIA concluded that Congress had no idea that, under the authority of the National Security Act, the CIA would undertake covert action such as subversion or sabotage.

Congress did intend to provide the newly created CIA with sufficient flexibility so that it would be able to respond to changing circumstances. There is no evidence, however, that that flexibility was intended to allow the creation of a peacetime agency engaged in activities such as paramilitary action or attempted assassination.

Although the evidence strongly suggests that the executive branch did not intend through the language of the National Security Act to obtain authorization from Congress for the conduct of covert action, the record is not absolutely clear. Whether it did or did not so intend, the executive branch soon seized upon the broad language of the Na-

tional Security Act. Facing what was perceived as an extraordinary threat from the Soviet Union and her allies, coming to believe that the only possible course of action for the United States was to respond to covert action with covert action, the NSC authorized the CIA to conduct covert action.

1. Textual Analysis

Nowhere in the National Security Act is covert action specifically authorized. Section 102(d)(5) of the Act, however, has been cited as authority for covert action.[4] That clause authorizes the CIA to "perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." [5]

This clause was cited in NSC—4—A and NSC 10/2, the early directives from the National Security Council to the Central Intelligence Agency which directed the CIA to conduct covert action.[6] The Director of the CIA has cited the same section in claiming authorization for covert paramilitary activity.[7]

On its face, the clause might be taken to authorize an enormous range of activities not otherwise specified in the National Security Act.[8] An important limitation on the authorization, however, is that

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[4] Section 102(d)(4), which authorizes the CIA to "perform for the benefit of existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally," appears on its face to be applicable to covert action to the same extent as Section 102(d)(5). Both represent an effort to provide the Agency with some flexibility in intelligence matters. Section 102(d)(4), however, has not been cited by either the NSC or the CIA as authorizing covert action.

A provision similar to Section 102(d)(4) in the Presidential Directive establishing the Central Intelligence Group, the CIA's predecessor agency, was cited as the CIG's authority to engage in clandestine collection of intelligence; Section 102(d)(4) was cited by the National Security Council in directing the CIA to engage in the same activity.

[5] 50 U.S.C. 403(d)(5).

[6] While the CIA has consistently invoked the President's power to authorize covert action, neither NSC 4–A or NSC 10/2 mentioned that power; both referred to the authority conveyed by the National Security Act.

[7] The General Counsel of the CIA wrote the DCI commenting on his testimony before the Subcommittee on Security Agreements and Commitments Abroad of the Senate Committee on Foreign Relations as follows:

"As for the authority of this Agency to engage in [covert paramilitary activity], I think you were probably exactly right to stick to the language of the National Security Act of 1947, as amended, particularly that portion which says that the Agency shall 'perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.' Actually, from 1947 on my position has been that this is a rather doubtful statutory authority on which to hang our paramilitary activities." (Memorandum from the CIA General Council to the Director, Subject: Symington Subcommittee Hearings, 10/30/69.)

[8] One of the witnesses appearing before the executive session of the House Committee on Expenditures in the Executive Departments on June 27, 1947, described the function of section (d)(5) as being to allow the CIA to go beyond its enumerated functions during an emergency. (Peter Vischer testimony, House Committee on Expenditures in the Executive Departments, Hearings on H.R. 2319, 6/27/47, p. 78.)

the activities must be "related to intelligence affecting the national security." As Clark Clifford told the Senate Select Committee:

> You will note that the language of the Act provides that this catch-all phrase is applicable only in the event that the national security is affected. This was considered to be an important and restricting clause.[9]

Some covert actions are at least arguably "related to intelligence affecting the national security." As an individual in the CIA's Office of the General Counsel noted in a memorandum to the General Counsel:

> . . . it can be argued that many covert activities assigned to the Agency by the National Security Council are at least "related" to intelligence affecting the national security . . . in the sense that their performance often is intimately dovetailed with clandestine intelligence operations, use the same operations and methods and yield important intelligence results.[10]

Not all covert actions, however, have the characteristics suggested in the above quotation. Many covert operations, such as the invasion of the Bay of Pigs, have, at best, only the most limited relationship to intelligence affecting the national security.[11] As the General Counsel of the CIA wrote in 1947:

> Taken out of context and without knowledge of its history, these Sections [102(d)(4) and (5)] could bear almost unlimited interpretation, provided that the services performed could be shown to be of benefit to an intelligence agency or related to national intelligence.
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> Thus black propaganda, primarily designed for subversion, confusion, and political effect, can be shown incidentally to benefit positive intelligence as a means of checking reliability of informants, effectiveness of penetration, and so forth. Even certain forms of S.O. [special operations] work could be held to benefit intelligence by establishment of W/T [wireless telegraph] teams in accessible areas, and by opening penetration points in confusion following sabotage or riot. *In our opinion, however, either activity would be an unwarranted extension of the functions authorized in Sections 102(d)(4) and (5).* This is based on our understanding of the intent of Congress at the time these provisions were enacted.[12] [Emphasis added.]

The General Counsel concluded again in 1962 that certain forms of covert action are not "related to intelligence." In a memorandum to the DCI he wrote, "some of the covert cold war operations are related to intelligence within a broad interpretation of Section 102(d)(5). It

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[9] Clark Clifford testimony, 12/4/75, Hearings, Vol. VII, p. 51.

[10] Memorandum from the CIA Office of the General Counsel to the General Counsel, 2/6/74, p. 1.

[11] The secrecy which surrounded the invasion of the Bay of Pigs may well have interferred with the CIA's mission to correlate and evaluate intelligence related to the national security. Analysts in the Directorate of Intelligence were neither informed about, nor asked to evaluate, the invasion plans.

[12] Memorandum from the CIA General Counsel to the Director, 9/25/47, p. 1.

would be stretching that section too far to include a Guatemala or a Cuba even though intelligence and counterintelligence are essential to such activities." [13] In this same memorandum, the General Counsel suggested that, in order for the National Security Act to provide authority for the conduct of the wide range of covert action engaged in by the CIA, Section 102(d)(5) would have to read, "perform such other functions and duties related to the national security" as the NSC might from time to time direct, and not "perform such other functions and duties related to intelligence affecting the national security." [14] After this interpretation was given by the General Counsel, no attempt was made by the executive branch to have the National Security Act amended.[15]

Only the most strained interpretation of "intelligence affecting the national security" would allow certain covert actions by the CIA such as paramilitary activities or the attempted assassination of foreign leaders to come under Section 102(d)(5). As some covert actions are more directly "related to intelligence affecting the national security," however, it is important to examine the legislative history [16] of the Na-

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[13] Memorandum from the CIA General Counsel to the Director, 1/15/62, p. 2. While the CIA has recently stated that "intelligence" was intended to have a broader interpretation than the General Counsel indicated in the memorandum, (See Rogovin, HSIC 12/9/75, p. 175) there is no evidence that Congress intended the phrase "related to intelligence" to cover such activities as the attempted assassination of foreign leaders. Under the CIA's expansive interpretation even this would be authorized as the agents involved in the assassination attempt might have previously provided intelligence to the CIA.

[14] General Counsel memorandum, 1/15/62, p. 2.

[15] In the same memorandum the General Counsel argued that the CIA was authorized by Congress to conduct covert action as "Congress as a whole knows that money is appropriated to CIA and knows that generally a portion of it goes for clandestine activities." Given presidential direction and congressional appropriation he advised that additional statutory authority is "unnecessary and, in view of the clandestine nature of the activities, undesirable." (*Ibid.* p. 3.)

[16] Legislative history includes review of the pre-enactment history, including a history of the predecessor agencies, the history of the enactment, and subsequent interpretation of the act. Legislative history is used as an aid to statutory construction where the language of the statute is unclear [*United States* v. *Donrus Co.*, 393 U.S. 297 (1965); *United States* v. *Public Utilities Commission California*, 345 U.S. 295 (1953)], where placing the "plain language" of a particular provision in the context of the whole statute creates an ambiguity [*Mastro Plastic Corp.* v. *National Labor Relations Board*, 350 U.S. 270 (1956); *Richards* v. *United States*, 369 U.S. 1 (1962)], or where it can be shown that an application of the literal words would bring about a result plainly at variance with their purpose [*Johansen* v. *United States*, 343 U.S. 427 (1952); *United States* v. *Dickerson*, 310 U.S. 554 (1940)]. It is pertinent only to show legislative intent and, thus, the various kinds of legislative history—hearings, reports, floor debates—are considered significant according to the likelihood that they indicate the purpose of the legislature as a whole. For instance, if Congress as a whole is not, or cannot be, aware of the evidence that a bill would have a particular effect, or remedy a particular evil, it cannot be assumed that Congress intended the statute to have that effect. In construing statutes courts will, therefore, consider whether the history manifested in the hearings, reports and floor debates was made available to the legislators, whether they were actually aware of it, and the credence which the legislators themselves may have given to it.

In certain instances, an examination of executive sessions may illuminate the intent of individual members of Congress. Such testimony might also clarify the Executive's interpretation of a particular piece of legislation.

tional Security Act to determine if these forms of covert action were within the range of activities which Congress intended to authorize or whether they represent what the CIA's former General Counsel called "an unwarranted extension of the functions authorized in Sections 102 (d) (4) and (5)." Congressional intent is particularly important in this instance as Congress required the language of Section 102 to be written into law rather than incorporating an earlier Presidential Directive by reference. This was done because several Members of Congress believed that if the CIA's missions were not set out in the statute, the President could change them at any time simply by amending the Directive.[17]

Before turning to the legislative history of the National Security Act, however it is important to note that Section 102(d)(5) sets out a second condition—the CIA must be directed by the NSC to perform the "other functions and duties." The authority of NSC to direct the CIA to undertake activities has recently come under attack.[18] The question of whether the NSC must specifically approve each covert action or whether it can delegate its authority or provide approval in advance for whole categories—or programs—of covert action has also been raised. General Vandenberg, who headed the Central Intelligence Group, the CIA's predecessor body, expressed to the drafters of the National Security Act his belief that the CIA should not have to come continually to the NSC for approval for action. According to a CIA legislative history of the Act, Vandenberg was told that the CIA would need to come to the NSC only on such specific matters as the NSC required.[19]

Over time the practice developed that all politically risky or costly covert action projects would be brought before the 40 Committee of the National Security Council, or its predecessors, for approval. However, low-risk projects could be approved within the CIA. During some periods of time only a quarter of all covert action projects undertaken by the CIA—the high-risk, high-cost covert actions—were approved by the NSC 40 Committee.[20] In at least one instance, the 40

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[17] Hearings before the House Committee on Expenditures in the Executive Department on H.R. 2319, National Security Act of 1947 April–July, 1947, p. 171. See also Transcript, House Committee on Expenditures in the Executive Departments, Hearings on H.R. 2319, 6/27/47, pp. 57–58. Another reason given for enumerating the CIA's purpose was that the public would not have access to the *Federal Register* and thus would be ignorant of the Agency's missions.

[18] See Committee on Civil Rights and the Committee on International Rights of the Association of the Bar of the City of New York, "Central Intelligence Agency: Oversight and Accountability," p. 13; and Central Intelligence Agency response to "Central Intelligence Agency: Oversight and Accountability," p. 21.

For a discussion of the President's authority to direct the CIA to undertake various forms of covert action in the absence of congressional authorization, or when Congress has spoken, see chapt. III.

[19] See CIA Legislative Counsel memorandum, "Legislative History of the Central Intelligence Agency: the National Security Act of 1947," 5/25/67, p. 30 (hereinafter cited as "CIA's Legislative History".)

[20] A 1963 study showed that of the 550 existing covert action projects of the CIA, which according to the CIA's own internal instruction should have been submitted to the Special Group (the 40 Committee's predecessor), only 86 were separately approved (or reapproved) by the Special Group between January 1 and December 1, 1962. Memorandum for the Record, C/CA/PEG, Subject: "Policy Coordination of CIA's Covert Action Operations," 2/21/67.

Committee was not informed about a major covert action—the Track II attempt in Chile to foment a coup.[21]

If Congressional authorization is claimed then the procedures established by Congress must be honored. If Congress intended covert actions to be undertaken on an ad hoc basis as specifically directed by the NSC then that procedure must be followed. As Chief Justice Marshall wrote, once Congress has "prescribed . . . the manner in which the law shall be carried into execution" the President is bound to respect the limitation.[22]

2. Preenactment History[23] *of the National Security Act of 1974: The CIA's Predecessor Agencies*

Some of the language of the National Security Act, in particular Section 102(d)(5), closely resembles provisions of the Presidential Directive which established the CIA's predecessor agency, the Central Intelligence Group, in 1946. The CIG in turn grew out of the wartime experience with the Office of Strategic Services and its predecessor, the Office of Coordinator of Information.

The evolution from the Office of the Coordinator of Information to the Central Intelligence Agency may indicate what the Executive intended to accomplish through submission of the Central Intelligence Agency section of the National Security Act of 1947. To the extent to which Congress was familiar with this evolution, and with the roles played by the Coordinator of Information, the OSS, and the CIG, it could be said that Congress understood the meaning of the legislation which the Executive proposed and shared in the Executive's expectation of what the legislation would accomplish.

The Office of the Coordinator of Information was established by a Presidential Directive of July 11, 1941. The Directive was preceded by a memorandum to the President by William J. Donovan on June 10, 1941, proposing a centralized intelligence organization with psychological warfare among its functions.[24] The Directive did not

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[21] See Senate Select Committee, "Alleged Assassination Attempts Against Foreign Leaders."

[22] *Little* v. *Barreme*, 2 Cranch 170, 178 (1805). If it is Presidential power which is delegated, then the procedures established for the delegation cannot be disregarded.

[23] Preenactment history is the term given to events occurring prior to the introduction of legislation. Sutherland, *Statutory Construction*, § 48.03 (4th ed. 1973). It encompasses events to which the legislation in question was apparently a response.

Preenactment history is considered by the courts, in some cases, to be significant in determining legislative intent. The challenge is to determine the mischief which particular legislation is meant to remedy. Generally, the courts look to events or patterns of abuse which were well publicized and which Congressmen would most likely know about and have in mind when they enacted a particular law: See e.g. *Clark* v. *Uebersee Fianz-Korp.*, 322 U.S. 459 (1947).

Thus the relaitonship between poor coordination of intelligence and the successful bombing of Pearl Harbor by the Japanese could be considered as extrinsic evidence of Congressional intent in passing the National Security Act of 1947.

[24] Memorandum from William J. Donovan to the President, 6/10/41. Physical subversion and guerrila warfare were not mentioned in Donovan's memorandum, but they were discussed with Cabinet officers involved and were felt by Donovan to be implicit with his plan.

mention psychological warfare, but authorized the Coordinator of Information to "collect and analyze all information and data which may bear upon national security" and to "carry out when requested by the President such supplementary activities as may facilitate securing of information important for national security." Like the National Security Act of 1947, the 1941 Directive was designed for flexibility.

The Presidential Directive establishing the COI made no distinction betwen overt and clandestine collection. Within the month, the COI established a unit to collect intelligence from overt sources, and by October the COI had begun the collection of information by undercover agents outside the Western Hemisphere.[25] On October 10, 1941, the "Special Activities" unit was established in COI to take charge of sabotage, subversion, and guerrilla warfare. Thus a Directive which authorized the collection and analysis of information, together with supplementary activities "to facilitate securing of information important for national security" was interpreted within the executive branch as authorizing what is now known as covert action.

All of these events preceded the outbreak of World War II. Following the outbreak of hostilities. President Roosevelt established the Office of Strategic Services (OSS) by military order dated June 13, 1942. Among the functions assigned to the OSS was to "collect and analyze such strategic information as may be required by the United States Joint Chiefs of Staff" and to perform "such special services as may be directed by the Joint Chiefs of Staff." Pursuant to this order, the OSS undertook both clandestine collection of intelligence and covert action.[27] The assignment of both these functions to the OSS was opposed by various branches of the Armed Services.

In 1944, William Donovan, then head of OSS, wrote to the President proposing a permanent peacetime intelligence service. He suggested that the service should collect, analyze, and disseminate "intelligence on the policy or strategy level," and that it should be responsible for "secret activities," such as "clandestine subversive operations." [28] At roughly the same time that General Donovan made his recommendations, General Doolittle proposed an intelligence agency which would collect intelligence either directly or through existing agencies and perform subversive operations abroad. The Joint Chiefs of Staff and the Department of State eventually responded to the Donovan proposal.[30] The debate focused on the extent of the new agency's independence, to whom it should report, and its responsibility for clandestine collection of intelligence.

In September 1945, OSS was disbanded amid the struggle over the future shape of American intelligence activities. By an Executive Order dated September 20, 1945, the responsibility for the clandestine

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[25] The FBI was responsible for information collected by overt and covert means in the Western Hemisphere.

[27] See generally R. Harris Smith. *OSS* (Berkeley: University of California Press, 1972).

[28] Memorandum from William Donovan to the President, October 1944, as cited in CIA Legislative History, pp. 12–13.

[30] CIA Legislative History, pp. 14–17.

collection of intelligence was transferred to the War Department, where the Strategic Services Unit (SSU) was established.[31]

Also transferred to SSU were the OSS sections responsible for covert psychological and paramilitary activities. In a significant break with wartime operations, however, these latter sections were to be liquidated, leaving only such assets as were necessary for peacetime intelligence.[32]

In the absence of agreement among his advisers, President Truman directed Admiral Sidney Souers to prepare a plan for the establishment of a central intelligence organization. On January 22, 1946, President Truman issued a Presidential Directive [33] which established the National Intelligence Authority under the direction of the Director of Central Intelligence. The NIA was to include the Secretary of State, the Secretary of War, the Secretary of the Navy, and the personal representative of the President. Under the Directive, the NIA was to be "assisted by" the Central Intelligence Group, a coordinating body which drew funds and personnel from other agencies of the executive. The CIG was to collect, evaluate, and disseminate intelligence relating to the national security, plan for the coordination of intelligence agencies, and perform "such services of common concern" as the National Intelligence Authority determines can be more efficiently accomplished centrally.[34] The CIG was also to perform "such other functions and duties related to intelligence affecting the national security as the President and the National Intelligence Authority may from time to time direct."

Although the House Select Intelligence Committee was told in 1975 that the CIG was assigned the "function of conducting covert action" [35] the former General Counsel of the CIA noted that at the time of the CIG draft directive "there was really . . . no contemplation whatsoever of a program of what might be called covert action." [36] In fact, the CIG does not appear to have been engaged in any covert action abroad.[37] The covert action capability of the government which had been lodged in OSS and then transferred to SSU in the War Department had been, in early 1946, almost totally liquidated.[38] The absence of a covert action program and the decline of the capability

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[31] For the following nine months, until the clandestine intelligence function was transferred to the Central Intelligence Group, SSU was responsible for clandestine intelligence gathering.

[32] Testimony of Lawrence Houston, former CIA General Counsel, 6/17/75, p. 6.

[33] Presidential Directive, 1/26/46; 11 *Fed Reg.* 1337, 2/5/46.

[34] The Presidential Directive made no explicit mention of clandestine collection of intelligence. It has been suggested that this function was omitted solely to avoid mention of intelligence collection in a published document. (See CIA's Legislative History, 7/25/67, p. 19.)

On July 8, 1946, the NIA issued NIA–5 authorizing the CIG to conduct clandestine intelligence collection outside the United States under the authority of the CIG to perform "services of common concern." NIA–5 resulted in the transfer of SSU to the CIG and the establishment within the CIG of the Office of Special Operations (OSO) to conduct espionage abroad.

[35] Rogovin, HSIC Hearings, 12/9/75, p. 1733.

[36] Houston, 6/17/75, p. 7.

[37] See interviews with Arthur Macy Cox and Lawrence Houston on file at the Center for National Security Studies.

[38] Houston, 6/17/75, p. 8.

suggests that a covert action mission for the CIA was not clearly anticipated by either the executive or the Congress.

3. The Enactment of the National Security Act of 1947

Efforts to draft legislation for a central intelligence organization began almost immediately after the Presidential Directive of January 22, 1946. Statutory authorization was required by the Independent Offices Appropriation Act of 1944, which provided that no office could receive funding for more than one year without specific authorization and appropriation by Congress. A June 7, 1946 report to the NIA by Admiral Souers, who drafted the 1946 Presidential Directive and who was the first Director of Central Intelligence, indicated the CIG's need for its own budget and personnel as well as for the authority to make certain kinds of contracts.

Lawrence Houston and John Warner,[39] both then with the CIG, began to work on a draft which would have established an organization far removed from the coordinating group concept of the CIG. The draft included provisions for an independent budget, direct hiring of personnel, and other administrative authorities which would allow the new agency to be autonomous and flexible. The provisions were drawn up after Houston and Warner had analysed the problems encountered by the OSS during the war, and were designed to avoid these difficulties.[40] As Houston noted, there was "no specific [covert action] program" under consideration at that time [41] but the aim of the draft was to "provide the Agency with the maximum flexibility for whatever it would be asked to do." [42]

In January 1947, another drafting group consisting of Clark Clifford, Charles Murphy, Vice Admiral Forest Sherman, and Major General Lauris Norstad, began to consider proposals for an agency to supercede the CIG, this time in the context of a proposal which would unify the Armed Services. On February 26, 1947, President Truman submitted to the Congress a draft entitled, "The National Security Act of 1947." Title 2 of Section 202 provided for a Central Intelligence Agency (CIA), which would report to a National Security Council (NSC). The NSC was to take over the duties of the NIA while the CIA was to have the functions, personnel, property, and records of the CIG.

The section in the draft legislation dealing with the CIA did not spell out, in any detail, its relationship to the rest of the executive branch or its functional responsibilities. As the framers were primarily concerned with the unification of the armed services,[43] the draft legislation, according to a memorandum from General Vandenberg to Clark Clifford, eliminated "any and all controversial material insofar as it referred to central intelligence which might in any way

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[39] Both individuals later served as General Counsel to the CIA. Mr. Houston occupied that post from 1947 until 1974, and Mr. Warner has occupied it since.
[40] Houston, 6/17/75, p. 9.
[41] *Ibid.*, p. 10.
[42] *Ibid.*
[43] CIA's Legislative History, p. 25.

hamper the successful passage of the Act." [44] The legislation incorporated by reference the functions of the CIG as set out in the Presidential Directive of January 22, 1946.[45]

S. 758, the Senate version of the draft legislation was referred to the Armed Services Committee, while H.R. 4214 was referred to the House Committee on Expenditures in the Executive Department. The Senate Committee held hearings for ten weeks, went into executive session on May 20, 1947, and reported out an amended version which was approved by voice vote. The House Committee held hearings from early April until July 1. On July 19, the House approved the amended bill and upon receipt of S. 758, amended it in accordance with the language of H.R. 4214. S. 758 emerged from Conference Committee with the functions of the CIA spelled out rather than incorporated by reference; the bill was approved by the Senate on July 24, 1947, and by the House on July 25, 1947.

There is little in the public record of this process to indicate congressional intent with respect to the CIA's authority to engage in covert action. The records of public hearings and floor debates on the National Security Act, as well as the proceedings of a committee meeting in executive session, support the view that Congress as a whole did not anticipate that the CIA would engage in such activities.

The record is ambiguous, however, in part because the legislators and witnesses were concerned that United States security might be compromised by too full and frank a discussion of American intelligence needs on the floor of Congress. As Representative Manasco stated:

> Many witnesses appeared before our Committee. They were sworn to secrecy. I hesitate to even discuss this section, as I am afraid that I might say something because the *Congressional Record* is a public record, divulge something here that we received in that Committee that would give aid and comfort to any potential enemy we have.[46]

Related to this point is the possibility that ambiguous language was expressly chosen in order not to offend world opinion. The former General Counsel of the CIA recalled that some Members of Congress sought to put in the statutory language the authorization to conduct espionage and counterespionage. But this we defeated, in "light

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[44] Memorandum from General Vandenberg to Clark Clifford, cited in CIA's Legislative History, p. 27.

Administrative provisions for the CIA were omitted from the proposed legislation in order that unification of the armed services would not be stalled and because there was some concern that the drafting of these could not be completed in time. (*Ibid.*, pp. 26, 32.)

According to the CIA's Legislative History, "There was a general feeling that any unnecessary enlargement of the CIA provision would lead to controversy" and would affect the legislative processing of the National Security Act of 1947. (*Ibid.*, p. 32.)

[45] These functions had been expanded by NIA-5 to include the clandestine collection of intelligence.

[46] 93 Cong. Rec. 9605 (1947).

of the argument that they didn't want it advertised that this country was going to engage in such activities." [47]

An additional problem in interpreting the available evidence is that in 1947 no term was clearly understood to mean covert action as the term is used today. Members of Congress and witnesses used terms such as "operational activities," "special operations," or and "direct activities," but these remarks were as likely to have meant clandestine collection of intelligence as covert action. The following exchange between Representative Busbey and Secretary Forrestal in public hearings before the House Committee on Expenditures in the Executive Departments illustrates this problem:

> Mr. BUSBEY. Mr. Secretary, this Central Intelligence Group, as I understand it under the bill, is merely for the purpose of gathering, disseminating, and evaluating information to the National Security Council, is that correct?
>
> Secretary FORRESTAL. That is a general statement of their activity.
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> Mr. BUSBEY. I wonder if there is any foundation in the rumors that have come to me to the effect that through the Central Intelligence Agency, they are contemplating *operational activities?*
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> Secretary FORRESTAL. I would not be able to go into the details of their operations, Mr. Busbey. The major part of what they do, their major function, as you say, is the collection and collation and evaluation of information from Army Intelligence, Navy Intelligence, the Treasury, Department of Commerce, and most other intelligence, really. Most intelligence work is not of a mystical or mysterious character; it is simply the intelligence gathering of available data throughout this Government. . . . As to the nature and extent of any *direct operational activities*, I think I should rather have General Vandenberg respond to that question.[48] [Emphasis added.]

Another example is contained in a letter, printed in the hearing record, from Allen Dulles, then a private citizen but later Director of Central Intelligence, to the Senate Armed Services Committee. Dulles recommended that the CIA have its own appropriations, but be able to supplement these with funds from other agencies, "in order to carry on *special operations* which may, from time to time, be deemed necessary by the President, the Secretary of State, and the Secretary of National Defense." [Emphasis added.] [49]

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[47] Houston, 6/17/75, p. 17. See also, memorandum from the CIA General Counsel to the Director, 5/7/48. In 1974, an individual in the CIA's Office of General Counsel wrote that additional statutory authority for covert action was "unnecessary and in view of the delicate nature of the activities, undesirable," (Memorandum from Stephen Hale to the General Counsel, 2/6/74.)

[48] James Forrestal testimony, House Expenditures in the Executive Departments Committee Hearings on H.R. 2319, 1947, p. 120. There is no record of any later statement by General Vandenberg on the subject.

[49] Letter from Allen Dulles to the Senate Armed Services Committee, Senate Armed Services Committee, Hearings on S. 758, 1947, p. 521.

Finally, Representative Patterson stated during the floor debates that while he clearly wanted "an independent intelligence agency working without direction by our armed services, with full authority in operation procedures," he knew that it was "impossible to incorporate such broad authority in the bill now before us. . . ." [50]

These exhaust the statements in open session—in hearings or on the floor—which arguably deal with covert action—although as was previously noted, they may also be read to refer to clandestine intelligence gathering. There is no clear explanation of or proposal for covert action. No justification for covert action was presented by the Executive.[51] It would be difficult, based upon these statements, to argue that Congress intended to authorize covert action by the CIA.

The legislating committees met extensively in executive session to consider the bill and to discuss the Central Intelligence Agency portions of it. The Select Committee has been able to locate a transcript for only one of these sessions, a June 27, 1947 meeting of the House Committee on Expenditures in the Executive Departments. At that meeting the wisdom of centralizing the clandestine intelligence collection function in the CIA was discussed in some detail. Although the Members and witnesses could put aside the security constraints which might have inhibited them in open session, this record too is ambiguous. It does, however, tend to support the proposition that Congress did not intend to authorize covert action by the CIA.

The CIA has cited two exchanges at this executive session for the proposition that the House Committee on Expenditures "had full knowledge of the broad implications" of the Presidential Directive and understood it to authorize the CIG to engage in covert action. Therefore, according to the CIA, by adopting the National Security Act, which contained the same broad language as the Directive, Congress was authorizing the CIA to conduct covert action.[52]

The first exchange quoted was between Representative Clarence Brown and General Hoyt S. Vanderberg, Director of Central Intelligence. The full context of the remarks which the Agency quoted, however, clearly indicates that the broad language of the 1946 Directive had been read to authorize clandestine collection of intelligence.[53]

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[50] 93 Cong. Rec., H9447 (1947).

[51] "In none of the formal . . . explanations or justifications did we, so far as I can recall, set forth any program for covert action." (Houston, 6/17/75, p. 10.)

[52] Rogovin, HSIC, 12/9/75, p. 1734–35.

[53] The exchange quoted by the CIA's Special Counsel is italicized in the following quote:

"General VANDENBERG. In 'd' of the President's letter (the Presidential Directive of January 22, 1946), which you read, is the following:

'Perform such other functions and duties related to intelligence affecting the national security as the President and the National Intelligence Authority may from time to time direct.'

That was the basis. The Intelligence Advisory Board, which consists of the Chief of the three departmental intelligence organizations, State, War and Navy, in consultation with the Director of Central Intelligence, made an exhaustive study of the best way to centralize, both from the point of view of efficiency of operations and cost, certain phases of the national intelligence.

Continued

The CIA also cited the executive session testimony of Peter Vischer, who opposed the "other functions and duties" clause. He urged its defeat, calling it a loophole "because it enabled the President to direct the CIG to perform almost any operations." [54] The CIA notes this opposition, implies that Vischer opposed the clause as it authorized covert action, and claims congressional authorization for covert action because the clause was included in the National Security Act.[55] The full record shows, however, that Vischer spoke specifically in opposition to centralizing clandestine collection in the CIA. He objected to the "other functions and duties" language as it would authorize such collection.[56] His objection might have alerted the Committee to "broad implications" in the language, but not to its potential as authorization for covert action.

The only clear reference to the activities which are now referred to as covert action took place in the executive session during an exchange between Representative Rich and General Vandenberg. Representative Rich asked, "Is this agency [the CIG] used in anyway as a propaganda agency?" General Vandenberg responded, "No, sir." [57]

Continued

They all felt, together with myself, who was Director at that time, that a very small portion, but a very important portion, of the collection of intelligence should be centralized in one place. Now, the discussion went on within the Intelligence Advisory Board as to where that place should be.

Mr. BROWN. May I interrupt just a moment there? In other words, you proceeded under the theory that this Central Intelligence Agency was authorized to collect this information and not simply to evaluate it?

General VANDENBERG. We went under the assumption that we should inform the National Intelligence Authority, with the setting up of the Central Intelligence Group, on an efficient basis, as was required from us from time to time to advise, because we were the Advisory Board for the National Intelligence Authority; and that part that says that we should "perform such other functions and duties as the President and the National Intelligence Authority may from time to time direct" and "recommend to the National Intelligence Authority the establishment of such overall policies and objectives as will assure the most effective accomplishment of the National Intelligence mission" gave us that right.

Mr. BROWN. Then, you did not consider that the word "evaluate" was a limitation on your duty, but *this other section was so broad that you could do about anything that you decided was either advantageous or beneficial, in your mind?*

General VANDENBERG. *Yes, sir.*

Mr. BROWN. *In other words, if you decided you wanted to go into direct activities of any nature, almost, why, that would be done?*

General VANDENBERG. *Within the Foreign Intelligence field, if it was agreed upon by all the three agencies concerned.*

Mr. BROWN. And that you were not limited to evaluation?

General VANDENBERG. That is right, sir.

(Transcript, House Committee on Expenditures in the Executive Department, Hearings on H.R. 2319, 6/27/47, pp. 9–11.)

Walter Pforzheimer has told one interviewer that General Vandenberg testified in the executive session about intelligence collection because Army Intelligence opposed any intelligence gathering by the CIA. Covert action, according to Pforzheimer, was not mentioned. Interview on file at the Center for National Security Studies.

In addition, as was noted earlier, there is no evidence that the Central Intelligence Group did engage in covert action.

[54] Rogovin, HSIC, 12/9/75, p. 1735.

[55] *Ibid.*

[56] Transcript, House Committee on Expenditures in the Executive Departments, Hearings on H.R. 2319, 6/27/47, p. 37.

[57] *Ibid.*, p. 37.

These statements and the discussions in the executive session about the CIA's role in clandestine intelligence gathering suggest that the ambiguous references in the public hearings referred to clandestine collection operations.

Because the Select Committee has been unable to locate transcripts of the other executive sessions, it is impossible to state conclusively that covert action was not explicitly mentioned during these meetings. However, none of the participants queried recalled any such discussions and none of the committee reports contain any references to covert action.

A memorandum by the CIA's General Counsel, written soon after the passage of the Act, noted that "We do not believe that there was any thought in the minds of Congress that the Central Intelligence Agency, under this authority, would take positive action for subversion and sabotage." In that September 25, 1947 memorandum to the Director, the General Counsel wrote:

> A review of debates indicates that Congress was primarily interested in an agency for coordinating intelligence and originally did not propose any overseas collection activities for CIA. The strong move to provide specifically for such collection overseas was defeated, and, as a compromise, Sections 102(d)(4) and (5) were enacted, which permitted the National Security Council to determine the extent of the collection work to be performed by CIA. We do not believe that there was any thought in the minds of Congress that the Central Intelligence Agency under this authority would take positive action for subversion and sabotage. A bitter debate at about the same time on the State Department's foreign broadcast service tends to confirm our opinion. Further confirmation is found in the brief and off-the-record hearings on appropriations for CIA. . . . It is our conclusion, therefore, that neither M.O. [morale operations] nor S.O. [special operations] should be undertaken by CIA without previously informing Congress and obtaining its approval of the functions and the expenditure of funds for those purposes.[58]

All of this is not to suggest that Congress or any Members of Congress specifically intended that covert action should be excluded from the authorized missions of the CIA. The issue of covert action simply was not raised in the course of the legislation's enactment. As the CIA's former General Counsel told the Senate Select Committee, there is "no specific legislative history supporting covert action as part of the functions assigned" to the CIA.[59] Rather than authorizing covert action, the broad language of 102(d)(5) appears to have

[58] Memorandum from the CIA General Counsel to the Director, 9/25/47.
This memo may have been the result of an inquiry by Admiral Hillenkoetter, who had been asked by Secretary Forrestal if the CIA would be able to conduct covert and cold war activities such as black propaganda and sabotage in support of guerrilla warfare. Admiral Hillenkoetter, who had doubts about the CIA's authority to undertake such activities, asked his General Counsel for his opinion. (Houston, 6/17/75, p. 13–15.)

[59] Houston, 6/17/75, p. 10.

been intended to authorize clandestine collection of intelligence [60] and to provide the CIA with the "maximum flexibility" [61] necessary to deal with problems which, due to America's inexperience with a peacetime intelligence agency, might not be foreseen.

D. Post Enactment History

As previously noted, the executive branch presented no justification to the Congress for the conduct of covert action by the CIA. Yet even while the National Security Act of 1947 was being drafted, introduced, debated, and passed the Coordinating Committee of the Departments of State, War, and the Navy (SWNCC) prepared a paper establishing procedures for psychological warfare during peacetime as well as wartime. On April 30, 1947, SWNCC established a Subcommittee on Psychological Warfare to plan and execute psychological war.

These plans took on new importance as the United States became concerned over the course of events in Western Europe and the Near East. Tension soon became so high that in December of 1947, the Department of State advised the NSC that covert operations mounted by the Soviet Union and her allies threatened the defeat of American foreign policy objectives. The Department recommended that the U.S. supplement its own foreign policy activity with covert action.

At its first meeting in December, 1947, the National Security Council approved NSC–4, which empowered the Secretary of State to coordinate information activities designed to counter communism. A top secret annex took cognizance of the "vicious psychological efforts of the USSR, its satellite countries, and Communist groups to discredit and defeat the activities of the U.S. and other Western powers." The NSC determined that "in the interests of world peace and U.S. national security the foreign information activities of the U.S. government must be supplemented by covert psychological operations."

The CIA was already engaged in clandestine collection of intelligence and, as the NSC put it, "The similarity of operational methods involved in covert psychological and intelligence activities and the need to ensure their secrecy and obviate costly duplication renders the CIA the logical agency to conduct such operations." Therefore, acting under the authority of section 102(d)(5) of the National Security Act of 1947, the NSC instructed the Director of Central Intelligence to initiate and conduct covert psychological operations that would counteract Soviet and Soviet-inspired covert actions and which would be consistent with U.S. foreign policy and overt foreign information activities.[62]

In the following months the CIA was involved in a number of covert actions. As the Soviet threat loomed larger and larger, the need for covert action, beyond psychological operations, seemed more pressing. On June 18, 1948, the NSC issued NSC–10/2 which superseded NSC–4–A, and vastly expanded the range of covert activities. The CIA was

[60] Memorandum from the CIA General Counsel to the Director, 5/7/48.
[61] Houston, 6/17/75, p. 10.
[62] Pursuant to the NSC's instruction, the Special Procedures Group was established in the Office of Special Operations (OSO) of the CIA to conduct covert psychological operations.

authorized to undertake economic warfare, sabotage, subversion against hostile states (including assistance to guerrilla and refugee liberation groups), and support of indigenous anti-communist elements in threatened countries.

The NSC noted that CIA was already charged with espionage and counterespionage abroad.[63] Because of this, according to the NSC, it was "desirable" for "operational reasons" to assign covert action authority to the CIA rather than to create a new unit. Therefore, under the authority of 50 U.S.C 403(d)(5), the NSC ordered the establishment in CIA of the Office of Special Projects (OSP), to conduct covert action. The Chief of OSP was to receive policy guidance from the Secretary of State and the Secretary of Defense. OSP (later, OPC) was to operate independently of all components of the CIA to the maximum degree consistent with efficiency.[64]

Thus even though the CIA's General Counsel could find no authority in the legislative history of the National Security Act, the NSC relied upon the Act to direct the CIA to initiate covert actions. Language intended to authorize clandestine intelligence gathering and to provide flexibility for unforeseen circumstances was broadened by the executive to cover sabotage, subversion and paramilitary activities. The executive branch did not heed the advice offered by the CIA's General Counsel in 1947 that congressional authorization was still "necessary." [65] This may well have been due to a belief in the power of the President to direct such activities.[66]

It is impossible to prove conclusively that Congress intended or did not intend to authorize covert action by the CIA through the passage of the National Security Act of 1947. It is possible, however, after reviewing the hearings, committee reports, and floor debates, to say that there is no substantial evidence supporting the existence of Congressional intent to authorize covert action by the CIA through the enactment of the National Security Act.

This conclusion is supported by the following:

(1) The absence of any explicit provision in the Act itself.

(2) The absence of any reference to covert action in the committee reports.

(3) The absence of any clear statement by a Member of Congress, in the hearings or debates, which demonstrates the intent to authorize covert action.

(4) The absence of any reference to a program of covert action in the justifications and explanations by the executive branch of the Act.

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[63] The CIA had also been charged with conducting covert psychological operations under the authority of NSC 4–A.

[64] Both NSC–4–A and NSC 10/2 cited 50 U.S.C. (d)(5); neither invoked the President's authority, if any, to order covert action in the absence of congressional authorization.

[65] Memorandum from the CIA General Counsel to the Director, 9/25/47, p. 2.

[66] The General Counsel of the CIA noted his belief that "if [the CIA got] the proper directive from the executive branch and the funds from the Congress to carry out that directive, these two together are the true authorization." (Memorandum from the General Counsel of the CIA to the Director, 10/30/69, at p. 2.)

(5) The absence of any discussion in the hearings or debates of the threats which would suggest the need for a covert action capability.

(6) The conclusion of the CIA's General Counsel, immediately following the Act's passage, that the CIA lacked statutory authority for covert action and that sections (d) (4) and (5) were intended by Congress to authorize clandestine intelligence gathering by the CIA.

B. The CIA Act of 1949

Passage of the CIA Act of 1949 has also been cited as support for the view that Congress has authorized covert action by the CIA. A careful analysis of the Act's legislative history does not support this view.

Two years after the enactment of the National Security Act and after the NSC had directed the CIA to engage in various covert activities, Congress passed the Central Intelligence Agency Act of 1949.[68] The 1949 legislation was an enabling act containing administrative provisions necessary for the conduct of the Agency's mission.[69] As such, it did not add to the missions of the Agency. The events surrounding its passage, however, may shed light upon what Congress believed it had authorized in the National Security Act of 1947.

The Act included a number of administrative provisions which clearly were designed to assure the security of some sort of clandestine activity by the CIA. These included the waiver of normal restrictions placed on governmental acquisition of materiel, hiring and, perhaps more important, accounting for funds expended. The General Counsel of the Central Intelligence Agency wrote that:

> Provision of unvouchered funds and the inviolatability of such funds from outside inspection is the heart and soul of covert operation.[70]

The Central Intelligence Agency has argued that passage of the Central Intelligence Agency Act of 1949 "clearly reflects Congress' determination that the Agency be able to conduct activities such as covert action, similar to those conducted by the OSS."[71] Although members of the House Armed Services Committees were aware that the Central Intelligence Agency was conducting covert operations and that the administrative provisions would be "essential to the flexibility

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[68] 50 U.S.C. 403a–403j.

[69] The administrative provisions had been included in a draft of the National Security Act of 1947 shown to Members of the House of Representatives. In order to avoid having to detail administrative provisions for all of the organizations set up under the National Security Act, these provisions were removed from the draft to be presented later as a separate act.

[70] Memorandum from the CIA General Counsel to the Director, 5/25/49, p. 2.

[71] Rogovin, HSIC, 12/9/75, p. 1735.

and security" [72] of these operations, there is no evidence that Congress as a whole knew the range of clandestine activities, including covert action, which was being undertaken by the CIA. The committee reports on the Central Intelligence Agency Act include no reference to covert action. The floor debates contain only one reference to covert action, and strongly suggest that the Congress knew only that clandestine intelligence gathering was going on.

In addition, the provisions of the 1949 Act are not uniquely designed to facilitate covert action. They would serve the needs of an organization performing espionage equally well; Members of Congress, in fact, described the Act as an "espionage bill." [73] Thus even a careful reader of the Act would not infer from its provisions that the Agency was conducting covert action.

Given these facts, it is difficult to find in the Act's passage congressional intent to authorize covert action or a congressional belief that the National Security Act of 1947 had authorized it.

The bill which was to become the Central Intelligence Agency Act of 1949 was first introduced in Congress in 1948. The Director of Central Intelligence appeared before the House Armed Services Committee on April 8, 1948, to discuss the bill. The Director noted:

> It was thought when we started back in 1946, that at least we would have time to develop this mature service over a period of years—after all, the British, who possess the finest intelligence in the world, have been developing their system since the time of Queen Elizabeth. Unfortunately, the international situation has not allowed us the breathing space we might have liked, and so, as we present this bill, we find our-

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[72] The CIA General Counsel described the provisions of the Central Intelligence Agency Act of 1949 as follows:

"Administrative authorities of the Agency are contained in the Central Intelligence Agency Act of 1949, as amended. This has provided us with all the authorities and exemptions needed to carry out the wide variety of functions assigned to the Agency during the past twenty years. It enables us to have an effective and a flexible personnel program, ranging from the normal desk officer in headquarters to persons in a relationship so remote that they do not know they are working for the Agency. It enables us to exercise all the techniques required for clandestine activities, from traditional agent operations through proprietary and other more sophisticated types of machinery. It has enabled us to undertake major unforeseen projects, such as the U–2 operation.

"Two provisions of the Act are particularly important. The unique authority in Section 5 to transfer to and receive from other government agencies sums as may be approved by the Bureau of the Budget. This has given us great flexibility and security in our funding. The other, Section 8, with its wide authority for utilization of sums made available to the Agency, particularly subsection (b) thereof which allows us to make any expenditures required for confidential, extraordinary, or emergency purposes, and these expenditures will be accounted for solely on the certificate of the Director. This has been essential to the flexibility and security of our covert activities." (Memorandum from the CIA General Counsel to the Deputy Director for National Intelligence Programs Evaluation 10/9/68, p. 3.)

[73] 95 Cong Rec. 1946 (1949).

selves in operations up to our necks, and we need the authorities contained herein as a matter of urgency.[74]

It is clear that the operations that the Director referred to were understood by the executive branch to include covert action. In describing the provision of the bill which would eliminate the normal government advertising requirements, the Director stated that there were urgent requests from overseas which required immediate operational response. As an example, he provided: "Any possible action in connection with the Italian election." [75] In later remarks on the same section,[76] the Director cited the need to avoid advertising for contracts for the production of certain materiél, listing among his examples explosives and silencers.[77] Such materiél was clearly not for the purposes of clandestine intelligence gathering and reporting.

In his 100-page statement, the Director also explained the provision for unvouchered funds, the provision which the General Counsel of the Central Intelligence Agency described as the "heart and soul of covert operations." The Director stated:

> In view of the nature of the work which must be conducted by the CIA under the National Security Act and applicable directives of the National Security Council, it is necessary to use funds for various covert or semi-covert operations and other purposes where it is either impossible to conform with existing government procedures and regulations or conformance therewith would materially injure the national security. It is not practicable, and in some cases impossible, from either a record or security viewpoint to maintain the information and data which would be required under usual government procedures and regulations. In many instances, it is necessary to make specific payments or reimbursements on a project basis where the background information is of such a sensitive nature from a security viewpoint that only a general certificate, signed by the Director of CIA, should be processed through even restricted channels. To do otherwise would obviously increase the possibilities of penetration with respect to any specific activity or general project. The nature of the activities of CIA are such that items of this nature are recurring and, while in some instances the confidential or secret aspects as such may not be of primary importance, the extraordinary situations or the exigencies of the particular transaction involved warrant the avoidance of all normal channels and procedures.[78]

On the basis of this presentation, it can be concluded that at least the House Armed Services Committee, one of the committees which had jurisdiction over the CIA, knew that the CIA was conducting or would in the future conduct covert action. The Committee also knew that

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[74] Statement of Adm. Roscoe Hillenkoetter, Director of Central Intelligence, House Armed Services Committee, 4/8/48, pp. 6–7 (statement on file at the CIA).

[75] *Ibid.*, p. 21.

[76] Sect. 3(s) of H.R. 5871, 80th Cong., 2d Session.

[77] Hillenkoetter, 4/8/48, p. 27. These examples were drawn by the Director from the history of the OSS.

[78] *Ibid.* pp. 111–113.

the administrative provisions would enhance the Agency's covert action capability.[79]

The evidence, however, is not entirely clear. While the present day reader may interpret "covert or semicovert operations" to mean covert action, the Members had had little exposure to these terms. Covert or semicovert operations could easily have been interpreted to mean clandestine intelligence gathering operations; the CIA's role in clandestine intelligence gathering had been discussed in a hearing before the same committee,[80] as well as in the press.[81]

Even if it were assumed, moreover, that the House and Senate Armed Services Committees fully understood that the CIA was engaging in covert action, there is no evidence that the Congress as a whole knew that the CIA was engaged in covert action or that the administrative provisions were intended to facilitate it. The hearings on the CIA Act of 1949 were held almost entirely in executive session. The committee reports on the Act did not mention covert action at all. They were bland and uninformative—the provision to provide the secret funding of the CIA through transfers from appropriations to other government agencies was described as providing "for the annual financing of Agency operations without impairing security." [82] They were strikingly incomplete. As the House Armed Services Committee report itself noted, the report:

> does not contain a full and detailed explanation of all of the provisions of the proposed legislation in view of the fact that much of such information is of a highly confidential nature.[83]

The floor debates contain only one indication that covert action, as opposed to clandestine intelligence gathering, was being, or would be undertaken by the CIA.[84] The debates strongly suggest that rather than approving covert action by the CIA, Congress was attempting to facilitate clandestine intelligence gathering by the Agency.

Prior to the passage of the Act there had been discussion in the press of CIA involvement in clandestine intelligence gathering. Clandestine intelligence gathering was mentioned on the floor; as noted previously, Members referred to the CIA Act of 1949 as an "espionage bill." [85] Senator Tydings, the Chairman of the Senate Armed Services Committee, stated, "The bill does not provide for new activity, but what it does particularly is to seek to safeguard information procured by

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[79] It is quite likely that the Senate Armed Services Committee was presented with a similar statement from the Director, although the Senate Select Committee has been unable to locate any transcripts of executive sessions held by the Senate Armed Services Committee.

[80] Testimony of Gen. Hoyt S. Vandenberg before House Armed Services Committee Hearing on H.R. 5871, 4/8/48 (statement on file at the CIA).

[81] "The X at Bogatá," *The Washington Post*, 4/13/48; Hanson W. Baldwin, "Intelligence—II," *The New York Times*, 7/22/48.

[82] S. Rep. No. 725, 81st Cong., 1st Sess. 4 (1949).

[83] H. Rep. No. 160, 91st Cong., 1st Sess. 6 (1949). See also 95 Cong. Rec. 1946 (1949), remarks of Rep. Marcantonio.

[84] It was remarked in the House debates, in the context of a discussion of intelligence gathering that "in spite of all our wealth and power and might we have been extremely weak in psychological warfare, notwithstanding the fact that an idea is perhaps the most powerful weapon on this earth." (95 Cong. Rec. 1047 (1949).)

[85] 95 Cong. Rec., 1946 (1949).

agents of the government so that it will not fall into the hands of enemy countries or potential enemy countries who would use the information to discover who the agents were and kill them." [86] Thus there is ample evidence to suggest that the full legislature knew that the functions of the CIA included espionage; but there is no evidence to suggest that more than a few Members of Congress knew that the CIA was engaged in covert action. Without such knowledge Congress could hardly be said to have authorized it.[87]

Another factor undercutting the theory that passage of the CIA Act constituted congressional authorization for covert action is that the argument confuses implementing authority with statutory authority. Congress had set out the CIA's statutory authority in the National Security Act of 1947. The CIA Act of 1949 did not provide any additional non-administrative or non-fiscal powers to the CIA.[88] It simply provided the means for the CIA to implement the authorities already granted it.

C. The Provision of Funds to the CIA by Congress

There is no evidence that Congress intended, by the passage of the National Security Act of 1947, to authorize covert action by the CIA. Passage of the Central Intelligence Agency Act of 1949 did not add the covert action mission to those already authorized by the National Security Act. Nevertheless, the National Security Council had in 1947 directed the CIA to engage in covert activities; by the early 1950s the Central Intelligence Agency was involved in covert action around the world.

In 1962 the General Counsel summarized the early developments in the CIA's undertaking of covert action: [91]

> The National Security Council did develop a Directive (NSC 10/2) setting forth a program of covert cold-war activities and assigned it to the Office of Policy Coordination under the Director of Central Intelligence with policy guidance from the Department of State. The Congress was asked for and did appropriate funds to support this program, although, of course, only a small number of Congressmen in the Ap-

[86] 95 Cong. Rec. 6955 (1949). This quote, indicating Chairman Tydings' interpretation of the Act, seems to undercut the argument that he and the Senate Armed Services Committee understood that the CIA was conducting covert action and that the provisions of the CIA Act of 1949 were designed to facilitate this.

[87] Without such knowledge a Member reading the Act would not be likely to infer that it was designed to facilitate covert action. As the provisions of the Act were not uniquely designed for covert action but were equally applicable to clandestine intelligence gathering, an activity which Congress knew about and approved, Members would be unlikely to realize from reading the Act that the CIA conducted covert action.

[88] S. Rep. No. 106, 81st Cong., 1st Sess. 1 (1949).

[91] In a September 25, 1947 memorandum to the Director, the General Counsel advised that no covert action "should be undertaken by CIA without previously informing Congress and obtaining its approval of the functions and expenditure of funds for those purposes." He further noted that even if the NSC were to assign the covert action function to the CIA it would still be necessary for the CIA to "go to Congress for authority and funds." (Memorandum from the CIA General Counsel to the Director, 9/25/47).

propriations Committees knew the amount and purpose of the appropriations.[92]

The Office of Legislative Counsel of the Department of Justice argued in 1962 that this provision of funds for covert action, even though known only to a few members of Congress, constituted congressional ratification of the CIA's conduct of covert action.

> Congress has continued over the years since 1947 to appropriate funds for the conduct of such covert activities. We understand that the existence of such covert activities has been reported on a number of occasions to the leadership of both houses, and to members of the subcommittees of the Armed Services and Appropriations Committees of both houses. It can be said that Congress as a whole knows that money is appropriated to CIA and knows generally that a portion of it goes for clandestine activities, although knowledge of specific activities is restricted to the group specified above and occasional other members of Congress briefed for specific purposes. In effect, therefore, CIA has for many years had general funds approval from the Congress to carry on covert cold-war activities, which the Executive Branch has the authority and responsibility to direct.
>
> It is well-established that appropriations for administrative action of which Congress has been informed amount to a ratification of or acquiescence in such action. *Brooks* v. *Dewar*, 313 U.S. 354, 361; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116; see also *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293–294; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 409. Since the circumstances effectively prevent the Congress from making an express and detailed appropriation for the activities of the CIA, the general knowledge of the Congress, and specific knowledge of responsible committee members, outlined above, are sufficient to render this principle applicable. [Citations omitted.][93]

And in December 1975 the House Select Committee on Intelligence was told by the CIA that given "CIA reporting of its covert action programs to Congress, and congressional appropriation of funds for such programs" the "law is clear that, under these circumstances,

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[92] Memorandum from the CIA General Counsel to the Director, 1/15/62, p. 2.

[93] Memorandum re: "Constitutional and Legal Basis for So-Called Covert Activities of the Central Intelligence Agency," prepared by the Office of Legislative Counsel, Department of Justice, 1/17/62, pp. 12–13.

The Office of Legislative Counsel apparently placed considerable weight on the knowledge of the subcommittee members of the committees having jurisdiction over the CIA (*Ibid.*, p. 12 n. 4) and implied "close contact" between the CIA and "its committees," (*Ibid.*, p. 13 n. 5) For example, the memorandum cited a letter dated May 2, 1957, from Mr. Allen W. Dulles, Director, CIA, to Sen. Hennings, in *Freedom of Information and Secrecy in Government*, Hearing before the Subcommittee on Constitutional Rights of the Senate Committee of the Judiciary, 85th Cong., 2d Sess., pp. 376, 377:

"The Director of the Central Intelligence Agency appears regularly before established subcommittees of the Armed Services and Appropriations Committees of the Senate and of the House, and makes available to these subcommittees complete information on Agency activities, personnel and expenditures. No information has ever been denied to their subcommittees."

Congress has effectively ratified the authority of the CIA to plan and conduct covert action under the direction of the President and the National Security Council." [95]

In order to analyze the claim that congressional provision of funds to the CIA constitutes congressional ratification of the CIA's authority to conduct covert action, the general question of congressional ratification by appropriation must be examined. The general rule has been stated as follows: "Ratification by appropriation is not favored and will not be accepted where prior knowledge of the specific disputed action cannot be demonstrated clearly."[96] In the same opinion the Court noted that:

> ratification by appropriation, no less than ratification by acquiescence, requires affirmative evidence that Congress actually knew of the administrative policy. . . . Moreover, to constitute ratification, an appropriation must plainly show a purpose to bestow the precise authority which is claimed." [Citations omitted.]

Appropriations do not convey authority or ratify agency acts without proof that Congress knew what the agency was doing. For instance, in *Green* v. *McElroy*, 360 U.S. 474, the Supreme Court held that an appropriation to the Department of Defense for its security program did not constitute ratification of a procedure which denied the right of an individual to confront the witnesses against him. On the other hand, if appropriations are enacted after objections have been made to the appropriations committees that no legal authority exists to carry out a particular project, congressional acknowledgement or ratification of the authority to perform the specified act can be inferred.[97]

In sum, general appropriations for an agency cannot be deemed to be ratification of a specific activity of that agency in the absence of congressional knowledge of the specific activity and congressional intent that the specific activity be funded from the general appropriation.[98]

The argument that through the provision of funds to the CIA Congress has effectively ratified the authority of the CIA to conduct covert action rests on the assumption that since the founding of the Agency, Congress has known that CIA was engaged in covert action and has provided funds to the CIA with the knowledge and intent that some of the funds would be used for covert action.

The CIA's conduct of covert action was not known by Congress as a whole during the early years of the CIA. In the interest of security, few Members were informed about covert actions—a situation which

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[95] Rogovin, HSIC, 12/9/75, p. 1736.

[96] *D.C. Federation of Civic Associations* v. *Airis*, 391 F.2d 478, 482 (D.C. Circ. 1968).

[97] *United States ex rel Tennessee Valley Authority* v. *Two Tracts of Land*, 456 F.2d 264 (6th Cir. 1972). Appropriations for the Vietnam War, in combination with other congressional actions, were held by most courts to constitute congressional authorization for the war. See e.g., *Berk* v. *Laird*, 317 F. Supp. 715 (E.D. N.Y. 1970). *But see, Mitchell* v. *Laird*, 488 F. 2d 611 (D.C. Cir. 1973).

[98] *Thompson* v. *Clifford*, 408 F.2d 154 (D.C. Cir. 1968); Sutherland, *Statutory Construction* (Sands ed. 1974) sec. 49.10.

continued until Congress mandated disclosure to six congressional committees of CIA activities not intended solely for intelligence gathering.[99] Even prior to this mandate, many Members of Congress not briefed on covert action by the executive branch probably knew that the CIA had engaged in covert actions such as the Bay of Pigs; this knowledge was not official being based neither on declarations of official U.S. policy nor on briefings of the Congress as a whole, but rather on information gained from other sources.[100] One of the reasons offered for the 1974 Amendment to the Foreign Assistance Act was that it would ensure that Congress would have sufficient information about covert action to determine if such activities should continue.[101]

It is difficult to fix a point in time in the past when it could be said with assurance that Congress as a whole "clearly" had the knowledge of covert action required for congressional ratification.[102] Congress certainly has that knowledge today.

The first requirement, congressional knowledge of covert action by the CIA, is, at least now, met. In the future appropriation to the CIA without any provision prohibiting the use of funds for covert action would ratify the CIA's authority. But did the provision of funds to the CIA in the past, or will the provision of funds in the future under present arrangements constitute "appropriations" which "plainly show a purpose to bestow the precise authority which is claimed"?

The answer would be a clear yes if the funding had been or were to be by open appropriations to the CIA. The answer would be yes if Congress as a whole had voted the appropriations to the CIA in executive session. This has not been the case.

The funds provided to the CIA are concealed in appropriations made to other agencies. They are then transferred to the CIA, pursuant to the provisions of the CIA Act of 1949,[103] with the approval of

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[99] 22 U.S.C. 2422.

[100] Under the system of plausible denial the U.S. Government would not officially confirm that it engaged in covert action and would seek to avoid acknowledging a U.S. Government role in any particular covert action. Therefore, the knowledge imputed to Members of Congress not officially briefed on the CIA's covert actions would have to be based on other sources.

[101] Cong. Rec., S18065, daily ed., 10/2/74 (remarks of Senators Baker and Symington).

[102] It might be argued that Congress chose to limit knowledge of covert action to selected Members and that *their* knowledge, combined with that congressional decision, would be sufficient. J. Edwin Dietel, of the Office of General Counsel of the CIA, in a 11/20/73 memorandum for the record, in fact wrote: "We would also note that, while the specific activities that the Agency's appropriations are used for is limited to only a few Members of Congress, the whole Congress chose to adopt that procedure for reviewing the Agency's activities and appropriations."

First, it must be noted that until Congress "knew" about covert action, Congress could not delegate to a small group of Members the responsibility for overseeing it. When Congress reached that point of knowledge—and as noted it is impossible to say when that was—it arguably could delegate although there may be limits to that delegation.

Given the presumption against ratification by appropriation, the difficulty in fixing a time when Congress "knew," as well as the small number of knowledgeable Members, and the question of whether Congress could delegate to these Members the congressional knowledge required for ratification, it cannot be concluded that the knowledge of these few Members met the test cited for ratification by appropriation.

[103] 50 U.S.C. 403 f.

the OMB and selected members of the Appropriations Committee. Congress, as a whole, never specifically votes on funds for the CIA. Congress, as a whole, does not know how much money the CIA will receive in a given year.[104] This secret funding undercuts the argument that the Congress has notified the CIA's conduct of covert action by knowingly appropriating funds to be used for covert action. In fact, there is some doubt that the CIA is even "appropriated" funds pursuant to the constitutional requireemnt.[105]

Even if the provision of funds is constitutionally valid, in the absence of a vote by Congress on the funding, it can hardly be said to "plainly" demonstrate a congressional intent to ratify the CIA's authority to conduct covert action.

The CIA ignored the questionable nature of Congress' knowledge of covert action and the secret funding of the CIA in claiming that "the law is clear that, under these circumstances, Congress has effectively ratified the authority of the CIA to plan and conduct covert action under the direction of the President and the National Security Council." [106] In support of its position, the Central Intelligence Agency cited what was described as "the leading case on this point," *Brooks* v. *Dewar*, 313 U.S. 354 (1941). According to the Central Intelligence Agency, "the Brooks case requires the conclusion that Congress has ratified the CIA's authority to plan and conduct covert action." [107]

Brooks involved a challenge to a licensing scheme established by the Secretary of the Interior under a statute providing him with broad responsibility for the administration of livestock grazing districts. Although the act in question did not explicitly authorize him to require persons wishing to utilize the land to purchase licenses, the Court found congressional ratification of his actions. The Court, in upholding the Secretary's argument that Congress had ratified his action wrote, "The information in the possession of Congress was plentiful and from various sources." [108] The Court cited annual reports of the

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[104] For a fuller discussion of the funding of the CIA, see Chap. XVI, p. 367.

[105] Article I, Sec. 9, Clause 7 of the Constitution provides that "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." Appropriations are, by definition, specific amounts of money set aside for designated purposes [*Geddes* v. *United States*, 39 Ct. Claims, 428. 444 (1903)] It is not required to particularize each item in order for an appropriation to be valid [*United States* v. *State Bridge Commission*, 109 F. Supp. 690 (E. D. Mich. 1953)] but the appropriation must be sufficiently identifiable to make clear the intent of Congress. [*Ibid.*] As Congress votes on appropriations for other agencies from which CIA funds are secretly transferred rather than setting aside a specific sum of money for the CIA for a specific purpose, it can be argued that there is no constitutionally valid appropriation to the Agency. If the public accounting required by Article 1, Sec. 9, Clause 7 is a necessary condition for a constitutionally valid appropriation, it would be even harder to argue the validity of the present funding scheme as the statement published pursuant to the constitutional requirements do not reflect receipts and expenditures of the CIA.

The argument might be made that congressional establishment of the transfer provisions of the CIA Act of 1949 manifested a congressional purpose to authorize the CIA to conduct covert action. However, nothing in the debates supports this argument. Moreover, the transfer provision was equally applicable to any clandestine activity, including the clandestine collection of intelligence.

[106] Rogovin, HSIC, Hearings, 12/9/75, p. 1736.

[107] *Ibid.*

[108] 313 U.S. at 360.

Secretary, testimony at Appropriation Committee hearings, and statements on the floor of Congress. The Court found that the "repeated appropriations of the fees thus covered and to be covered into the Treasury . . . constitutes a ratification of the action. . ." [109]

Given the special treatment of the CIA, the relevance of *Brooks* seems questionable. "Plentiful" information is not available. No annual reports are issued by the Director of Central Intelligence. Until recently there have been few open hearings or floor debates on the activities of the CIA. Congress as a whole has never voted on appropriations for the CIA, nor designated funds for covert action.

Brooks and several other cases are also cited by a Justice Department memorandum written in 1962 and presented to the House Select Committee on Intelligence in 1975. The memorandum argues that:

> Since the circumstances effectively prevent the Congress from making an express and detailed appropriation for the activities of the CIA, the general knowledge of the Congress, and specific knowledge of responsible committee members . . . are sufficient to render this principal [ratification] applicable.[110]

Given the presumption against ratification by appropriation, the small number of knowledgeable Members, the uncertainty as to whether congressional knowledge required for ratification could be imputed from the knowledge of these few Members, and the question of whether a congressional appropriation can be imputed from the approval of secret transfers of funds to the CIA by subcommittees of the House and Senate Appropriations Committees, there is substantial doubt as to the validity of this position.

As was previously noted, the actual state of congressional knowledge about covert action prior to the 1970s is unclear. Congress, however, now knows that the CIA conducts covert action. Congress also knows that the Executive claims Congress has authorized the Agency to do so.[111] Finally, Congress knows that the CIA receives its funds through secret transfers of funds appropriated to the Department of Defense [112] and that some of the transferred funds are used to finance cover action. In the future the failure by Congress to prohibit funds from being used for covert action by the CIA would clearly constitute congressional ratification of the CIA's authority, eliminating any ambiguity.[113]

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[109] *Ibid.*

[110] Rogovin, HSIC, 12/9/75, p. 1736.

[111] Congressional acquiescence, with notice, of long-standing executive policy, creates a presumption in favor of that policy's validity (*United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915). See also, *Sibach* v. *Wilson & Co.*, 312 U.S. 1 (1941).]

[112] Cong. Rec., H9359–76, daily ed., 10/1/75.

[113] Congress clearly has the authority to attach conditions to the use of the funds appropriated by it. [*Ohio* v. *United States Civil Service Commission*, 65 F. Supp. 776 (S.D. Ohio 1946); *Spalding* v. *Douglas Aircraft Co.*, 60 F. Supp. 985, 988 (1945) *aff'd* 154 F. 2d 419 (9th Cir. 1946).]

Such ratification, however, like ratification by acquiescense,[114] would would still be disfavored.[115] As the Supreme Court has cautioned, "it is at best treacherous to find in congressional silence alone the adopting of a controlling rule of law." [116] It would seem that important activities of the United States Government deserve direct and specific authorization from Congress.

D. The Holtzman and Abourezk Amendment of 1974

In 1974 Congress directly addressed the issue of the Central Intelligence Agency's conduct of covert action. In September, the House of Representatives defeated an amendment which would have forbidden the Central Intelligence Agency to spend funds "for the purpose of undermining or destabilizing the government of any foreign country." In October, the Senate defeated an amendment to the Foreign Assistance Act of 1974, which would have forbidden any agency of the United States Government to carry out "any activity within any foreign country which violates or is intended to encourage the violation of, the laws of the United States or of such countries," except for activities "necessary" to the security of the United States and intended "solely" to gather intelligence.

While both amendments would have limited the ability of the Central Intelligence Agency to conduct covert action, the failure of Congress to adopt them does not clearly constitute congressional ratification of the CIA's authority to conduct covert action.[117] Neither dealt with covert action in general. Strong opposition to even their consideration prior to hearings and committee reports was voiced. The amendments, however, did signal an increasing congressional concern over covert action and marked the beginning of attempts by Congress as a whole to regulate and obtain information on covert action.

In September 1974, Representative Holtzman proposed a joint resolution which would have amended the Supplemental Defense Appropriations Act as follows:

> After September 30, 1974, none of the funds appropriated under this joint resolution may be expended by the Central Intelligence Agency for the purpose of undermining or destabilizing the government of any foreign country.

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[114] The theory that congressional acquiescence constitutes ratification that can be easily stretched. J. Edwin Dietel, Assitant General Counsel of the Agency, wrote a memorandum for the record dated May 7, 1974. In it he described a question submitted by Senator Proxmire to Director Colby during Mr. Colby's nomination hearing which concerned the Agency's secret financing of political parties. Mr. Dietel wrote that in a classified response Mr. Colby stated that the CIA has, over the last twenty-five years of its existence, provided secret financial assistance to political parties in a number of foreign countries. "As there have been no reverberations from this statement, there is, at least, tacit approval for this type of activity."

[115] *Thomas* v. *Clifford*, 408 F. 2d 134, 166, (D.C. Cir. 1968). See also, Norman Dorsen testimony, House Select Intelligence Committee, Hearings, 12/9/75, p. 1741.

[116] *Girouard* v. *United States*, 328 U.W. 61. 69 (1946).

[117] For a contrary view See Rogovin, HSIC, 12/9/75, pp. 1736–1737.

Ms. Holtzman introduced the amendment in response to revelations about the efforts of the CIA to "destabilize and undermine the government in Chile" and as a "beginning" in "restoring congressional prerogatives over the activities of the Government of this country." [118] Ms. Holtzman stressed her opposition to such activities directed against foreign governments with whom the United States was not at war "especially in an atmosphere of virtually complete secrecy, without approval by the Congress, or approval by the people of this country." [119]

The amendment was supported by Representative Giaimo, who noted:

> Since we have been informed of the improper activities of the CIA in Chile, and perhaps in other countries—and we have certainly been informed of its wrongful activities in Chile—this is the first opportunity which we have had in Congress to voice either approval or disapproval of the actions of our Government as they relate to the CIA. This is the first bill before us which presents us that opportunity. It is too late for us as a practical matter to do anything in the defense appropriation bill, but it is not too late now for us to approve this amendment, and to show to the world that the U.S. Congress will not sanction these nefarious and covert activities of the CIA, that the people of the United States will not approve and ratify the improper and wrongful acts of the CIA in Chile." [120]

The amendment was opposed by Representative Mahon who argued that the bill was "irrelevant" because the defense appropriation bill would be signed into law within a few days.[121] and because the legislation contained no proposal to undermine or destabilize any government.[122] He described as "indefensible" the presentation of the amendment as there had not been sufficient hearing by any of the committees of the House.[123] He was joined in his opposition by Representative Cederberg, a member of one of the CIA oversight subcommittees in the House, who indicated his belief that U.S. activities in Chile were taken "in the best interest of the United States," [124] and by Representative Conlan who argued that the amendment would lead to the identification of all our intelligence agents throughout the world and the destruction of the "basic defenses" of the United States. A vote for the amendment, Representative Conlan cautioned, would "cut off our covert intelligence operations" and "would be a vote for national suicide." [125]

The proposal was defeated by the House of Representatives on September 30, 1974, by a vote of 291–108.

Given this debate the defeat of the amendment cannot be read as congressional ratification of the CIA's authority to conduct covert ac-

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[118] Cong. Rec. H9492–9493, daily ed., 9/24/74. (remarks of Rep. Holtzman).
[119] Cong. Rec. H9492, daily ed., 9/24/74.
[120] *Ibid.*, p. H9493 (remarks of Rep. Giaimo).
[121] *Ibid.*, (Remarks of Rep. Mahon).
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*, p. H9494 (remarks of Mr. Cederberg).
[125] *Ibid.*, (remarks of Rep. Conlan).

tion. The absence of hearings, the possible "irrelevance" of the amendment noted by both supporters and opponents of the bill, and the fact that the amendment only dealt with activities the purpose of which was the "undermining or destabilizing the government of any foreign country," all undercut an expansive reading of Congress' failure to adopt it.

On October 2, 1974 Senator Abourezk introduced an amendment (#1922) to the Foreign Assistance Act of 1974 which read as follows:

> Illegal activities in foreign countries.—(a) no funds made available under this or any other law may be used by any agency of the United States Government to carry out any activity within any foreign country which violates or is intended to encourage the violation of, the laws of the United States or of such countries.
>
> (b) The provision of this section should not be construed to prohibit the use of such funds to carry out any activity necessary to the security of the United States which is intended solely to gather intelligence information.

The amendment triggered a more extended floor debate than that generated by the Holtzman amendment.[126] During the debate Senator Abourezk asserted that his amendment would "abolish all clandestine or covert operations by the Central Intelligence Agency." [127] He argued that even the Director of the CIA had indicated that the national security would not be endangered if covert action were abolished.[128] Some of the opponents of the amendment argued that improved congressional oversight would be preferable to banning covert action. Senator Church noted that he could envision situations where threats to the national security would require covert activities.[129]

The amendment failed of passage. It might be argued that this failure, like that of the Holtzman amendment, constituted congressional ratification for the CIA's conduct of covert action.

The logic of this is undercut by a number of factors. One is that the amendment was not directed to all covert action, although the comments of some of the members implied that it was.[130] It was directed to activity abroad "which violates or is intended to encourage the violation of, laws of the United States or of such country." Thus, if failure to pass the amendment is to be read as congressional ratification of the actions which the amendment sought to prohibit, the Congress would have ratified only those foreign activities by the CIA which are illegal or intended to encourage the violation of law.

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[126] See Cong. Rec. S18051-18056, daily ed., 10/2/74.

[127] *Ibid.*, p. 18051 (remarks of Sen. Abourezk).

[128] *Ibid.*

[129] *Ibid.*, (remarks of Sen. Church).

[130] Senator Abourezk stated that the amendment would "abolish all clandestine or covert operations," while Senator Church argued that increased oversight would be better than a complete prohibition. On the other hand, Senator Hatfield opposed the amendment as it did not go far enough in merely prohibiting the use of funds to carry out illegal foreign covert action; he argued that the capacity for any covert action should be taken away from the CIA. Senator Metzenbaum argued for the amendment's passage precisely because it was aimed only at illegal activities abroad by the CIA.

Whether the amendment passed or failed, it left unchanged whatever authority, if any, the CIA then had to conduct covert actions abroad which were illegal neither at home nor overseas.

Finally, the question of whether the amendment's failure should be read as congressional ratification of the CIA's authority to conduct such activities as would have been banned must be viewed in the light of other, and telling, arguments raised by those opposed to the amendment. Several Senators including Senators Humphrey, Stennis, and Goldwater objected to the fact that the amendment had not had the benefit of analysis by the committees with proper jurisdiction. Without the benefit of consideration by the Armed Services Committee, the amendment would be, according to Senator Stennis, "a shot in the dark." [131]

Using a different argument in opposition, Senator Baker stated that there existed "an insufficient state of information" by which to judge whether covert operations were or were not properly conducted. In place of the amendment he suggested that a proposed joint committee on intelligence oversight be established; Congress could then be supplied with sufficient information on covert action to make a judgment as to whether it should be banned or controlled by some other device.[132]

Given the fact that the amendment would prohibit only those foreign activities by the CIA which were illegal, the lack of explicit authorization for the CIA to conduct any covert action, the opposition of a substantial number of Senators to the amendment's consideration before it was examined by the committees with appropriate jurisdiction, and the statements by certain Senators that not enough was known about covert action to take a position on its continuance, the amendment's failure can hardly be given much weight in determining whether Congress has ratified the CIA's authority to conduct covert action.

E. The Hughes-Ryan Amendment

In 1974 Congress passed a significant amendment to the Foreign Assistance Act. The amendment provided that no funds might be expended by the CIA for operations not intended solely for obtaining necessary intelligence, in the absence of a Presidential finding that the operation is important to the national security of the United States, and a timely report to the appropriate committees of the Congress.

The amendment does not specifically authorize covert action by the CIA or unambiguously demonstrate congressional intent to provide such authorization. It does provide support for the position that Congress has authorized the CIA to conduct covert action or, more specifically, activities that are not intended solely for intelligence gathering. The debates indicate, however, a desire on the part of some Senators to withhold a decision on whether to authorize covert action until the reporting requirement provided Congress with more information.

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[131] See Cong. Rec. S-18052, daily ed., 10/2/74 (remarks of Sen. Stennis).
[132] *Ibid.*, p. S18065 (remarks of Sen. Baker).

In December 1974, the Congress passed a set of amendments to the Foreign Assistance Act. The amendments provided inter alia:

> Limitations on intelligence activities—(a) no funds appropriated under authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives (b) the provisions of subsection (a) of this section shall not apply during military operations initiated by the United States under a declaration of war approved by the Congress or an exercise of powers by the President under the War Powers Resolution.[133]

The statute does not explicitly authorize covert action by the Central Intelligence Agency. On its face it leaves the question of congressional authorization for covert action by the Central Intelligence Agency in the same position as existed prior to its passage, with two exceptions:

(1) For the first time a statute passed by Congress and signed by the President acknowledges that the Central Intelligence Agency might, in fact, conduct operations which were not intended solely for intelligence-gathering purposes; and

(2) The statute required that if such operations were to be carried out the President must first find that they are important to the national security of the United States. If such a finding is made, the operations must then be reported in a "timely fashion" to the appropriate committees of Congress.[134]

The amendment does not on its face provide any new authority for the President or the CIA. Nowhere in the public record is there any suggestion that the amendment might, in itself, serve as a new delegation by Congress of authority to the President to order any action by the CIA. If the amendment were read as a new delegation of powers to the President, the delegation would cover an enormously wide range of activities—all those activities not intended solely for intelligence gathering.[135]

While there is no evidence in the public record that Congress intended to delegate new powers to the President or the CIA, it might

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[133] Appendix D, Hearings, Vol. 7, p. 230.

[134] There is some question as to the meaning of a "timely fashion." It is not clear whether it means prior to, at the same time as, or within a reasonable time after, the initiation of such an operation. The Central Intelligence Agency has, on occasion, notified the appropriate congressional committees before initiation of a project. The Senate Select Committee has recommended that the appropriate congressional committees be notified prior to the initiation of any significant covert action projects.

[135] This would be limited, to some extent, by the requirement of a presidential finding.

be argued that passage of the amendment constitutes congressional acknowledgment that the CIA did have authority to conduct those covert actions consonant with the Presidential finding. The CIA has, in fact, taken the position that passage of the amendment "clearly implies that the CIA is authorized to plan and conduct covert action." [136] Two committees of the Association of the Bar of the City of New York concluded that passage of the amendment serves as a "clear congressional authorization for the CIA to conduct covert activities." [137] This argument has considerable merit.

While certain restrictions were placed on the conduct of covert action, it was not prohibited as it might have been. The amendment was described in the floor debates as permitting the CIA to engage in many activities and "authorizing" even covert activities such as those designed to "subvert or undermine foreign governments." [138]

Congressional ratification or authorization, however, as demonstrated by the floor debates, was hardly unambiguous. A substantial number of the proponents of the amendment saw it as a temporary measure. As Senator Hughes, its sponsor, stated:

> . . . the amendment I offer should be regarded as only a beginning toward the imperative of imposing some order and structure to the means by which the American people, through their elected representatives, can exercise a measure of control over the cloak-and-dagger operations of the intelligence agencies of the U.S. government.[139]

He went on to say that the amendment "provides a temporary arrangement, not a permanent one, recognizing that a permanent arrangement is in the process of being developed." [140]

The development of this "permanent arrangement" depended on the effectiveness of the reporting requirement. Senator Baker, who had opposed the Abourezk amendment because there existed "an insufficient state of information" by which to judge covert operations, and Senator Symington both described the Hughes amendment as an important step in providing Congress with much-needed information about the activities of the intelligence agencies.[141] Thus the amendment might be seen not as congressional authorization for the CIA to conduct covert action but as a temporary measure placing limits on what the CIA would do anyway, while at the same time requiring reporting to Congress so that Congress as a whole, traditionally deprived of knowledge about covert action, could determine what action to take with respect to this activity.[142]

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[136] Rogovin, HSIC, 12/9/75, p. 1737.

[137] "The Central Intelligence Agency: Oversight and Accountability," prepared by the Committee on Civil Rights and the Committee on International Human Relations, of the Association of the Bar of the City of New York (1975) p. 15.

[138] Cong. Rec. H11627, daily ed., 12/11/74. (remarks of Rep. Holtzman.)

[139] Cong. Rec., S18062, daily ed., 10/2/74. (remarks of Sen. Hughes.)

[140] *Ibid.*

[141] *Ibid.*, p. S18065 (remarks of Sen. Baker and Sen. Symington).

[142] There is no evidence to support the view that Congress intended the amendment to serve as a *post hoc* ratification for all previous CIA activities not intended solely for intelligence gathering.

Proponents of this interpretation of the amendment can argue that a measure designed to gather information about an activity cannot be construed as congressional ratification of that activity. If it were, Congress would be powerless to seek regular reports about a controversial subject on which it had been ill-informed without such action being cited as congressional ratification for the subject of the reports.

The amendment did not directly address the question of congressional authorization for the CIA to conduct covert action. Its passage did not unambiguously demonstrate a congressional intent to authorize covert action. However, its passage supports the position that Congress has either provided the CIA with implied authority or ratified whatever authority the CIA possessed.

Congress clearly could have eliminated covert action. It chose, instead, to place certain limits on the CIA and to require reporting on covert actions to Congress. The reports to Congress should facilitate an informed legislative response to the issues raised by covert action. They also have the effect of preventing Congress from plausibly denying its own knowledge of covert action by the United States if questions of congressional authorization of covert action arise in the future.

Given the passage of the amendment and subsequent developments, particularly the hearings and reports of the House Select Committee on Intelligence, and the Senate Select Committee on Intelligence, there is little doubt that Congress is now on notice that the CIA claims to have the authority to conduct, and does engage in, covert action. Given that knowledge, congressional failure to prohibit covert action in the future can be interpreted as congressional authorization for it.

F. CONCLUSION

There is no explicit statutory authority for the CIA to conduct covert action. There is no substantial evidence that Congress intended by the passage of the National Security Act of 1947 to authorize covert action by the CIA or that Congress even anticipated that the CIA would engage in such activities. The legislative history of the CIA Act of 1949 similarly provides no indication of congressional intent to authorize covert action by the CIA.

The 1974 Amendment to the Foreign Assistance Act recognizes that the CIA does engage in activities other than those solely for the purpose of intelligence-gathering, i.e. covert action. Enacted following disclosures of CIA covert action in Chile, the amendment does provide support to the argument that Congress has authorized covert action by the Agency or has ratified the Agency's authority. (One of the purposes of the amendment, however, was to assure Congress the information about covert action necessary to decide what to do about it.)

Additional support for the argument that Congress has ratified the CIA's authority to conduct covert action would be provided by the continuing provision of funds to the CIA when it is clear that such funds will be used, in part, for covert action. Some support for the position may also be found in the continuing acquiscence of Congress in the executive branch's claim that court action has congressional authorization. While neither ratification by appropriation nor ratification by acquiescence are favored by the courts, they cannot be disre-

garded. In the past such claims were weak. A few individual members of Congress were kept informed about covert action but there were doubts about the knowledge of Congress as a whole. The claims are now more powerful because of the notoriety of the executive branch's claim of authorization by Congress and because Congress, in part due to the reports required since 1974 and House and Senate investigations, can no longer claim ignorance of covert action.

Given the present state of congressional knowledge any remaining ambiguity will be resolved—whether Congress acts directly or not.

Views of the inherent power of the President and the rightful role for Congress in the formulation, initiation, and review of U.S. actions abroad have changed since the establishment of the CIA and the enactment of the National Security Act in 1947. These changes are reflected in such legislation as the 1974 amendment to the Foreign Assistance Act. Whatever role evolves for the Congress in the future it must now take responsibility for the CIA's conduct of covert action, and for its results.