A Needed Capability Jeopardized:

Covert Action in the Wake of the Iran-Contra Hearings

by George A. Carver, Jr.*

The Iran-contra hearings, now mercifully ended, make one think of Shakespeare. To paraphrase Mark Antony (in Julius Caesar), the evil men do lives after them, the good is oft interred with their reports. Even more pertinent, particularly in the hearings' aftermath, is Lady Macduff's plaint (in Macbeth) at being,

> "... in this earthly world, where to do harm
> Is often laudable; to do good, sometime
> Accounted dangerous folly ..."

These Shakespearean aphorisms apply with particular force to something much-debated but little understood, inside or outside the hearing room or even, alas, in the Reagan White House: covert action.

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Successful foreign policy, as de Toqueville observed, requires secrecy and patience. Washington abounds in neither, at either end of Pennsylvania Avenue, which is far from the least reason why many of our foreign policy ventures are notably unsuccessful. Covert action is a special, often useful and sometimes essential form of secret diplomacy, practiced from time immemorial by all manner of tribes, kingdoms and nations to further their interests and those of their friends or allies, or thwart the designs of their adversaries, in situations where it is deemed desirable or necessary to mask the hand of the action in question's true instigator or sponsor. Before we condemn this as invariably sinister, we should remember that we would never have won our War of Independence and become a free nation without French and Spanish covert action support, initially handled with great secrecy to keep the donors from becoming openly embroiled, themselves, in a direct conflict with George III's Britain. We should also remember that for similar reasons, private individuals often act in a similar fashion. A benign mother or aunt who tries "to bring two young people together" without being an obvious matchmaker is engaging in covert action, as is anyone who tries to break up an alliance which that person considers ill-advised, without getting counter-productively caught in the process.

There are many similarities between covert action and a scalpel. Neither can be successfully wielded by a committee. Like covert action, a scalpel is useful, even essential in certain situations, though disaster can quickly result if it is not skillfully employed, with a deft and sure hand, by someone who knows what he or she is doing. Surgeons do not forgo scalpels because if inappropriately or clumsily used they can inflict great injury, even cause death. Similarly, covert action -- despite the risks its employment engenders -- is a tool of statecraft no nation should forgo, and very few do. In dealing with the United States, for example, virtually every nation in the world supplements its open diplomacy with various forms of covert action -- or unadvertised, unacknowledged lobbying -- attempting, with varying degrees of success, to influence our opinions and actions in ways congenial to the nation in question's perception of its interests. Our adversaries are by no means the only ones to essay this game; indeed, no one plays it more indefatigably, or successfully, than one of our closest allies -- Israel.

To stand any reasonable chance of being successful, a proposed or contemplated covert action must meet several tests. Conceptually, it should reflect a sense of proportion and perspective. Immediate desires and objectives, such as freeing hostages, should never be allowed to obscure or put at risk larger, long-term national

interests, such as punishing and curbing terrorism. It should also be sensible, running with -- never against -- the grain of local reality in the area in which the operation in question is to be attempted.

Like surgery, covert action should be conducted by trained, experienced professionals, not entrusted to zealous, well-meaning amateurs with more energy than judgment, whose warheads are better than their guidance systems. By definition, no covert action should be undertaken unless there is a reasonable chance of keeping it secret, and no such action should be conducted in a way that increases its risk of exposure. Secrecy being hard to maintain under the best of circumstances, however, the political and other costs of exposure should be carefully assessed before a final decision is made to launch any given covert action operation.

Though covert action operations -- again, by definition -- inevitably involve at least some dissimulation and deception, no such operation should be basically inconsistent or incompatible with any important, publicly proclaimed governmental policy. Covert action functions at the margins of policy -- ideally, in a quietly supportive way. It can contribute, sometimes significantly, to a policy's success, but it can never be an effective substitute for policy -- or for thought. Furthermore, the most brilliantly conceived and skillfully executed covert action operation cannot salvage or redeem a policy that is fundamentally unsound or flawed.

Providing U.S. arms to Iran, by the planeload, in a bootless effort to negotiate the release of American hostages for these already-provided arms failed every test and violated every precept just outlined. From an American perspective (though not necessarily from an Israeli one), the Iranian exercise was a disasterous fiasco -- particularly as a covert action operation. At its end, Iran's stock of weapons and resultant military capabilities were markedly increased (which may well have been Israel's primary objective), the Reagan administration and the United States were gravely embarrassed, the sound American policy of not negotiating with terrorists was badly undercut, and the net number of American hostages held in or near Lebanon by Shi'ite militant factions presumably responsive to Iranian influence, such as Hezbollah, had not diminished but, instead, had increased by half (from six in the summer of 1985 to nine in the summer of 1987).

In the process, matters were worsened by grafting the Iran exercise onto the contra support and re-supply endeavor (another Israeli suggestion) -- thus violating every professional canon of compartmentation and sound security in running covert action operations, with the inevitable result any professional could have predicted. This was doubly unfortunate since the contra endeavor was far more sensible and defensible, on its merits, than the Iran quadrille and should never have been tarred with the latter's brush.

As a candidate for election, then re-election, and as President, Ronald Reagan has never made any secret of the fact that he considers the establishment of a Cuban and Soviet supported Communist dictatorship in Central America, in Nicaragua, a potential threat to America's vital interests. Whatever its defects in detailed conception and in execution, the contra-aid endeavor directly supported -- and unlike the Iran exercise, did not undercut or contravene -- well-known, often-ennunciated Reagan administration policy. In retrospect, it was nonetheless clearly not wise, or politically astute, to handle contra aid as a covert action operation. Indeed, 20/20 hindsight strongly suggests that the country and the Congress, as well as the administration, would have been far better served if Lt. Col. North -- in open session, with appropriate publicity -- had given Congress his forceful presentation of the case for contra aid in 1982, before the passage of the first of the five "Boland amendments", not at a post-Iran-contra disaster hearing in 1987.

We can not go back, however, only forward. We should do so, furthermore, in the realization that ample mistakes have already been made, at both ends of Pennsylvania Avenue. Mining these errors for partisan political advantage should not be anyone's primary objective. Instead, the American people and their elected representatives in Washington should focus on protecting our nation's interests, and the capabilities -- including covert action capabilities -- that any administration, of any party, will need to safeguard those interests in years ahead.

Unfortunately, no such focus is currently evident on Capitol Hill, or in the White House. Instead, there is only sharp skirmishing in the unending legislative-executive branch struggle for foreign policy primacy, a struggle as old as our republic and ingrained in our Constitution -- which, by design, divides this power as well as others. Perceiving Presidential weakness, a partisan Congress is pressing to extend its prerogatives, while an embarrassed, beleaguered White House seems willing, even eager, to placate Congress by voluntarily accepting self-imposed restrictions that Ronald Reagan and his Oval Office successors may one day bitterly regret. In this situation, both Congress and the White House -- as well as America's media and public -- would profit from recalling some pertinent history.

With little Congressional knowledge and even less Congressional input, President Thomas Jefferson's representatives -- Robert Livingston and James Monroe -- negotiated the purchase of "Louisiana" from Napoleon, who shrewdly sold them land he could not defend. The treaty consumating this purchase was signed, in Paris, on 30 April 1803 and ratified by a somewhat surprised Senate the following November. Thus, for an eventual total price of $27,267,622, Thomas Jefferson -- without any explicit constitutional warrant to do so -- acquired a block of territory five times the size of France, in area, and extended America's frontier westward to the Rockies. With equally minimal Congressional knowledge or input, Jefferson's successor James Madison directed the covert action

operations that brought "West Florida" into the Union -- i.e. the land extending to the east bank of the Mississippi, encompassing what is now Alabama and Mississipi, plus part of Louisiana, as well as Florida proper. If Jefferson, the drafter of our Declaration of Independence, or Madison, the principal architect of our Constitution had shown -- as President -- the diffident deference to Congress it is now fashionable to claim that a President is constitutionally obligated to show, in conducting foreign affairs, our republic would not now have its present territorial extent and probably would not have survived its perilous initial decades.

Precedents even older than our republic are germane to current concerns and debates about covert action, and about secrecy. Our first foreign intelligence and covert action directorate -- the Committee of Secret Correspondence -- was established by the Continental Congress in November 1775. That Committee negotiated and handled the covert French support without which we could never have won our struggle for independence. Speaking of that support, two of the Committee's members -- Benjamin Franklin and Robert Morris -- commented: "We agree in opinion that it is our indespensable duty to keep it a secret, even from Congress ... We find, by fatal experience, the Congress consists of too many members to keep secrets." In this regard, little has changed in over two centuries.

During the past two decades, the endemic, perpetual legislative-executive branch struggle over foreign policy has perceptibly sharpened -- especially as Democratic-controlled Congresses, partly out of pique and frustration, have tried to hobble Republican presidents, elected by landslides, and curtail their discretionary latitude. In the process, Congress has attempted to insert itself into the managment, even micro-management, of foreign affairs, asserting authority without accepting responsibility and essaying a role for which Congress not only has little constitutional warrant but is also ill-suited -- by organization and temperament -- to perform.

One example of this phenomenon is the 1973 War Powers Resolution, which President Nixon should have immediately challenged, on constitutional grounds, and probably would have so challenged had he not been mired in Watergate. It still needs to be challenged and, if possible, rescinded or struck down before a situation arises in which this act's potential for damage-causing mischief is fully realized. Indeed, the Capitol Hill Democrats now filing suit to force the administration to place its Persian Gulf operations under the War Powers Act may be doing the republic a great, if unintended, service by subjecting that act to judicial scrutiny and review.

Other obvious examples are the five "Boland amendments" (one each in 1982, 1983, and 1984, then two in 1985), each of which was attached to an omnibus, veto-proof "continuing resolution" or spending bill made necessary by Congress' inability to complete its

work on time. Not one of these five amendments is clearly or precisely drafted, no two are consistent with each other, and the Reagan administration should have forcefully challenged every one, particularly the first, when it was initially proposed -- not tried to finesse or evade it after it was passed.

The Boland amendments symptomize and highlight a decidedly disquieting turn that legislative-executive branch struggles over foreign policy have recently taken: the attempt by Democratic Congressional leaders and their media supporters to criminalize foreign policy differences. This effort set a tone that permeated the Iran-contra hearings, as evidenced by The Washington Post's headline over its wrap-up story: "Three Months of Hearings Fail to Crack the Case". Nothing but bitter divisiveness, damaging to a whole range of national interests, is likely to result from any continued effort to make differences of opinion over foreign policy criminal matters to be resolved by the courts, rather than the subject of political debates to be settled at the ballot box.

The phenomenon of Congressional assertiveness, with an attendant penchant for detailed, legalistic documentation, has been particularly pronounced in the sphere of covert action. In 1974, the Hughes-Ryan amendment to the Foreign Assistance Act of 1961 stipulated that the CIA could spend no funds "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". This requirement for reporting to the Congressional intelligence oversight committees was broadened and tightened in the Intelligence Authorization Act for Fiscal Year 1981, though that act did leave the President the discretionary option of reporting sensitive covert action activities "in a timely fashion" -- an option the Reagan administration clearly abused in its handling of the Iran-contra matter, quite understandably irritating Congress in the process.

Not surpisingly, given Congress' current mood and temper, several bills to tighten these restrictions even further are already in the hopper, including H.R. 1013 -- sponsored by House Intelligence Committee Chairman Stokes and former Chairman Boland, among others -- which would require the circulation of additional copies of written Presidential findings, eliminate the "in a timely fashion" provision, and require advance notice, to Congress, of all contemplated covert action operations with but one, 48 hour, exception to be used "only in extraordinary circumstances affecting the vital interests of the United States, and only where time is of the essence". Similar ideas were reflected in "suggestions" given the White House by the Senate's oversight committee, to which President Reagan responded in a

disquieting 7 August letter that the White House took pains to publicize. In the present situation, the White House's timorous defensiveness may be as understandable as Congressional assertiveness, but both need to be curbed if the national interest is not to suffer.

Those who wrote, passed or issued the restrictions on covert action now in force forgot or ignored a unique, very important feature of our Constitution, which all those considering new restrictions should remember. Our Constitution combines in one individual, our President, two distinct offices and functions that virtually all other nations divide: the government's chief executive and administrative officer -- a partisan political figure chosen (in America) by election -- and the nation's Chief of State -- a symbolic focus of national unity supposedly, in that capacity, above the fray of political partisanship. As chief executive officer, a President should certainly be accountable for his and his administration's actions. Nonetheless, it is by no means necessarily in our national interest for our Chief of State to sign "findings" or any other documents directing agencies or officers of the U.S. Government to infringe upon or violate the laws of other nations with which we are not in a state of declared war. NSC staff members, national security advisors, cabinet officers and directors of central intelligence are all expendable; but in our government, presidents are not. As Chief

of State, an American President should be able to distance himself or herself from, even disavow, a covert action that he or she approved, even ordered, as chief executive. This may sound complicated, but so is the real world and, hence, effective diplomacy that runs with the grain of its complex reality.

With respect to covert action, in all its forms and ramifications, many mistakes have clearly been made over the past several years -- at, again, both ends of Pennsylvania Avenue. With the White House taking the lead, the administration obviously needs to reform and improve its relevant structures and mechanisms, and then use them -- not ignore them or supplant them with hip pocket, ad hoc arrangements. The administration's relations and manner of dealing with Congress also manifestly need to be improved; for no matter who may or may not like this arrangement, our Constitution yokes the legislative and executive branches in a single harness and unless they can pull together, in tandem, the nation suffers.

To be effective, however, this kind of tandem-harness partnership requires reciprocal confidence and trust which both partners must work to build and maintain -- even when the White House is controlled by one party and the Congress by another. Here, though the White House clearly needs to clean up and improve its act, so too

does Congress. For example, Congress should curb its itch to exploit its power over the purse to exercise negative, blocking authority over the administration's conduct of foreign affairs unless, at a minimum, Congress is also willing to accept responsibility for its actions, and their consequences.

Additionally, there is much that Congress needs to do in the field of secrecy protection. The current Senate and House intelligence oversight committees, to cite another example, have a total of thirty two members, plus four honorary members (the majority and minority leaders in each house), plus about sixty more people on the two committee staffs (combined). That makes a total of around a hundred people on Capitol Hill who, under existing arrangements, are formally, officially apprised of covert action operations -- and no matter how these Committees' majorities may rule, any of these 100-odd people, members or staffers, can kill by a pre-emptive leak any covert action operation of which he or she personally disapproves. That is not a workable situation if a true covert action capability is to be preserved. At a minimum, Congress should give serious consideration to combining these two separate oversight committees into one joint committee -- with an appreciably smaller membership and a much smaller combined staff.

In the wake of the Iran-<u>contra</u> hearings, the concerns and emotions that prompted them, and the additional emotions they engendered, there is a great danger that the covert action

capabilities our nation urgently needs -- for its security and perhaps even its survival -- will be crimped, emasculated or erased by a new spate of restrictive laws and regulations hastily written in a fit of moralistic pique. This might suffuse the drafters and enacters of such laws and regulations with a transient glow of self-righteous virtue; but for the country, it would be disasterous. If this were to happen, harking back to Mark Antony, the Iran-contra committee -- whatever its intent may have been -- would have done evil that would live long after that committee was disbanded and its various reports interred in files.

Particularly for an open, democratic society such as ours, the issues here involved are thorny and complex. They need to be carefully, coolly and dispassionately weighed, not hastily decided under emotional or political pressure. Effective covert action not only needs to be covert, by definition, it also needs to be imaginative, flexible, and quickly responsive to concrete challenges, problems or situations that can not be predicted, let alone codified, in advance. The kinds of additional restrictions now being discussed, in the White House as well as on Capitol Hill, would not only make effective covert action much more difficult, they could easily make it impossible.

-- White House-Capitol Hill consultation on covert action clearly needs improvement, but an automatic advance notice requirement, with only rare exceptions, would put Congress directly into the approval loop, on individual operations, in ways that would inevitably increase Congress' already pronounced penchant for micro-management and would have profound constitutional implications.

-- "Timely" should mean just that, and any month-measured interval clearly stretches "timely's" meaning beyond reasonable bounds, but a rigid 48 hour or "two working day" stipulation would be a strait-jacket too confining for the real world's exigencies.

-- Key Congressional leaders and all the cabinet-level members of the National Security Council itself (not the NSC staff), including the Vice-President, should be apprised of all covert action operations, but in ways that minimize -- not maximize -- security risks. Oral briefings to principals (only) can not be xeroxed. Spreading additional copies of highly sensitive "findings" around Capitol Hill and the Executive Branch would increase security risks exponentially, along with the attendant risk that anyone, anywhere who personally disapproved of a given covert action -- even one that had successfully surmounted all formal approval hurdles -- could kill it by a leak.

-- If present restrictions were broadened and tightened, cautious bureaucrats could easily become skittish about even attempting to obtain approval for covert action operations that badly needed to be undertaken.

-- Simultaneously, conscientious intelligence professionals could easily become very reluctant to embark on an approval process that could clearly imperil the security and safety of their indispensable foreign contacts and assets.

-- Additional Congressional involvement in a more formalized approval process, furthermore, could understandably make foreign organizations and individuals, whose co-operative assistance we need, very loathe to put themselves, their futures and even their lives hostage to our willingness and ability to protect their secrets when we are demonstrably incapable of protecting our own.

In our nation's conduct of covert action, the patently necessary improvements and reforms can not be produced by additional verbiage, written in legalese. Instead, the leaders of Congress, on both sides of both aisles, should meet quietly and privately with senior officials in the administration, including the President, to ascertain the best way, under our Constitution, to give any President -- of either (or any) party -- the covert action capabilities, and the discretionary flexibility, he or she will need in this dangerous, strife-ridden and now thermonuclear world to "provide for the common defence", as that Constitution's Preamble puts it, and "secure the blessings of Liberty to ourselves and our Posterity."

In the current climate of political and public opinion, writing new legislative or executive branch restrictions on covert action would doubtless be considered laudable, but -- harking back to Lady Macduff -- would actually do great harm. Quiet, executive-legislative branch leadership discussions that produce only sensible compromises and agreements on future procedures -- some of which could well be secret and not published, even if written -- might be "accounted dangerous folly", particularly by the media; but for the nation, that is the approach that would truly do good.

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