

White House Decisionmaking Involving Paramilitary Forces

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The standard framework for understanding presidential decisionmaking in projecting American power and influence into other countries is to assume that the Administration develops diplomatic, military or covert options which the President then assigns to State, Defense or the CIA (sometimes in combination). This framework is incomplete, because diplomacy is carried on not only by officers of the United States but also by an “invisible presidency” of informal emissaries.¹ Military operations are conducted not only by members of the U.S. Armed Forces – whether conventional or special operations forces – but also by others with arms (paramilitaries) with whom American armed forces or intelligence agents propose to have (or already have) a formal or informal working arrangement.² Covert operations are supplied, financed and conducted not only by the CIA (and recently the Pentagon),³ but also by private organizations with ties to the government, such as in the Iran-Contra Affair, when arms dealers were granted extraordinary access to intelligence resources and stocks of military weapons.

White House decisionmaking involving the use of force is not just about which combination of diplomatic signaling, military campaigning, or covert operating Presidents should authorize, but also whether they should authorize the paramilitary option, and if so, by which official or unofficial organization. But even this statement of presidential decisionmaking is incomplete, because it assumes that: (a) the President knows all the options in advance of a decision and chooses from among them; and (b) policy is

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1. LOUIS WILLIAM KOENIG, *THE INVISIBLE PRESIDENCY* 4 (1960). The term refers to go-betweens who might communicate messages from the President or even get involved in negotiations with foreign governments.

2. DEP’T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 354 (as amended through Apr. 2010), available at http://www.fas.org/irp/doddir/dod/jp1_02.pdf. The Department of Defense defines paramilitary forces as those “distinct from the regular armed forces of any country, but resembling them in organization, equipment, training or mission.” They differ from auxiliary or local police forces which maintain order, since the mission of a paramilitary force is either to create order (i.e., support the existing regime) or to undermine it (as a rebel force).

3. Alfred Cumming, *Covert Action: Legislative Background and Possible Policy Questions* (Cong. Res. Serv. RL 33715), Apr. 6, 2011, at 3-7.

decided at the top, in the Oval Office and the National Security Council. These assumptions are often incorrect because there are systemic dysfunctions in presidential decisionmaking.

Some are well known, and involve questions I will not treat here: Did the President know about the operation? Was the President duped by a “rogue elephant” intelligence agency? Did the Administration follow the letter and spirit of framework legislation? Did the President, in relying on prerogative power, transgress the Constitution? Instead, I want to begin with prior questions: What kind of transactions might occur between the leaders of paramilitaries and the U.S. government? What risks might these pose for the White House? How would the Administration attempt to manage these risks? And finally, circling back to questions of constitutionality and legality: How might White House risk management affect the authority and legitimacy of covert operations relying on paramilitary forces?

I. THE PRIOR QUESTIONS

At some point in the government’s attempt to project influence in another country, the President will be presented with the option of using an indigenous paramilitary force for the purposes of what international relations theorists call *compellence* – raising the costs of continuing with policies that go against American interests. National security managers usually present the option to the President in terms of costs and benefits to adversaries: How much damage might a paramilitary force do? Can it do sufficient damage to alter adversaries’ calculations, and therefore induce them to change their behavior?

But there are prior questions involving the paramilitary force itself (and its likely behavior) that turn out to be important in making a prognosis about success or failure, yet these tend to be considered operational details that are not to be dealt with at the presidential level. Military and think-tank publications gloss over the questions of what kind of people, organized in what kind of groups, are likely to join a paramilitary effort, and instead deal with paramilitaries as an abstract concept to be fitted into a larger doctrine of force projection.⁴ But there are two questions that must be answered before attempting to multiply force and accelerate its use in a contested area: Who are the paramilitaries, and what makes them capable of projecting force domestically? What would be the transactions between

4. LT. GEN. JAMES M. DUBIK (U.S. ARMY RET.), BEST PRACTICES IN COUNTER-INSURGENCY: ACCELERATING COMBAT POWER IN AFGHANISTAN (Institute for the Study of War eds., 2009); DEP’T OF DEF., REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN, AND UNITED STATES PLAN FOR SUSTAINING THE AFGHANISTAN NATIONAL SECURITY FORCES 62 (Apr. 2011).

the U.S. government and the paramilitaries, and who would make policy about those transactions?

The contrast between these potential allies and the paramilitaries of the 19th century is striking. The acquisition of territory in the North American continent (and later Hawaii) involved American settler paramilitary activities: in West Florida during the Madison administration, in Texas during the Jackson administration, in the California Bear Flag Republic during the Polk administration, and in the Hawaiian coup of 1893 during the Cleveland administration. In some of these incidents American regular armed forces directly or covertly supported American settlers.⁵ The transaction was simple (albeit delayed in the Hawaiian case): Paramilitaries consisting of American settlers living under a foreign flag sought American military assistance to overthrow a sovereign power. Assistance was granted by the U.S. military as part of American territorial expansion. Since the start of the Cold War, the paramilitary option has involved far-away lands and peoples, who at best view American aid as helpful in tipping a local balance toward their side but who have no intention of becoming a part of the Union, and who are ambivalent about how closely to align with American policies. This makes the transactions tenuous at best and duplicitous (on both sides) at worst.

The presidential stakes in the use of paramilitary force are calculated as the potential benefits of employing it against the likely costs of disclosure, which although low in monetary terms, are likely high in political, diplomatic, and legal risks. Paramilitary forces are not abstractions, and they encompass a multitude of sins, however often Presidents label them “freedom fighters.”⁶ So this is what the President must ask: Who are these people, and how did it come to pass that they are armed, organized, and able to use weapons? What has made them an armed group that could be of use to us? These are the key questions because it is likely that *their capabilities and motives are presidential liabilities*. They are usually engaged in routine activities that require them to be armed and to use force, and these activities make it difficult for Presidents to openly engage with or be identified with them.

Groups that the United States might work with include street thugs, as in CIA organized demonstrations in Teheran in 1953.⁷ They might involve organized crime syndicates and cartels (engaged in smuggling, extortion, protection rackets, or illegal domestic trading and tax evasion schemes in the underground economy) that support armed street elements, as in

5. STEVEN KINZER, *OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ 111-195* (2006).

6. See <http://www.globalsecurity.org/military/world/para/index.html>.

7. STEPHEN KINZER, *ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR 167-192* (2003).

Colombia and Central America.⁸ They might be “kidnap and ransom” (KR) squads on land or pirates at sea, or warlords with de facto territorial control in a region in which they sell natural resources, trade in drugs, or extract taxes, as in Indochina in the 1960s and Afghanistan in the 2000s.⁹ They might be remnants of a prior regime in exile (the sabotage groups in Eastern Europe in 1949-1951, the Raiders of the China Coast in 1950, the Cuban brigade in 1961 and the Nicaraguan Contras in the 1980s) with both financial and ideological interests in a counterrevolution.¹⁰ They might be local villagers organized as a militia, as with the Arbakai in rural Pashtun valleys in Afghanistan, more interested in settling local grudges than in supporting U.S. interests. They might be ethnic minorities, clans, or tribes controlling (or contesting for) extensive territory, as with Kurdish militias or guerrillas in Turkey, Syria, Iraq, and Iran.

Whether a paramilitary group succeeds or fails, it usually creates problems for the United States. Failure of a force puts the American government in a quandary: abandon allies or take responsibility for their repatriation. General Van Pao and the 30,000 Hmong who interdicted communist supply lines along the Ho Chi Minh trail were airlifted to the United States to make new lives after the wars in Indochina were lost.¹¹ More than 350,000 Hmong now live in the United States as a result of their evacuation and their assimilation remains incomplete.¹² Many scattered over Southeast Asia were forcibly repatriated back to Laos in the 1990s.¹³ Others remained in camps near the Thai border, in appalling conditions, led by expatriate leaders of the Neo Hom resistance, waiting for their chance to destabilize the regime.¹⁴ There are different problems when a victory is secured, as demonstrated with Mujahideen efforts in Afghanistan against

8. COLONEL ROBERT KILLEBREW & JENNIFER BERNAL, CRIME WARS: GANGS, CARTELS AND U.S. NATIONAL SECURITY 51-63 (Center for a New American Security eds., 2010).

9. MAX G. MANWARING, STATE AND NON-STATE ASSOCIATED GANGS: CREDIBLE “MIDWIVES” OF NEW SOCIAL ORDERS (2009); ALFRED W. MCCOY, THE POLITICS OF HEROIN: CIA COMPLICITY IN THE GLOBAL DRUG TRADE 436-492 (2d ed. 2003).

10. FRANK HOLOBER, RAIDERS OF THE CHINA COAST (1999); MAJ. D.H. BERGER, U.S.M.C. THE USE OF COVERT PARAMILITARY ACTIVITY AS A POLICY TOOL: AN ANALYSIS OF OPERATIONS CONDUCTED BY THE UNITED STATES CENTRAL INTELLIGENCE AGENCY, 1949-1951 (Marine Corps Command and Staff College eds., 1995), <http://www.fas.org/irp/eprint/berger.htm>.

11. JAMES PARKER JR., COVERT OPS: THE CIA’S SECRET WAR ON LAOS 204-219 (1997); JANE HAMILTON-MERRITT, TRAGIC MOUNTAINS: THE HMONG, THE AMERICANS, AND THE SECRET WARS FOR LAOS, 1942-1992, 337-351 (1999).

12. GAYLE MORRISON, SKY IS FALLING: AN ORAL HISTORY OF THE CIA’S EVACUATION OF THE HMONG FROM LAOS 83-107 (2007).

13. Brian W. Jacobs, Note, *No-Win Situation: The Plight of the Hmong – America’s Former Ally*, 16 B. C. THIRD WORLD L. J. 139, 139 (1996).

14. KEITH QUINCY, HARVESTING PA CHAY’S WHEAT: THE HMONG AND AMERICA’S SECRET WAR IN LAOS 450-479 (2000).

the Soviets. Their leaders, such as Jalaluddin Haqqani and Gulbuddin Hekmatyar, were willing to form a temporary alliance with American infidels in order to do damage to Soviet infidels. The short-term gain in utilizing their paramilitary capabilities (as well as the use of Green Beret trainers for Osama bin Laden's operatives) led to Soviet withdrawal from Afghanistan, but this gain was offset by the subsequent "blowback."¹⁵ (One might assume that Americans, based on their experiences in the French and Indian War followed by the Revolutionary War, would understand that today's indigenous militia is tomorrow's revolutionary army.)

The use of paramilitaries involves attempting to establish a long-term relationship with armed groups. In some cases the U.S. military sponsors them: these are usually situations in which the United States is either backing an existing regime against a guerrilla force in order to impose security, and it not only trains the regular army, but also trains the paramilitary auxiliaries, as in Iraq and Afghanistan in the 2000s. When the U.S. military has its own "boots on the ground," it organizes the locals (in the nineteenth century parlance "natives") as auxiliaries or labor battalions (often officered or "advised" by U.S. forces), or as scouts and translator/interrogators attached to regular U.S. forces.¹⁶ The use of paramilitaries alleviates the problem planners face: too many theaters of combat and too few troops – a situation that will be exacerbated in the next decade as troop levels for the Army and Marine Corps are likely to decrease.¹⁷

The presidential problems occur at the time the decision is made either to mobilize indigenous paramilitaries in a *covert* operation, relying directly on the CIA (or Pentagon special forces), or to "outsource" the operation to a middleman. Either way, the operative in charge becomes what Colonel Christian Prouteau, a French agent for President Mitterrand, called "Le Truc" – loosely translated as "a thingy." As the Colonel explained to French judges: "When there is a problem, you have to have a thingy. I was the thingy."¹⁸

There is a scene in the first *Godfather* movie in which the retired head of the syndicate counsels his son to beware of the person working for them who brings him the offer to negotiate with a rival syndicate, since that person will betray them. The kernel of wisdom here is that the "thingy"

15. Andrew Marshall, *Terror Blowback Burns CIA*, THE INDEPENDENT, Nov. 1, 1998, <http://www.independent.co.uk/news/terror-blowback-burns-cia-1182087.html>.

16. Steve Bowman & Catherine Dale, *War in Afghanistan: Strategy, Military Operations, and Issues for Congress* (Cong. Res. Serv. R40156), Mar. 9, 2011, at 46-49.

17. Andrew Feickert & Thomas K. Livingston, *U.S. Special Operations Forces (SOF): Background and Issues for Congress* (Cong. Res. Serv. RS 21048), Mar. 28, 2011, at 2.

18. Charles Bremner, *How Mitterrand's Secret Network Spied To Protect the President*, THE TIMES (London), Nov. 20, 2004, at 52.

offering to set up the paramilitary operation – whether CIA, Special Operations Forces, outside arms dealers and financiers, foreign government agency – has its own stakes in the proposed operation, and these stakes will affect policymaking once the President signs off on the deal. Each has its own cost-benefit equation, and its own biases in presenting the pros and cons and in assessing the risks.

For the military, use of local paramilitaries or contractors helps keep expenses and casualties down among regular forces. “To train, equip, and maintain one American soldier in Iraq or Afghanistan for just one year costs a cool million dollars” Andrew Bacevich observes.¹⁹ In addition to cheap hired guns, the military obtains local knowledge and (potentially) ethnic and communal support from the area in which the paramilitaries have come. The military multiplies its boots on the ground and may be able to secure and hold more territory. But it often underestimates the risks and the costs: antagonizing adjacent ethnic or religious groups and exacerbating intercommunal or regional tensions, especially when the paramilitary force violates the laws of war in dealing with civilians.²⁰

For the White House, one of the most significant risks is the “quagmire” effect: the weakness of the paramilitary group leads to an unintended escalation of American commitments to it. In the case of the Libyan rebellion in 2011 (a scheme facilitated by French intelligence to end Gadhafi’s meddling in its sphere of influence in Africa) the U.S. decision to sign on to the “no-fly zone” soon escalated into a much larger intervention, with A-10 Thunderbolt jets, AV-8 Harriers, AC-130 gunships and Predator drones utilized to protect hapless paramilitary forces who were in way over their heads in fighting regular Libyan troops (and *their* African mercenary paramilitaries). A covert operation approved by the President to help irregulars riding in “technicals” headed from Benghazi west along the coastal road was “leaked” by the Administration to the media (complete with the information that Obama had signed an intelligence “finding” and issued executive orders for the CIA to place agents on the ground) in order to counter the President’s partisan opponents who accused him of lacking resolve.²¹ Someone should have reminded the Obama administration that *the point of authorizing a covert operation is to keep it covert*, and if you are not in a position to do that, you probably should not have authorized the covert aspect in the first place.

19. Andrew Bacevich, *The Tyranny of Defense, Inc.*, THE ATLANTIC, Jan./Feb. 2011, at 79.

20. R. L. O’M., Note, *Applying the Critical Jurisprudence of International Law to the Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 71 VA. L. REV. 1183, 1194-1199 (1985); Tom J. Farer, *Drawing the Right Line*, 81 AM. J. INT’L L. 112, 114 (1987); Erica Gaston, *Outsourcing the Dirty War in Afghanistan*, THE HUFFINGTON POST (Sept. 29, 2010), <http://huffingtonpost.com>.

21. Mark Mazzetti & Eric Schmitt, *C.I.A. in Libya Aiding Rebels, U.S. Officials Say*, N.Y. TIMES, Mar. 31, 2011, at A1; Karen DeYoung & Greg Miller, *In Libya, CIA Is Gathering Intelligence on Rebels*, WASH. POST, Mar. 30, 2011, at A1.

2012] DECISIONMAKING INVOLVING PARAMILITARY FORCES 471

For the CIA's Special Activities Division, sponsorship of paramilitaries to back a friendly regime or destabilize a hostile one has become the preferred option when there is no indication that the administration is willing to incur the political costs of open intervention. The risk in such a covert operation is that it will not stay covert for long, which may result in both electoral and congressional backlash. It may also lead to a loss of influence in regional organizations. And in a worst case scenario, the temporary local gain may be more than counterbalanced by a loss in regional influence. In Afghanistan, the CIA and Pentagon have been running clandestine activities at the same time that the military has been fighting an overt war. The CIA has a string of bases near the Pakistan border (and a presence in Pakistan military bases) at which it trained and equipped 3,000 or so tribesmen into Counterterrorism Pursuit Teams, whose members crossed the border into Pakistan, for intelligence collection and not lethal action.²² But the intelligence collected and the liaison with U.S. personnel on the Pakistan side of the border was used to target drones involved in targeted killing of Taliban mid-level leaders taking refuge on the Pakistan side of the border. Over the course of several years, these operations led to a deterioration of the American relationship with Pakistan, resulting in sporadic holdups of the logistical supply train, putting the entire military campaign at risk.

What a paramilitary force would want in return for assisting the military or the CIA may involve significant risks for the White House. Some may want recognition of their political goals, including the possibility of independence or autonomy, recognition of their territorial claims, diplomatic assistance in consociational regime-building or coalition-making in the existing national government. (This has always been the problem in assisting Kurdish paramilitary groups, as gains against Syria and Iran had to be balanced against diplomatic losses with Iraq and Turkey.) Some would want the United States to look the other way at their "fundraising" activities, such as drug trafficking in Southeast Asia, and they might ask for protection from Interpol cooperative law enforcement, as well as from enforcements efforts by U.S. authorities mandated by laws, such as the Foreign Narcotics Kingpin Designation Act.²³ They may want weapons, communications systems, logistical resources (trucks, planes), and other supplies, but the problem is that these can be used to bolster their criminal activities as well as their paramilitary actions. They may want de facto immunity from prosecution for activities they conduct at the behest of the

22. Craig Whitlock & Greg Miller, *U.S. Covert Paramilitary Presence in Afghanistan Much Larger than Thought*, WASH. POST, Sept. 22, 2010, at A1.

23. Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§1901-1908 (1999); 8 U.S.C. §1182 (2006); Exec. Order No. 12,978, *Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers*, 60 Fed. Reg. 54,579 (Oct. 21, 1995).

U.S. government: assassinations by death squads or solo hit men, economic sabotage (even against facilities owned by American companies), and war crimes involving interrogation techniques. None of these are transactions that the President wants to be associated with, since they may violate both the conventions and the laws of war and international conventions for the protection of lives and property, as well as the U.N. Charter and the treaties governing regional arrangements. All of these activities involve significant risks for the White House if the transactions with paramilitary groups (or the turning of a blind eye) see the light of media day. Therefore, there will be significant differences in perspective between the White House and those organizations proposing to use paramilitaries, especially when it comes to assessment of risks.

II. THE RISK PARADOX: THE BAY OF PIGS INVASION

Two concepts used by presidential scholars to analyze presidential decisionmaking are helpful when discussing the *risk paradox*. Efforts to shield the White House and to minimize the risk of disclosure actually raise operational and disclosure risks. First, Presidents must consider their power stakes, defined as the relationship between decisions they take now and the effect on their options later. They try to gain mastery in future situations by the way they make decisions about current issues. Just as a chess master thinks many moves ahead, and plays out lines of move and countermove before settling on the most advantageous line, so too Presidents must make decisions today that protect their options and lower their risks for the situations they will face tomorrow. Second, Presidents who act as professionals rather than as amateurs *define* the problem to be solved in terms of their own power stakes.²⁴

The calculus of risk when the CIA raises, trains, and deploys a paramilitary force involves scale and commitment: how big a force should be created, and how much support should it be given? In the overthrow of a regime, for example, the force might be expanded and the support might be close – unless regime overthrow is actually to be done by disaffected elements of the country's military, in which case the paramilitary operation is simply a cover for the coup that will occur, as was the plan for Guatemala successfully carried out in 1954.²⁵

During the run-up to the Bay of Pigs invasion in 1961, President Kennedy defined the problem in terms of his own power stakes, and in doing so significantly raised the operational risks. When the CIA brought

24. RICHARD NEUSTADT, *PRESIDENTIAL POWER THE POLITICS OF LEADERSHIP* 183-185 (1960).

25. NICHOLAS CALLATHER, *CENTER FOR THE STUDY OF INTELLIGENCE, CENTRAL INTELLIGENCE AGENCY, OPERATION PBSUCCESS: THE UNITED STATES AND GUATEMALA, 1953-1954*, 26-42 (1994).

plans for an exile invasion to President Eisenhower (and later to Kennedy), it initially described a small group that would infiltrate at a beachhead and then head into the mountains to launch a rebellion.²⁶ Military planners and some in the intelligence community eventually pushed for a much larger mission, but Kennedy insisted that it be scaled back. From his perspective it would have to be entirely covert (lest the United States be accused of violations of international law and hemispheric good neighbor understandings that bar military interventions). And there could be no possibility of American air cover or naval support.

Why go ahead at all? Kennedy wanted to protect his power stakes. By agreeing to allow the exiles to launch an invasion he hoped to avoid their anger and minimize the right-wing criticism that he was weak and soft; by keeping the operation small he hoped to keep American involvement secret; by keeping U.S. forces out of the fray he hoped to avoid a diplomatic crisis within the Organization of American States; by agreeing to an operation that would send exiles into the mountains, he hoped to get them out of his hair by fulfilling promises to help them get back to Cuba. Kennedy outmaneuvered the CIA with a simple stratagem. He would take the Agency and the exiles at their word – that all they wanted was initial backing to start their own insurrection.

What some CIA planners actually intended came from the Guatemala playbook. They planned to create a situation in which Kennedy would have to use U.S. armed forces to protect the exile force, which in turn would lead to dissension or panic in the Cuban military and political echelons and a psychological crisis that would end with American armed intervention and the overthrow of the regime. The CIA's Branch 4 planners wanted the landing force "to survive and maintain its integrity on Cuban soil" in order to spark a general uprising. "The way will then be paved for United States military intervention aimed at pacification of Cuba, and this will result in the prompt overthrow of the Castro Government."²⁷ Kennedy avoided this trap in the early planning and did not give into the temptation to intervene when the operation went awry on the beaches. Although American

26. Lucien S. Vandenbroucke, *Anatomy of a Failure: The Decision to Land at the Bay of Pigs*, 99 POL. SCI. Q. 471, 471-491 (1984); JAMES G. BLIGHT & PETER KORNBLUH, *POLITICS OF ILLUSION: THE BAY OF PIGS REEXAMINED* (1998); OFFICE OF THE HISTORIAN, DEPARTMENT OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES, VOL. 10: CUBA 1961-62* (Louis J. Smith & David S. Patterson eds., 1997); COLONEL J. HAWKINS, *CLANDESTINE SERVICES HISTORY, CENTRAL INTELLIGENCE AGENCY, RECORD OF PARAMILITARY ACTION AGAINST THE CASTRO GOVERNMENT OF CUBA, 17 MARCH 1960-MAY 1961* (1961), available at <http://www.fas.org/irp/cia/product/cuba.pdf>; RICHARD M. PIOUS, *WHY PRESIDENTS FAIL* 29-46 (2008).

27. Piero Gleijeses, *Ships in the Night: the CIA, the White House and the Bay of Pigs*, 27 J. OF LATIN AM. STUD., Part 1, Feb. 1995, at 23-24 (citing an internal CIA memorandum dated Jan. 4, 1961).

involvement in the Bay of Pigs operation was already leaking to newspaper reporters and publishers even prior to the actual invasion,²⁸ and although it turned into a fiasco as a military operation, and a public humiliation for Kennedy, he avoided an escalation that, while it might have won some temporary gains for the exiles (though it is doubtful they could have gotten to the mountains), would have cost the United States dearly throughout Latin America. Yet Kennedy's definition of the mission, based on a power stakes analysis, put the operation at greater risk than other definitions and options with which he was presented. And so a "professional" President achieved neither operational nor political success.

A lesson to be learned here is this: If the White House is thinking about power stakes and minimizing its own risks, it might be better not to run the risk of an operation that has been "defined down." This might also be the lesson of Libya in 2011, where the Administration seems to have used power stakes to define the mission minimally in order to avoid a Russian veto (and a Chinese amen chorus) and to minimize domestic opposition to a third military campaign. Security Council Resolution 1973 simply authorized the "no-fly" zone and limited the use of force to protection of civilians. President Obama defined the American role as "leading from the rear" as NATO took the lead, but American participation in the strikes was crucial to the effort. Meanwhile the Administration (along with the British and French) proclaimed a goal of regime change that implied an open-ended commitment. The U.N. Resolution did not authorize attacks on Libyan leaders, yet NATO's pattern of targeting (hitting Gadhafi's residences in the main compound and targeting one of his son's residences) attempted to decapitate Libyan leadership. The difference between bombing Gadhafi's locations and attempting to destroy "command and control" (as put by British Prime Minister Cameron) were purely semantic. Eventually this fog of war would resolve in one of three ways: a diplomatic debacle for the Western powers if Gadhafi had been able to hang on; humanitarian tragedies associated with a continued civil war until either a military or a political solution could be fashioned; or a quagmire of Western assistance versus old regime resistance.

III. MINIMIZING RISK THROUGH PRIVATIZATION: ANGOLA V. IRAN-CONTRA

Presidents may try to lower their political and diplomatic risks by pretending to privatize a paramilitary operation. This contrasts with practices prior to the mid-1980s, when paramilitary forces were directly (if covertly) assisted by American military and intelligence officials.

28. LOUIS FISHER, *PRESIDENTIAL WAR POWER* 248-249 (2d ed. 2004).

Congo and Angola are case studies in the traditional methods of support. In the 1960s the CIA assisted in the overthrow of the first Congo regime and furnished later regimes with Cuban exile pilots and planes and then with U.S. service personnel as trainers and technicians. In breakaway Katanga province the CIA recruited a “gendarme/mercenary force” to roll back rebel advances, later supplying four C-130 Air Force transports and five B-26 bombers, brought in to assist a 700-man force of South African, Rhodesian, and European mercenaries.²⁹ In Angola in the 1970s, the CIA backed the Front for the National Liberation of Angola (ENLA) and the National Union for the Total Independence of Angola (UNITA), tribally based groups contending for power as the Portuguese were giving up their colonial rule.³⁰ The National Security Council’s “40 Committee” authorized Operation Feature, which involved flying weapons to paramilitary forces on Air Force planes. The CIA also provided funds directly to some of the leaders of UNITA and ENLA to recruit mercenaries, and U.S. personnel helped with supply and reconnaissance missions in the guise of an intelligence operation.³¹ This effort not only foundered militarily (the Popular Movement for the Liberation of Angola (MPLA), a pro-Soviet tribal grouping, was able to gain power), but it also became discredited when CIA-backed guerrillas decided to attack Western oil facilities (including Gulf Oil rigs) in the oil-rich enclave of Cabinda. The Angola government dispatched a Cuban combat brigade to the province, not only to put down a separatist movement, but also to defend American oil interests from the CIA-backed rebels.³² None of this made sense to members of Congress, who legislated an end to the covert operation by passing the “Clark Amendment” in 1976.³³

Subsequently, the CIA and the U.S. military developed ways to privatize support for paramilitary activities. The Iran-Contra Affair is a case in point. In place of direct U.S. financing and supply missions, CIA Director William Casey encouraged investors to form syndicates that would bankroll nominally private arms dealers, who would either purchase weapons on the open market or from Defense Supply Agency stocks. These weapons were purchased (at a huge markup) by Iran, and some of the profits (known as “residuals”) were transferred to the Nicaraguan Contras. Instead of CIA or armed forces trainers and technicians, former military or

29. Steven Weissman, *CIA Covert Action in Zaire and Angola: Patterns and Consequences*, 94 *POL. SCI. Q.* 263, 272 (1979).

30. JOHN STOCKWELL, *IN SEARCH OF ENEMIES* (1984).

31. Weissman, *supra* note 29, at 284.

32. PIERO GLEJESES, *CONFLICTING MISSIONS: HAVANA, WASHINGTON, AND AFRICA* 325 (2002).

33. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, §404, 90 Stat. 729, 757-758 (1976).

intelligence personnel were encouraged or recruited by officials to provide logistical and other assistance to the Contras.

While these efforts were undertaken to get around legal prohibitions (the Boland Amendments prohibiting lethal assistance to the Contras), they were also designed to minimize risk of disclosure.³⁴ But “the Enterprise” actually increased the risk. Those financing the operations expected to make a return on investment, and when they didn’t, they threatened disclosure. The United States used middlemen to negotiate with Iranian officials. Had the middlemen and arms brokers been caught in any illegal activities (whether involving the operation at hand or their other activities) they would have had every incentive to use what they had known about the operation to bargain for leniency. Ultimately there were two disclosures. Elements in the Iranian government tipped off *As-Shiraa* (a newspaper in Beirut) in order to embarrass their rivals. In the Contra resupply operations (as in many such efforts), some of operators doing air resupply got shot down and captured, and then were interrogated and paraded before the international media.

In any covert operation designed to improve the capability of a paramilitary force, everyone involved, whether investor or broker or operative, has a blackmailing capability against the government. Those who are unstable or mercenary may change sides, double-dip from several sources, leak information, or freelance in other activities (smuggling activity on resupply missions), all of which create vulnerabilities that will quickly move past the “cutout” and lead right back to the sponsoring government.

IV. POLICY INVERSION AND THE LACK OF ACCOUNTABILITY: IRAN-CONTRA AND CROATIA

There is another risk equal to that of disclosure. The White House effort to create a firewall, not only for itself, but also for its intelligence agencies and armed forces, leads to *policy inversion*: a systemic dysfunction in which policy is made at low levels of the operation rather than controlled at high levels, because the lower-level operators have been “privatized” and government officials keep their distance.³⁵ Lowlife middlemen and brokers pitch such operations to national security managers, and then offer to handle the operations. In the Iran-Contra Affair, negotiations with Iran were often conducted by private arms brokers rather than by American

34. Defense Appropriations Act for FY 1983, 793, Pub. L. No. 97-377 (1982) (first Boland Amendment); Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473 (1984) (second Boland Amendment); Further Continuing Appropriations, Fiscal Year 1986, Pub. L. No. 99-190 (1985) (third Boland Amendment).

35. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 114-115 (1990).

diplomats.³⁶ When you have an interlocutor whose livelihood (and perhaps whose life) turns on the successful outcome of the negotiations, you are likely to wind up with “soft” bargaining in which the interests of the U.S. Government may become secondary to the interests of the go-between. In a situation in which Iran was desperate for American weapons (and satellite intelligence) to bolster its position against Iraq, the bargaining position should have favored the American side. But with negotiators desperate to make deals (to repay a set of particularly nasty investors), the situation resolved time and again in ways that favored Iran. One of the main interlocutors, Manucher Ghorbanifar, was viewed by the CIA as a fraud, because he had failed several lie detector tests, and it issued a “burn” (avoid) notice on him in mid-1984. NSC director “Bud” McFarlane reported to President Reagan that he was a “borderline moron” and “the most despicable character I’ve ever met.”³⁷ At one point in the negotiations two arms dealers, Richard Secord and Albert Hakim offered the Iranians a nine-point agreement that included a promise of help to release seventeen Da’Wa terrorists from Kuwaiti jails, help in toppling Saddam Hussein, and the exchange of 500 TOW missiles in return for one hostage.

Since Iran-Contra, the U.S. government has attempted to avoid policy inversion when operations are privatized. In the 1990s in the midst of a conflict between Serbia and Croatia for dominance of what had been Yugoslavia, the United States decided to tilt strongly toward Croatia. Instead of turning the operation over to a new “Enterprise” with only tenuous connections to policymakers under a system of plausible deniability, U.S. officials encouraged Croatia to hire private companies with close links to the U.S. military as consultants. These companies in turn recruited recently retired U.S. military personnel to assist with communications, logistics, and intelligence. The result in 1995 was Operation Lightning Storm, a campaign against the Serbs that led to a negotiated end to the conflict over Bosnia. The activities of these companies were sanctioned by the State Department Office of Defense Trade Controls, and the privatization (which consisted of using retired rather than active-duty U.S. military personnel to assist the Croat forces) allowed State and Defense to provide effective assistance without getting active-duty U.S. forces involved. Nevertheless, operations involving privatization of logistics, training and supply continue to foster a culture of concealment from the American people, as well as inhibiting congressional oversight.³⁸

36. PIOUS, *supra* note 26, at 115-148.

37. LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 199 (1993); JANE MAYER & DOYLE MCMANUS, LANDSLIDE 181 (1988).

38. Ken Silverstein, *Privatizing War: How Affairs of State Are Outsourced to*

Accountability is lost when the supply, training, or financing of a paramilitary force is shifted from U.S. agencies to foreign agencies, militaries, or militias. After the Angola operation was (supposedly) shut down by the Clark Amendment, the South African military became a prime instrument of Western policy to block the MPLA. In the Iran-Contra Affair, financing of the Contras not only shifted to private investors, but also to foreign governments – who may have expected quid pro quo in their relationships with the State Department, in violation of federal law. After the Soviet invasion of Afghanistan, President Carter ordered the CIA to provide weapons to the Afghan resistance. In turn, the CIA enlisted the help of the Pakistan intelligence service (ISA).³⁹ Policy was then made primarily by the ISA, which favored the more militant and Islamist resistance forces, with consequences that continue to plague the American military.

V. THE CRISES OF AUTHORITY AND LEGITIMACY

Use of paramilitary forces has succeeded when the United States relied on settlers to acquire territory or scouts to protect regular military forces in hostile territory, but otherwise it often fails, and Presidents then pay the costs in the form of diminished authority, as happened to Kennedy with the Bay of Pigs, Reagan with the Iran-Contra Affair, and a succession of recent Presidents who have sponsored or assisted paramilitary groups in Iraq, Afghanistan, and Libya. It is difficult to assess the capabilities of indigenous leadership, who often exaggerate as to what they can deliver. This was true more than two centuries ago in Libya as much as it is today. During Jefferson's presidency a covert operation led by a dodgy diplomat (William Eaton) and by U.S. Marines that attempted to put the Dey of Tripoli's half-brother Hamet Karamanli on the throne was reduced to a comic-opera escapade when the Bashaw (ruler in waiting) kept sneaking off into the desert rather than committing to the venture.⁴⁰ During the Cold War resistance movements in Eastern Europe through the early 1950s and sabotage efforts against North Korea in the early 1950s and North Vietnam in the early 1960s promised success but failed completely.

Assessments of the effectiveness of paramilitaries are subject to the same kind of data falsification or exaggeration (especially of personnel, payrolls, and body counts) that are typical in reporting the size and performance of regular military forces that we subsidize. Savvy middlemen and national security operatives can spin the data, as Oliver North did when

Corporations Beyond Public Control, THE NATION, July 28, 1997, at 11.

39. See generally STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN (2004).

40. CHRISTOPHER H. PYLE & RICHARD M. PIOUS, THE CONSTITUTION UNDER SIEGE 198-199 (2010); MICHAEL KITZEN, TRIPOLI AND THE UNITED STATES AT WAR 47 (1993).

2012] DECISIONMAKING INVOLVING PARAMILITARY FORCES 479

he informed superiors that the number of Contras in Honduras had doubled after a fighting season – which was true only because many of them had been forced to move back across the border from Nicaragua after being routed by the Sandinistas. In Afghanistan the warlords and tribal leaders that the United States recruited into the Northern Alliance sold American occupiers a bill of goods by rounding up those they claimed were Taliban supporters, many of whom were nothing of the sort, but who could be labeled and then “sold” for bounty. False labeling of the merchandise would later bedevil U.S. efforts to interrogate and try the detainees at Guantanamo.

The crisis of legitimacy occurs when American officials who are privatizing operations do so in order to get around the Constitution, the laws of war, international conventions, procedures of the Intelligence Oversight Act of 1980 and various arms sales laws, or conflict-specific restrictions legislated by Congress, such as the Clark Amendment involving Angola, or the Boland Amendments dealing with Nicaragua.⁴¹ The White House, understanding that there is no public or congressional support for a covert operation, may decide on a deeper covert operation that hides the American hand, but when the American hand is uncovered, the prior cover-up becomes the issue. In the mid-1980s the CIA used a group of UCLAs (unilaterally controlled Latino Assets) trained as scuba divers, to plant mines on freighters docked at the Nicaraguan port of Corinto. Because Congress had not been briefed in advance, the ensuing uproar (mostly among Republicans such as Senator Goldwater) induced Casey to negotiate two agreements with the congressional intelligence oversight committees: the Casey Accords and the Casey Addendum, requiring the Director of Central Intelligence (DCI) to notify Congress of assets transferred to paramilitary forces.⁴² The transfer of assets from Iran arms sales to the Contras then became bound up not only in the issue of authority (whether unilateral American covert action was a better idea than the Contadora diplomatic initiative to encourage a peaceful settlement, which was sponsored by several Latin American nations), but also the issue of legitimacy, since no reports had been made or briefings given to Congress

41. Richard A. Best Jr. & Andrew Feickert, *Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress*, (Cong. Res. Serv. RS 22017), Dec. 6, 2006; Alfred Cumming, *supra* note 3.

42. BARRY GOLDWATER, DANIEL P. MOYNIHAN, & WILLIAM J. CASEY, PROCEDURES GOVERNING REPORTING TO THE SENATE SELECT COMMITTEE ON INTELLIGENCE (SSCI) ON COVERT ACTIONS, S. Hrg. 100-241, at 16-17 (Feb. 17-18, 1987) (commonly referred to as *Casey Accords*); DAVE DURENBERGER, PATRICK LEAHY, & WILLIAM J. CASEY, ADDENDUM TO PROCEDURES GOVERNING REPORTING TO THE SENATE SELECT COMMITTEE ON INTELLIGENCE ON COVERT ACTION, S. Hrg. 100-241 (Feb. 17-18, 1987), at 17-18 (commonly referred to as *Casey Addendum*).

under provisions of the Intelligence Oversight Act of 1980 or the understandings Casey had negotiated.

Questions of legitimacy lead to congressional hearings and GAO attempts to audit (which may be rebuffed), followed by shakeups within the administration. The use of paramilitary force may lead to private tort claims for damages to property or lawsuits alleging violations of human rights and the laws of war or attempts at criminal prosecution of officials violating American laws, especially if they stonewall or lie in their testimony before Congress. The Administration will defend itself with claims of immunity, testimonial privileges, and state secrets, leading to the conclusion that it has much to hide. Public approval of the President will drop sharply, Presidents no longer will lead public opinion on other matters, and presidential leadership of Congress (as measured by support scores) will plummet. In a worst case scenario, there will be a full-blown legitimacy crisis, and at that time the very form of government may change. The Secretary of State (Henry A. Kissinger in the Nixon administration and George P. Shultz in the Reagan administration) may emerge as an ersatz “prime minister” for foreign affairs in a quasi-parliamentary “custom and usage” that substitutes for presidential leadership since the White House is in disarray.

These seem like high costs for the White House to pay for tactical advantages in far-flung military adventures that have rarely proven to bring lasting advantages to the United States.