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

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Summary

Covert action and clandestine activities of the intelligence community and activities of the military may appear similar, but they involve different notification requirements and usually are conducted under different authorities of the *U. S. Code*.

The requirements for notifying Congress of activities of the intelligence community originated from instances in the 1970s when media disclosure of past intelligence abuses underscored reasons for Congress taking a more active role in oversight. Over time, these requirements were written into statute or became custom.

Section 3091 of Title 50, *U. S. Code* requires the President of the United States to ensure that the congressional intelligence committees are “kept fully and currently informed of the intelligence activities of the United States, including any significant *anticipated* intelligence activity,” significant intelligence failures, illegal intelligence activities, and financial intelligence activities. Intelligence activities also include covert action as outlined under Section 3093(e) of Title 50, *U.S. Code*.

Section 3092 of Title 50, *U. S. Code* sets out the congressional notification requirements for non-covert action intelligence activities. Section 3093 of Title 50 sets out the congressional notification requirements for covert actions. Both sections 3092 and 3093 explicitly state such notification is to be provided to the “extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods, or other exceptionally sensitive matters.”

The President and intelligence committees are responsible for establishing the procedures for notification, which are generally to be done in writing. Partly in deference to this higher standard, such notifications are sometimes limited to specific subgroups of Members of the Senate and the House of Representatives in certain circumstances, as defined by law and custom.

Contents

Non-Covert Intelligence Activities Notifications	1
Non-Covert Intelligence Activities <i>Gang of Four</i> Notifications	1
Covert Action Notifications.....	2
Covert Action <i>Gang of Eight</i> Notifications.....	2
Distinctions between <i>Gang of Four</i> and <i>Gang of Eight</i> Notifications	3
Sensitive DOD Activities Notifications.....	4
Traditional Military Activities.....	5
Operational Preparation of the Environment	5
Routine Support to Traditional Military Activities	6
Other-than-Routine Support to Traditional Military Activities.....	6
Defense Clandestine Service Activities.....	7
Counterterrorism Operations Briefings.....	7
Military Cyber Operations (Not Constituting Covert Action).....	7
Cyber Weapons	7
Offensive and Significant Defensive Military Operations in Cyberspace	7
Sensitive Military Operations	8
Sensitive Military Cyber Operations	8

Contacts

Author Contact Information	9
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Non-Covert Intelligence Activities Notifications

Section 3092 of Title 50, *U. S. Code*, requires that the congressional intelligence committees be kept “fully and currently informed” of all intelligence activities, other than a covert action, by the Director of National Intelligence (DNI) and the head of any of the component organizations of the intelligence community. Notifications shall be in writing and include the nature of the circumstances and an explanation of their significance. Intelligence Community Directive (ICD) 112, *Congressional Notification*, specifies that it is the specific component organization that determines which activities are reportable. Some notifications, by their nature, are after the fact, such as a significant intelligence failure “extensive in scope, continuing in nature” impacting U.S. national security. ICD 112 also provides guidance on significant *anticipated* activities that might qualify as reportable beforehand. They include, for example

1. intelligence activities that entail, with reasonable foreseeability, significant risk of exposure, compromise, and loss of human life;
2. intelligence activities that are expected to have a major impact on important foreign policy or national security interests; or
3. significant activities undertaken pursuant to specific direction of the President or the National Security Council (other than covert action).

Non-Covert Intelligence Activities *Gang of Four* Notifications

Typically, intelligence activities that are considered less sensitive are briefed to the membership of each committee in line with statute. In certain circumstances, however, the Section 3092 requirement may be met through notifications to select members of the House and Senate, a group colloquially known as the *Gang of Four*. *Gang of Four* intelligence notifications are usually oral briefings provided only to the chairs and ranking members of the two congressional intelligence committees.

Gang of Four notifications are not based in statute or in the rules of either of the two congressional intelligence committees. They are a practice generally accepted by the leadership of the intelligence committees in circumstances when the executive branch believes a non-covert action intelligence activity—often a collection program—to be of such sensitivity that a restricted notification is warranted in order to reduce the risk of disclosure, inadvertent or otherwise.¹ These notifications are provided as briefs without any written record or notetaking.

¹ Their use pre-dates the establishment of the congressional intelligence committees in the 1970s. Similar briefings were earlier used to inform relevant congressional committee leadership of especially sensitive intelligence matters, including both covert action and routine intelligence collection programs. See David M. Barrett, *The CIA and Congress: The Untold Story From Truman to Kennedy* (Lawrence, KS: University Press of Kansas, 2005) pp. 100-103. Observers, commenting on such notifications used during this time period, characterized them as being oral, often cursory, and limited to committee chairmen and ranking members, plus one or two senior staff members. See L. Britt Snider, *The Agency and the Hill, CIA's Relationship With Congress, 1946-2004*, (Washington, DC: Center For the Study of Intelligence, Central Intelligence Agency, 2008), p. 281. See also Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, Second Edition, 1947-1994*, (Nashville: The University of Tennessee Press, 1994), p. 119.

Covert Action Notifications

Section 3093 of Title 50, *U. S. Code* sets out how the congressional intelligence committees are to be informed of covert actions, to include use of cyber capabilities when employed as a covert action.²

The President may authorize the conduct of a covert action only if he or she determines such an action is “necessary to support identifiable foreign policy objectives of the United States, and is important to the national security of the United States.”³ Such determinations are to be generally set forth in a written *finding* to be reported to the congressional intelligence committees as soon as possible after the approval of a finding, and before the covert action starts.⁴

Findings must be made in writing unless immediate United States action is required. If time constraints prevent the initial preparation of a written *finding*, a written *finding* is to be produced as soon as possible but not later than 48 hours after the authorizing decision was made. *Findings* may not authorize or sanction a covert action, or any aspect of any such action, that already has occurred, and may not authorize any action that would violate the Constitution or any statute of the United States.

Findings are to specify each department, agency, or entity of the U.S. government authorized to fund or otherwise participate in any significant way in the activity.⁵ They also are to specify whether it is contemplated that any third party not an element of, or a contractor or contract agent of, the U.S. government, or who is not otherwise subject to U.S. government policies and regulations, will be used to fund or otherwise participate in any significant way, or be used to undertake the covert action on behalf of the United States. The DNI and responsible component of the intelligence community must also keep the congressional intelligence committees informed of any significant change to a *finding* or failure of the covert action.

Covert Action *Gang of Eight* Notifications

If the President determines that it is “essential” to limit access to a covert action finding in order to “meet extraordinary circumstances affecting vital interests of the United States,” he may limit the notification of such a *finding* to the chairs and ranking minority members of the House and Senate intelligence committees, the Speaker and minority leader of the House of Representatives,

² Specific reference to notification requirements for cyber as a covert action can be found in §130k(c)(2) of Title 50 United States Code.

³ See 50 U.S.C. §3093, as added P.L. 102-88, title VI, §602(a)(2), August 1991 and subsequently amended. This section was formerly classified as 50 U.S.C. 413b prior to editorial reclassification and renumbering. 50 U.S.C. §3093(e) specifies that such *covert actions* do not include (1) activities with the primary purpose of acquiring intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of U.S. government programs, or administrative activities; (2) traditional diplomatic or military activities or routine support to such activities; (3) traditional law enforcement activities conducted by U.S. government law enforcement agencies or routine support to such activities; or (4) activities to provide routine support of any other overt activities of other U.S. government agencies abroad.

⁴ See §3093(a) and (c), Title 50 *U. S. Code*.

⁵ Although covert action is historically most closely associated with the Central Intelligence Agency (CIA), the statutory definition allows for other departments and agencies of the U. S. Government, including the Department of Defense, to conduct covert action as well. See §3093(a), Title 50 *U. S. Code*.

and the majority and minority leaders of the Senate. These Members are colloquially known as the *Gang of Eight*.⁶

Whenever such a limited notification is given, the President is further required to “fully inform” the congressional intelligence committees in a “timely fashion” of the relevant finding, and is further required to provide a statement summarizing executive rationale for not providing prior notice of the relevant finding.⁷ After 180 days, the President must either provide all Members of the intelligence committees with access to the *finding* or explain why access must remain limited.⁸

Distinctions between *Gang of Four* and *Gang of Eight* Notifications

Gang of Four and *Gang of Eight* notifications differ in several ways. A principal difference is that the *Gang of Four* notifications procedure is not based in statute, and is a more informal process that generally has been accepted by the leadership of the intelligence committees over time.

By contrast, the *Gang of Eight* procedure is provided in statute,⁹ and imposes certain statutory obligations on the executive branch. For example, when employing this particular notification procedure, the President must make a determination that vital U.S. interests are at stake if a notification is to be restricted to the *Gang of Eight* and provide a written statement setting forth the reasons for limiting notification to the *Gang of Eight*, rather than notifying the full membership of the intelligence committees.¹⁰

Another distinction between the two notification procedures, at least since 1980 when the *Gang of Eight* procedure was first adopted in statute, is that *Gang of Four* notifications generally are limited to non-covert action intelligence activities, including principally but not exclusively intelligence collection programs viewed by the intelligence community as being particularly sensitive. In contrast, *Gang of Eight* notifications are statutorily limited to particularly sensitive covert action programs.

Notwithstanding these distinctions, there is no provision in statute that restricts whether and how the chairs and ranking members of the intelligence committees share with committee members information pertaining to the intelligence activities that the executive branch has provided only to the committee leadership, either through *Gang of Four* or *Gang of Eight* notifications. Nor, apparently, is there any statutory provision that sets forth any procedures that would govern the access of appropriately cleared committee staff to such classified information.

Some critics of restricted intelligence notification of Congress, such as the *Gang of Eight* procedures, maintain that they do not allow for effective oversight because participating Members “cannot take notes, seek the advice of their counsel, or even discuss the issues raised with their

⁶ See §3093(c) (2), Title 50 U.S. Code. The statute also allows, at the discretion of the President, to notify “other... members of the congressional leadership” than those specified.

⁷ See §3093(c)(3), Title 50 U. S. Code.

⁸ See §3093(c)(4), Title 50 U. S. Code.

⁹ See §3093(c)(2), Title 50 U.S. Code.

¹⁰ §3093(c)(3), Title 50 U. S. Code does not explicitly specify whether such a statement must be in writing, nor does it explicitly specify to whom such a statement should be provided.

committee colleagues.”¹¹ Other critics contend that restricted notifications such as *Gang of Eight* and *Gang of Four* briefings have been “overused.”¹² Still others believe *Gang of Four* notifications are unlawful because they are not statutorily based.¹³

Supporters of *Gang of Eight* notifications assert that such restricted notifications continue to serve their original purpose, which is to protect operational security of particularly sensitive intelligence activities while they are ongoing. Further, they point out that although Members receiving these notifications may be constrained in sharing detailed information about the notifications with other intelligence committee members and staff, these same Members can raise concerns directly with the President and the congressional leadership and thereby seek to have any concerns addressed.¹⁴ Supporters also argue that Members receiving these restricted briefings have at their disposal a number of rarely used legislative remedies if they decide to oppose particular programs, including the capability to use the appropriations process to withhold funding.¹⁵

Sensitive DOD Activities Notifications

The four congressional defense committees exercise oversight of sensitive Department of Defense (DOD) activities.¹⁶ These activities, on occasion, may appear similar to clandestine activities or covert action conducted by the intelligence community. However, they differ in that they are conducted under a military chain of command, generally in support of, or in anticipation of a military operation or campaign conducted under Title 10 authority.¹⁷

Insofar as Congress exercises oversight over these activities, DOD’s requirements for notifying Congress differ from those of the intelligence community. Greater integration of military and intelligence activities—desired from an operational standpoint—has presented challenges when determining whether they fall primarily under Title 10 or Title 50 authority.¹⁸ Moreover, prior notification, which is generally required for covert action and significant *anticipated* intelligence

¹¹ See letter from Representative Jane Harman to President George W. Bush, January 4, 2006, regarding the National Security Agency (NSA) electronic communications surveillance program, often referred to as the Terrorist Surveillance Program, or TSP.

¹² See Tim Starks, “Pelosi Controversy Suggests Changes to Congressional Briefings Are Due,” *Congressional Quarterly*, May 14, 2009.

¹³ See Vicki Divoll, “Congress’s Torture Bubble,” *Washington Post*, May 13, 2009.

¹⁴ See Congressional Quarterly transcript of press conference given by Representative Peter Hoekstra, December 21, 2005.

¹⁵ See Tim Starks, “Pelosi Controversy Suggests Changes to Congressional Briefings Are Due,” *Congressional Quarterly*, May 14, 2009.

¹⁶ For purposes of Title 10, the four congressional defense committees include the Armed Services and Appropriations committees of the Senate and House, see 10 U.S.C. §101(a)(16). Section 1(a) of H.Res. 658, 95th Cong., 1st sess. (1977) provides for one member from each of the House defense committees to also be a member of the House Permanent Select Committee on Intelligence (HPSCI). Section 2(a)(1) of S.Res. 400, 94th Cong. 2nd sess. (1976) provides for one member from each party from each of the Senate defense committees to be a member of the Senate Select Committee on Intelligence (SSCI).

¹⁷ The one exception is the category of DOD activities known as *other-than-routine support* to traditional military activities which falls under §3093 of Title 50, *U. S. Code* governing covert action.

¹⁸ See, for example, Andru E. Wall, “Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action,” *Harvard National Security Journal*, Harvard University Law School (Cambridge: December 2, 2011). Wall argues that Titles 10 and 50 “create mutually supporting, not mutually exclusive, authorities.” See also Joseph B. Berger III, “Covert Action: Title 10, Title 50, and the Chain of Command,” *JFQ*, Issue 67, 4th Quarter 2012. Berger and others address the potential hazards that may present themselves when conducting activities under Title 50 authority that risk exposing members of the Armed Forces to an adversary’s denial of their prisoner-of-war status under the Geneva Convention Relative to the Treatment of Prisoners of War.

activities, is not typical of congressional notifications of sensitive DOD activities conducted in support of a larger military operation.

Following are notification requirements for sensitive military activities that, from an operational standpoint, could be confused with covert or clandestine activities of the intelligence community.

Traditional Military Activities

Traditional military activities are referenced but not defined in statute. They have been described as military activities “*under the direction and control of a United States military commander...preceding and related to hostilities which are either anticipated...or...ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly.*”¹⁹ Traditional military activities can be conducted covertly (i.e., U.S. sponsorship is secret and unacknowledged) or clandestinely (i.e., the activity itself is secret) in support of the overall military operation. Some have maintained that because these activities can resemble covert action in that they can influence political, military or economic conditions abroad, they warrant greater oversight.²⁰ In statute, however, traditional military activities and routine support to these activities are exempt from the congressional notification requirements for covert action.²¹

Operational Preparation of the Environment

Operational Preparation of the Environment (OPE) is defined in DOD doctrine—not in statute—as “activities in likely or potential areas of operations to prepare and shape the operational environment.”²² OPE can be conducted covertly or clandestinely and often involves the employment of U.S. Special Operations Forces (SOF) in counterterrorism operations. Joint Publication 3-05 cites examples of OPE as “close-target reconnaissance...reception, staging, onward movement, and integration...of forces...[and] infrastructure development.”²³

Because the military conducts OPE as a category of traditional military activities, these operations are not subject to congressional notification as a covert action or significant anticipated intelligence activity. Congress has been concerned that the military overuses the term *OPE* resulting in these operations effectively circumventing oversight by the congressional intelligence committees. OPE can also include clandestine intelligence collection, conducted under Title 10 authority, for example, that falls outside the jurisdiction of congressional defense committees, and, as part of a larger military operation, might not be brought to the attention of the congressional intelligence committees.²⁴

¹⁹ See U.S. Congress, House of Representatives, *Intelligence Authorization Act, Fiscal Year 1991*, conference report to accompany H.R. 1455, 102nd Cong., 1st sess., July 25, 1991, H.Rept. 102-166, pp. 29-30.

²⁰ See Joel Myer, “Supervising the Pentagon: Covert Action and Traditional Military Activities in the War on Terror,” *Administrative Law Review*, Vol. 59, No. 2, Spring 2007.

²¹ See §3093(e) of Title 50 United States Code: “...the term ‘covert action’...does not include...traditional diplomatic or military activities or routine support to such activities.”

²² See Joint Staff, “DOD Dictionary of Military and Associated Terms,” June 2017 revision, available at http://www.dtic.mil/doctrine/new_pubs/dictionary.pdf.

²³ Joint Publication 3-05, “Special Operations,” Joint Staff, July 16, 2014, available at http://www.dtic.mil/doctrine/new_pubs/jp3_05.pdf. Joint Publication 3-05 defines *preparation of the environment* as an “umbrella term for operations and activities conducted by selectively trained special operations forces to develop an environment for potential future special operation.”

²⁴ See U.S. Congress, House of Representatives, “Intelligence Authorization Act for Fiscal Year 2010,” report, together with minority and additional views to accompany H.R. 2701, 111th Cong., 1st sess., June 26, 2009, pp. 48-49: (continued...)

Routine Support to Traditional Military Activities

Routine support to traditional military activities might include logistic support to impending or ongoing military operations which involve U.S. Armed Forces *unilaterally* and in which the U.S. role is generally acknowledged.²⁵ They can be conducted clandestinely or covertly, however because they have a supporting function to a larger military operation in which the role of the United States is acknowledged, they are not considered covert action and do not require congressional notification separate from the operations they support.

Other-than-Routine Support to Traditional Military Activities

Other-than-routine support to traditional military activities includes activities abroad that involve other than unilateral employment of U.S. forces. They may be conducted covertly and clandestinely (i.e., the activity as well as U.S. sponsorship are secret). They include recruitment, training or other assistance to non-U.S. individuals, organizations or populations to conduct activities—wittingly or not—that support U.S. military objectives. Because they may be conducted well in advance of an anticipated military operation and because they can be intended to influence political, economic or military conditions in another country²⁶—such as swaying public opinion—other-than-routine support to traditional military activities is subject to congressional notification for covert action under Section 3093, Title 50 of the *U. S. Code*.²⁷

(...continued)

“Clandestine military intelligence-gathering operations, even those legitimately recognized as OPE, carry the same diplomatic and national security risks as traditional intelligence-gathering activities. While the purpose of many such operations is to gather intelligence, DOD has shown a propensity to apply the OPE label where the slightest nexus of a theoretical, distant military operation might one day exist. Consequently, these activities often escape the scrutiny of the intelligence committees, and the congressional defense committees cannot be expected to exercise oversight outside of their jurisdiction.”

²⁵ Joint Explanatory Statement of the Committee of Conference, H.R. 1455, July 25, 1991.

²⁶ That is, the activities may precede National Command Authority approval for hostilities or operational planning for hostilities. See U.S. Congress, House of Representatives, *Intelligence Authorization Act, Fiscal Year 1991*, conference report to accompany H.R. 1455, 102nd Cong., 1st sess., July 25, 1991, H.Rept. 102-166, pp. 29-30.

²⁷ See S. Rep. No. 101-358, p. 55:

[T]he Committee would regard as ‘other-than routine’ support (*requiring a finding and reporting to the committee*) such activities as clandestinely recruiting and/or training of foreign nationals with access to the target country actively to participate in and support a U.S. military contingency operation [sic]; clandestine efforts to influence foreign nationals of the target country concerned to take certain actions in the event a U.S. military contingency operation is executed; clandestine efforts to influence and effect public opinion in the country concerned where U.S. sponsorship of such efforts is concealed; and clandestine efforts to influence foreign officials in third countries to take certain actions in the event a U.S. military contingency operation is executed. (Traditional diplomatic activities would be excluded by other parts of this section.)

In other words, the Committee believes that when support to a possible military contingency operation involves other than unilateral efforts by U.S. agencies in support of such operation, to include covert U.S. attempts to recruit, influence, or train foreign nationals, either within or outside [sic] the target country, to provide witting support to such operation, should it occur, such support is not “routine.” *In such circumstances, the risks to the United States and the U.S. element involved have, by definition, grown to a point where a substantial policy issue is posed, and because such actions begin to constitute efforts in and of themselves to covertly influence events overseas* (as well as provide support to military operations). [emphasis added]

See also, Joel T. Meyer, “Supervising the Pentagon: Covert Action and Traditional Military Activities in the War on Terror,” *Administrative Law Review* (Washington, DC: The American University, 59 Admin. L. Rev. 463 (2007)).

Defense Clandestine Service Activities

Under Title 10, *U. S. Code*,²⁸ the Defense Clandestine Service, subordinate to the Defense Intelligence Agency, is designed to provide dedicated clandestine support to DOD to meet unique strategic military intelligence priorities.

The Secretary of Defense shall provide to the defense and intelligence committees of the House and Senate quarterly briefings on the deployments and collection activities of personnel of the Defense Clandestine Service.

Counterterrorism Operations Briefings

Section 485 of Title 10, *U.S. Code* requires the Secretary of Defense to provide monthly briefings to the congressional defense committees that describe DOD counterterrorism operations and related activities. Under the statute, each such briefing must include specific elements

- a global update on activity within each geographic combatant command and how such activity supports the respective theater campaign plan;
- an overview of authorities and legal issues, including limitations;
- an overview of interagency activities and initiatives; and
- any other matters the Secretary considers appropriate.

Military Cyber Operations (Not Constituting Covert Action)

Cyber Weapons

Section 130k of Title 10 of the *U. S. Code* provides notification requirements for cyber capabilities “intended for use as a weapon” that specifically do not constitute covert action. Section 130k specifies that covert actions are exceptions to these notification requirements. For these operations, the Secretary of Defense must notify the congressional defense committees in writing

- within 48 hours of the use of a cyber weapon that has been approved for use under international law;
- on a quarterly basis for any cyber capability developed for use as a weapon;²⁹ and
- immediately following the unauthorized disclosure of a cyber weapon capability.

Offensive and Significant Defensive Military Operations in Cyberspace

Offensive cyberspace operations are defined as operations “intended to project power by the application of force in and through cyberspace.”³⁰ Defensive cyberspace operations are defined as active or passive cyberspace operations “to preserve the ability to utilize friendly cyberspace

²⁸ See 10 *U.S. Code*, prec. 421 note.

²⁹ This measure expands Congress’s oversight role and ensures that the intended use of cyber weapons is consistent with emerging legal norms. See Benjamin Dynkin and Barry Dynkin, “Cybersecurity Showdown: Why the Military is Preparing for a New Kind of War,” *The National Interest*, January 9, 2018.

³⁰ See CRS In Focus IF10537, *Defense Primer: Cyberspace Operations*, by Catherine A. Theohary. See also Joint Publication 3-12(R), *Cyberspace Operations* (Washington, DC: Joint Staff, February 5, 2013), p. GL-4.

capabilities and protect data, networks, net-centric capabilities, and other designated systems.”³¹ Section 484 of Title 10 *U. S. Code* mandates the Secretary of Defense to provide the congressional defense committees in writing quarterly briefings “on all offensive and significant defensive military operations in cyberspace carried out by the Department of Defense during the immediately preceding quarter.” The briefings are to include the command involved and an overview of the legal authorities under which the operations took place.

Sensitive Military Operations

Sensitive Military Operations are defined in Section 130f(d) of Title 10 *U. S. Code* as (1) kill or capture operations conducted by U.S. Armed Forces *outside a declared theater of active armed conflict, or conducted by a foreign partner in coordination with the U.S. Armed Forces* that target a specific individual or individuals; or (2) an operation conducted by the U.S. Armed Forces *outside a declared theater of active armed conflict in self-defense or in defense of foreign partners*, including during a cooperative operation.

The Secretary of Defense shall submit notice in writing to the congressional defense committees

- within 48 hours of the operation (or within 48 hours of providing verbal notice to Congress), *to include occasions when DOD provides support to covert actions conducted under Title 50 authority*;
- immediately following an unauthorized disclosure of an operation;
- “periodically” in the form of briefs detailing the personnel and equipment assigned.

The Secretary of Defense is further required to brief the congressional defense committees periodically on DOD personnel and equipment assigned to sensitive military operations, including DOD support to such operations conducted under Title 50 authorities.

Sensitive Military Cyber Operations

Sensitive military cyber operations are a subcategory of sensitive military operations. Section 130j(c) of Title 10 of the *U. S. Code* defines *sensitive military cyber operations* as operations carried out by the armed forces of the United States that are intended to cause cyber effects outside a geographic location where the Armed Forces of the United States are involved in hostilities or where hostilities have been declared by the United States. The Secretary of Defense shall provide the congressional defense committees notice

- within 48 hours of the operation taking place;
- immediately subsequent to an unauthorized disclosure of a sensitive military cyber operation.

³¹ Joint Publication 3-12, *Cyberspace Operations*, (Washington, DC: Joint Staff, February 5, 2013) p. II-2. found at http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_12R.pdf.

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