

NATIONAL DEFENSE UNIVERSITY

NATIONAL WAR COLLEGE

**COVERT ACTION: TITLE 10, TITLE 50, AND THE  
CHAIN OF COMMAND—CONSEQUENCES OF POLICY DECISIONS**

**National War College Commandant's Award**

LTC JOSEPH B. BERGER III, USA  
COURSE 6902  
ADVANCED WRITING ELECTIVE  
APRIL, 2012

PAPER ADVISOR  
MR. HARVEY RISHIKOF, ODNI

PROFESSOR  
DR. JOSEPH COLLINS

FACULTY ADVISOR  
COL HERSHEL HOLIDAY

## COVERT ACTION: TITLE 10, TITLE 50, AND THE CHAIN OF COMMAND—CONSEQUENCES OF POLICY DECISIONS

### *Introduction*

On March 3, 2012, the Associated Press reported that, “Top Pentagon officials are considering putting elite special operations troops under CIA control in Afghanistan after 2014, *just as they were during last year’s raid on Osama bin Laden’s compound in Pakistan.*”<sup>1</sup> The plan would allow the “U[nited] S[tates] and Afghanistan [to] say there are no more US troops on the ground...because once [they] are assigned to CIA control, *even temporarily*, they become spies.”<sup>2</sup> The day prior, the acting Under Secretary of Defense for Personnel and Readiness, Ms. Rooney, warned senior DoD leaders that “the Department must be vigilant in ensuring military personnel are not inappropriately utilized,” in performing “new, expanding, or existing missions.”<sup>3</sup> While not explicitly addressing other government agencies’ use of military personnel, she cautioned that a “viable Total Force” must “align[] choices to strategy supported by rigorous analysis.” Placing military personnel (i.e., uniformed members of the Army, Navy, Air Force and Marine Corps) under CIA control demands such rigorous analysis. The raid on Osama bin Laden’s compound provides a framework.

On May 1, 2011, in a televised speech at 11:35 PM, President Barak Obama reported “to the American people and to the world that the United States ha[d] conducted an operation that killed

---

<sup>1</sup> Kimberly Dozier, “AP Sources: CIA-Led Force May Speed Afghan Exit,” ABC News Online (3 March 2012) (emphasis added); complete text available at <http://abcnews.go.com/Politics/wireStory/ap-sources-cia-led-force-speed-afghan-exit-15840357>.

<sup>2</sup> *Id* (emphasis added).

<sup>3</sup> Memorandum from Acting Under Secretary of Defense for Personnel and Readiness for Secretaries of the Military Departments, et al., SUBJECT: Guidance related to Utilization of Military Manpower to Perform Certain Functions (2 March 2012).

Osama bin Laden, the leader of al Qaeda.”<sup>4</sup> Over the next nine minutes, the President provided few details beyond noting that he had directed “Leon Panetta, the Director of the CIA (“Director”), to make the killing or capture of bin Laden the top priority of our war against al Qaeda” and that the operation, carried out by a “small team of Americans” with “with extraordinary courage and capability” was done “at [his] direction [as President].”<sup>5</sup>

However, in the hours and days that followed, explicit details poured out from the most senior levels of the Executive Branch. The specifics ranged from the now iconic photograph of the White House Situation Room to intricate diagrams of the targeted compound in Abbottabad.<sup>6</sup> Most significant was Panetta’s unequivocal assertion that the raid had been a covert action:

Since this was what’s called a ‘Title 50’ operation, which is a covert operation, and it comes directly from the president of the United States who made the decision to conduct this operation in a covert way, that direction goes to me. And then, I am, you know, the person who then commands the mission. But having said that, I have to tell you that the *real* commander was Admiral McRaven because he was on site, and he was actually in charge of the military operation that went in and got bin Laden.<sup>7</sup>

---

<sup>4</sup> Remarks by President Barack Obama, delivered from the East Room of the White House (1 May 2001); complete transcript available online at <http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead>.

<sup>5</sup> *Id.* Of critical note, the President did not describe the “small team of Americans” as military personnel, although later it would be publicized that the force included members of the Army and the Navy.

<sup>6</sup> The Department of Defense released a diagram of the Osama Bin Laden Compound within 24 hours of the President’s address. *See, e.g.*, Sorin Matei, Osama Bin Laden’s Compound Location in 3D, (2 May 2011); imagery available online at <http://matei.org/ithink/2011/05/02/osama-bin-ladens-compound-location-in-almost-3d-kml-overlay-picture-file/>. The CIA released similar imagery. *See, e.g.*, Gus Lubin and Mamta Badkar, “CIA Reveals Diagrams And Aerial Photos Of The Bin Laden Compound,” *Business Insider* (2 May 2011); imagery available online at <http://www.businessinsider.com/satellite-images-of-bin-ladens-compound-2011-5>. For a detailed identification of everyone in the iconic photograph, *see* “Breaking down the Situation Room” *Washington Post* (5 May 2011); available online at <http://www.washingtonpost.com/wp-srv/lifestyle/style/situation-room.html>. While some have argued that covert action is impossible in a personal media saturated world (*See, e.g.*, Doug Gross, “Twitter user unknowingly reported bin Laden attack” CNN Online (2 May 2011); complete text of article available online at [http://articles.cnn.com/2011-05-02/tech/osama.twitter.reports\\_1\\_bin-twitter-profile-twitter-user?\\_s=PM:TECH](http://articles.cnn.com/2011-05-02/tech/osama.twitter.reports_1_bin-twitter-profile-twitter-user?_s=PM:TECH)), that discussion is beyond the scope of this paper.

<sup>7</sup> Interview of then-CIA Director Leon Panetta by Jim Lehrer on *PBS Newshour*, “CIA Chief Panetta: Obama Made ‘Gutsy’ Decision on Bin Laden Raid,” (3 May 2011) (emphasis original); video of interview available online at [http://www.pbs.org/newshour/bb/terrorism/jan-june11/panetta\\_05-03.html](http://www.pbs.org/newshour/bb/terrorism/jan-june11/panetta_05-03.html).

Despite the self-effacing emphasis on then-Vice Admiral McRaven’s operational leadership, Panetta’s comment highlights that critical confusion exists amongst even the most senior leaders of the U.S. Government about both the chain of command in the classification of such an operation. Panetta publicly described the raid as both a “covert operation” and a “military operation.” Asserting that he was the “commander,” he described a chain of command that went from the President to the Director to Vice Admiral McRaven. This language and the open discussion of the raid are at odds with the statutory framework governing the conduct of covert action. The statute is clear: a covert action<sup>8</sup> is an act by the United States Government “where it is intended that the role of the United States Government will *not* be apparent or acknowledged publicly.”<sup>9</sup>

The Obama administration did the opposite: they made the nature of the raid and the precise role of the US Government patently clear and did so in exhaustive detail. The statute, in relevant part, reads:

[T]he term “covert action” means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will *not be apparent or acknowledged publicly*, but does not include—

(1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;

(2) *traditional* diplomatic or *military activities* or routine support to such activities...<sup>10</sup>

The President could have conducted the operation as a traditional military activity, the statutory exception enumerated above. As a traditional military activity, the President would have

---

<sup>8</sup> Unless otherwise indicated, this paper will use the term “covert action” only as that term is defined in 50 U.S.C. § 413b(e).

<sup>9</sup> 50 U.S.C. §413b(e) (emphasis added); complete statute reprinted at Appendix 1.

<sup>10</sup> *Id.* (emphasis added).

executed the raid as a military operation, pursuant to his constitutional authority as the Commander-in-Chief, under the Secretary of Defense's ("Secretary") statutory authorities, with a military chain of command, and with no statutory limits on subsequent public acknowledgement. But, as Panetta explained, the President's decision was to conduct the raid as a covert action. Unlike the raid's operational details, the process behind the decision to conduct the operation as a covert action remains largely shrouded.<sup>11</sup> The final decision to conduct an apparently military raid into a sovereign country targeting a non-state actor using military personnel under the command of the Director and to classify it as a covert action, raises significant issues of policy, law, and sovereignty. Such actions directly challenge the legitimacy and moral authority of future such US actions.

As the Abbottabad raid illustrates, DoD military and CIA intelligence operations have converged in the post-9/11 security environment.<sup>12</sup> While few question the efficacy of this arrangement, numerous commentators have directly questioned the legal and policy framework of current DoD-CIA cooperation. This discourse is largely focused on distinctions between "Title 10" and "Title 50"<sup>13</sup> and the domestic legal framework for the conduct of apparently overlapping military and intelligence operations outside what are accepted as theaters of war.<sup>14</sup>

---

<sup>11</sup> Vice President Biden is on record as having told the President, "Mr. President, my suggestion is, don't go." However, from the information available, it seems that recommendation was not about how to classify the operation, but rather whether to conduct the operation at all. Mary Bruce, "Joe Biden Advised Against the Osama Bin Laden Raid," *ABC News* online (30 January 2012); full text available online at <http://abcnews.go.com/blogs/politics/2012/01/joe-biden-advised-against-the-osama-bin-laden-raid/>.

<sup>12</sup> See, e.g., Jeff Mustin and Harvey Rishikof, "Projecting Force in the 21st Century - Legitimacy and the Rule of Law: Title 50, Title 10, Title 18, and Art. 75," *Rutgers Law Review* "Symposium 2011: Unsettled Foundations, Uncertain Results: 9/11 and the Law, Ten Years After," 63 *Rutgers L. Rev* 1235 (Summer 2011), at 1236; see also Robert Chesney, "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate," 5 *Journal of National Security Law and Policy* 539 (2012).

<sup>13</sup> DoD forces routinely operate under both Title 10 and Title 50 of the United States Code. The typical shorthand is to refer to DoD's authorities as "Title 10" and the CIA's as "Title 50." This shorthand is at best inaccurate and at worst, misleading. See discussion under *The Need for a Lingua Franca*, page 8, *infra*.

<sup>14</sup> Currently, this is limited to Afghanistan; it previously included Iraq. Because there is disagreement as to what constitutes the "battlefield" or "theater of war" in the current fight, there is attendant confusion over what the

These are critical discussions of complex issues, made more difficult by the absence of clear statutory answers resulting from a legacy statutory structure many argue is ill-constructed to effectively combat the current threat.

Focusing on the risks associated with military personnel conducting a kinetic covert action, this paper's goal is to enable senior leaders and their staffs to make appropriately informed recommendations to the President. The paper recommends changes to process to practice, but not to the law. It rejects the notion of melding Titles 10 and 50 of the United States Code into the oft-referred to "Title 60." By reinforcing the underlying basis of the current constitutional, statutory, treaty and doctrinal framework, the paper highlights the need to ensure proposed actions are properly classified—either under the statute as a covert action or exempted from the statute as a traditional military activity<sup>15</sup>—in order to ensure the correct command and control structure is in place. While there is no statutory definition of what constitutes a traditional military activity, properly applying that label is critical. The protections of the law of war require our Nation's military forces be engaged in *traditional*<sup>16</sup> military activities as soldiers<sup>17</sup> and not in intelligence activities as spies. At the core of that classification is the constitutional, statutory, treaty, and doctrinal framework of the truly unique, yet strikingly fundamental, concept of command authority.

The paper begins with a brief definition of the current and likely future threat. It then addresses the need for universal usage of the legally significant terms of art related to the conduct of covert action. Against that backdrop of a *lingua franca*, the paper then examines the

---

appropriate instrumentality is for engaging that enemy across the spectrum of law enforcement, military, and covert action options.

<sup>15</sup> 50 U.S.C. §413b(e)(2).

<sup>16</sup> Here, "traditional" is used both as an adjective, as well as within the covert action statute's meaning of a traditional military activity.

<sup>17</sup> The term "soldier" is used generically to include soldiers, sailors, airmen, and Marines.

statutory framework for and historical importance of classifying kinetic DoD operations as traditional military activities. Within that framework, the paper analyzes the relevant constitutional, statutory, treaty and doctrinal elements of command and how the authorities, requirements and benefits of the military command structure are placed at risk by tasking DoD to conduct kinetic covert action under CIA control.<sup>18</sup> Through that analysis, this paper illustrates that such an arrangement, while legally permissible, ultimately risks the individual protection of combatant immunity<sup>19</sup> the law of war provides military personnel while potentially also negatively impacting broader foundational elements of international law.

The potential policy implications of assuming this risk must be fully understood by not only the senior decision makers, but also by the individual soldiers. The practical risks to those soldiers are neither semantic nor inconsequential. The policy risks to the US Government are equally important as national moral and legal legitimacy remain critical elements of the United States' geopolitical soft power, a point reinforced in the 9/11 Commission Report.<sup>20</sup> Furthermore, the concept of exclusive state control over the legitimate use of armed force remains viable domestically and internationally *only* where that use of force—including the conduct of kinetic operations by a state's armed forces—is used within the accepted legal framework. Any deviation, however permissible under domestic law,<sup>21</sup> must be informed by a

---

<sup>18</sup> See Panetta interview, *supra* note 7, and accompanying discussion; *see also* Dozier, *supra* note 1.

<sup>19</sup> Combatant immunity allows those who fulfill the necessary requirements to legitimately participate in armed hostilities and not be punished for their conduct within the bounds of the laws governing conduct during war (in Latin, *jus in bello*). The phrase “combatant immunity” does not appear in the Geneva Conventions.

<sup>20</sup> “We should offer an example of moral leadership in the world...[including] abid[ing] by the rule of law...” Thomas H Kean, Chair, *The 9/11 Commission Report* (July 2004), 376; complete report available online at <http://www.9-11commission.gov/report/911Report.pdf>.

<sup>21</sup> It is worth noting that the United States is perhaps the only nation on earth which has codified its conduct of covert action as a matter of public record.

rigorous analysis of the immediate risks and their broader implications. That risk must be understood by both the President and the military personnel who bear it most directly.

### *Changed Character of the Battlefield and the Enemy*

In the decade since the attacks of 9/11, elements of the DoD and the CIA have become well-integrated. “In an interview at CIA headquarters two weeks ago, a senior intelligence official said the two proud groups of American secret warriors had been ‘deconflicted and basically integrated’—finally—10 years after 9/11.”<sup>22</sup> An increased reliance on special operations forces to achieve national objectives has been a direct outgrowth of both that integration and a transition from confronting a Westphalian-state enemy to a diffuse, morphing transnational threat. That enemy is “nimble and determined [and] cannot be underestimated.”<sup>23</sup> For most of the past decade, DoD simultaneously fought two larger wars on geographically defined battlefields. During that same time, the underlying legal structure as not changed. In the background of both, practitioners, lawyers, policy advisors, academics and others have argued about the appropriate legal and policy framework for the conduct of each over their various phases. Even as US combat forces have left Iraq and the manpower requirements for the US mission in Afghanistan continue to shrink, the United States must still continue to address the threat that al Qaida and their associated forces present.

The challenge is that the threat has migrated to other parts of the globe where the battlefield is less constrained and no longer defined by the sharp boundaries of sovereign nations or the

---

<sup>22</sup> Mark Ambinder, “The Secret Team That Killed bin Laden,” *National Journal* online (3 May 2011); full text available online at <http://nationaljournal.com/whitehouse/the-secret-team-that-killed-bin-lawden-20110502>. See also Mustin and Rishikof, *supra* note 12, at 1236, who argue that “The modern battlefield, defined in this Article as military operations since 2001, has contributed to the operational synthesis of intelligence and military organizations.”

<sup>23</sup> Remarks as prepared for delivery by Attorney General Eric Holder at Northwestern University School of Law (5 March 2012); complete text available online at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

formations of those states' armed forces. The legal and policy debates remain unresolved and have become arguably more complex on this geographically unconstrained battlefield. It is worth noting that during a recent *60 Minutes* interview, Scott Pelley recently asked now-Secretary of Defense Panetta: "How many countries are we currently engaged in a shooting war?" Panetta laughed and responded "that's a good question. I have to stop and think about that...we're going after al Qaeda wherever they're at.... Clearly, we're confronting al Qaeda in Pakistan, Yemen, Somalia, [and] North Africa."<sup>24</sup> These kinetic military operations outside of a recognized theater of war<sup>25</sup> raise significant legal and policy concerns, especially where the US Government conducts them without knowledge or consent of the host nation.<sup>26</sup> While the categorization and conduct of these operations is problematic for lawyers and policy makers, the stakes are much more immediate and individually much greater for the soldier actually executing them.

### *The Need for a Lingua Franca*

Pervasive shorthand refers to DoD's authorities as "Title 10" and the CIA's as "Title 50." This is technically inaccurate; worse, it's inherent imprecision can be misleading. DoD forces routinely operate under *both* Title 10 and Title 50 of the United States Code.<sup>27</sup> Instead of "Title 10 operations," this paper uses the term "military operations;" instead of "Title 50 operations"

---

<sup>24</sup> Interview of Secretary of Defense Leon Panetta by Scott Pelley, *60 Minutes* (29 January 2012); complete interview available online at <http://www.cbsnews.com/video/watch/?id=7396828n&tag=contentMain;contentAux>. See also Posture Statement of Admiral William H. McRaven, Commander, United States Special Operations Command, before the 112<sup>th</sup> Congress Senate Armed Services Committee (6 March 2012) *noting that* "Throughout the year, [special operations forces] conduct[] engagements in more than 100 countries worldwide."

<sup>25</sup> See note 15, *supra*.

<sup>26</sup> As was apparently the case with the Abbottabad operation. See, e.g., Adam Levin, "Bin Laden raid was humiliating to Pakistanis, Gates and Mullen say" CNN online (18 May 2011); full article available online at [http://articles.cnn.com/2011-05-18/us/pakistan.bin.laden\\_1\\_gates-and-mullen-bin-pakistanis?\\_s=PM:US](http://articles.cnn.com/2011-05-18/us/pakistan.bin.laden_1_gates-and-mullen-bin-pakistanis?_s=PM:US).

<sup>27</sup> See generally Andru E. Wall, "Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities, and Covert Action," 3 *Harvard National Security Journal* 85 (2011).

this paper will refer use the term “CIA operations” and, where appropriate, the more specific “covert action.” All three terms require clarification.

“CIA Operations” is a broader category that includes everything else done by the CIA that is not conducted pursuant to a Presidential covert action finding.<sup>28</sup> Thus, the statutory definition of covert action defines only a portion of the CIA’s activities.<sup>29</sup> “Covert action” is a statutorily defined term of art that includes any “activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”<sup>30</sup> A covert action thus has two central affirmative requirements: the act’s purpose must be to *influence* and the intent must be to *not* publicly acknowledge the US government’s involvement.

It is worth cautioning against the widespread, everyday use of the term “covert” is even more problematic. Covert action, “in its colloquial usage, is frequently used to describe any activity the government wants concealed from the public.”<sup>31</sup> Through ignorance, these colloquial usages ignore the critical fact that a traditional military activity, even when the government wants to conceal it from the public, is by statutory definition *not* a covert action, regardless of how “secretly” it is executed. Nor is the use of DoD’s doctrinal definition of “covert” recommended. DoD defines a “covert operation” as one “that is so planned and executed as to conceal the identity of or permit plausible denial by the sponsor. A covert operation differs from a

---

<sup>28</sup> See Appendix 1, 50 U.S.C. §413b(a)(1) through (5) for the requirements for Presidential findings.

<sup>29</sup> See, e.g., William J. Daugherty, *Executive Secrets: Covert Action and the Presidency*, (Lexington, KY: Univ. of Kentucky Press, 2004), at 9, *noting* that, “[t]here are three disciplines, or missions, inherent within the intelligence profession, which are separated by purpose and methodology: intelligence collection and analysis, counterintelligence/counterespionage, and covert action.”

<sup>30</sup> 50 U.S.C. §413b(e).

<sup>31</sup> Mustin and Rishikof, *supra* note 12, at 1240. See also Greg Miller, “CIA Is In Baghdad, Kabul For Long Haul: Large covert presence part of U.S. plan to exert power more surgically” *Washington Post* (8 February 2012, A1), highlighting this in the incorrect interchangeability of the terms “covert” and “clandestine” between the article’s title and it’s very first sentence: “Large *covert* presence” versus “The CIA is expected to maintain a large *clandestine* presence in Iraq and Afghanistan...”.

clandestine operation in that [in a covert operation] emphasis is placed on concealment of the identity of the sponsor rather than on concealment of the operation.”<sup>32</sup> While not in conflict with the statutory definition, DoD’s definition is incomplete.

The DoD definition adds a layer of complexity by bringing in the concept of clandestine operations. The DoD definition for a clandestine operation notes that in “special operations, an activity may be both covert and clandestine and may focus equally on operational considerations and intelligence-related activities.”<sup>33</sup> DoD officials assert that, absent a presidential finding:

DOD conducts only “clandestine activities.” Although the term is not defined by statute, these officials characterize such activities as constituting actions that are conducted in secret but which constitute “passive” intelligence information gathering. By comparison, covert action, they contend, is “active,” in that its aim is to elicit change in the political, economic, military, or diplomatic behavior of a target.<sup>34</sup>

Drawing a clear distinction between covert and clandestine, while absent from the statute, is critical. In sum, for a covert action, the sponsorship of the act is hidden but not the act itself. The US Government could influence foreign elections under a covert action finding and, while the propaganda (e.g., posters, marches, election results, etc.) would be visible, the sponsorship would not. For a clandestine act, it is the act itself (e.g., intercepting a phone call) that must remain hidden.

Some in DoD have argued, contrary to the 9/11 Commission’s recommendation with respect to covert paramilitary operations, that DoD’s “activities should be limited to clandestine or

---

<sup>32</sup> JOINT PUBLICATION 1-02, *Department of Defense Dictionary of Military and Associated Terms* (8 November 2010; as amended through 15 November 2011) (JP 1-02), pp. 81; available online at [http://www.dtic.mil/doctrine/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf). For a more thorough discussion of what have been categorized as “unacknowledged special operations,” see Richard C. Gross, “Different Worlds: Unacknowledged Special Operations and Covert Action,” unpublished (Carlisle Barracks, PA; U.S. Army War College, 2009).

<sup>33</sup> JP 1-02, at 53.

<sup>34</sup> Richard A Best, Jr., “Covert Action: Legislative Background and Possible Policy Questions,” (Washington, DC; Congressional Research Service, 2011); complete report available online at <http://www.fas.org/sgp/crs/intel/RL33715.pdf>.

passive activities,” noting that “if such operations are discovered or are inadvertently revealed, the U.S. government would be able to preserve the option of acknowledging such activity, thus assuring the military personnel who are involved some safeguards that are afforded under the Geneva Conventions.”<sup>35</sup> The critical distinction is a covert action triggers statutory requirements and may eviscerate certain protections of the law of war (which will be discussed at length later); clandestine actions do not. Both the CIA and DoD can conduct clandestine operations without a presidential finding.

“Military operations” are those military activities DoD conducts under its statutory Title 10 authority. In this context, it includes those activities intended or likely to involve kinetic action.<sup>36</sup> These are operations conducted by military personnel, pursuant to an order issued by the Secretary, and conducted under DoD command and control, in accordance with the law of war.<sup>37</sup> This distinction is highlighted by the statutory requirements that, in order to task DoD “in any significant way”<sup>38</sup> with the conduct of a covert action, the President must:

- (1) Find that the “action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States”;
- (2) Intend to “influence political, economic, or military conditions abroad”;
- (3) Intend “that the role of the United States Government will not be apparent or acknowledged publicly”; and,

---

<sup>35</sup> *Id.* See also William Safire, “Covert operation, or clandestine?” *New York Times* (14 February 2005); complete text of column available online at <http://www.nytimes.com/2005/02/13/arts/13iht-saf14.html>.

<sup>36</sup> Kinetic operations are distinct from military intelligence collection or intelligence operations. The Secretary of Defense has extensive intelligence-related authorities under Title 50, and military personnel conduct intelligence activities under the Joint Military Intelligence Program. Those activities, conducted as part of the National Foreign Intelligence Program, even if they were to *potentially* lead to or support involve kinetic activity, are not considered “military operations” for purposes of this analysis.

<sup>37</sup> Their conduct in accordance with law of war ensures the participants enjoy the protections of those laws. This includes combatant immunity as codified in Article 4 of the Third Geneva Convention. See discussion under *Pacta sunt servanda: Chain of Command in the International Law Context*, page 26, *infra*.

<sup>38</sup> 50 U.S.C. §413b(a)(3).

(4) Determine that the activity is not a traditional military (i.e., the proposed activity is not one of the four enumerated exceptions to the definition of covert action).<sup>39</sup>

In distinguishing between CIA operations and military operations, it is critical to understand where the statutory framework assigns responsibility for covert action. While the statute empowers the President to designate which department, agency, or entity of the U.S. government will *participate* in the covert action, it implicitly tasks the CIA as the default *lead* agency:

Any employee, contractor, or contract agent of a department, agency, or entity of the United States Government *other than the Central Intelligence Agency* directed to participate in any way in a covert action shall be subject either to the policies and regulations of the Central Intelligence Agency, or to written policies or regulations adopted by such department, agency, or entity, to govern such participation.<sup>40</sup>

Executive Order 12333 (“EO 12333”) further clarifies that tasking by noting that:

The Director of the Central Intelligence Agency shall...[c]onduct covert action activities approved by the President. *No agency except the Central Intelligence Agency (or the Armed Forces of the United States in time of war declared by the Congress or during any period covered by a report from the President to the Congress consistent with the War Powers Resolution, Public Law 93-148) may conduct any covert action activity unless the President determines that another agency is more likely to achieve a particular objective...*<sup>41</sup>

The covert action statute does not define what a traditional military activity *is* except to say that it is *not* a covert action. Conversely, coupled with EO 12333, the statute places the conduct of covert action squarely under the CIA’s control. Understanding the lack of statutory specificity in defining traditional military activities and the default hierarchy under Director for those

---

<sup>39</sup> This list is not exhaustive; it merely includes those requirements relevant to this portion of the discussion.

<sup>40</sup> 50 U.S.C. §413b(a) (emphasis added).

<sup>41</sup> Executive Order 12333, *United States Intelligence Activities* (As amended by Executive Orders 13284 (2003), 13355 (2004) and 13470 (2008)) (hereinafter “12333”), para. 1.7(a)(4) (emphasis added); complete text of the Order is available online at <http://www.fas.org/irp/offdocs/eo/eo-12333-2008.pdf>. It should be noted that, unlike the Director, neither the DoD nor the Secretary are tasked in the Executive Order with the conduct of covert action; *see* Executive Order 12333, para 1.10(a) through (l).

activities that are covert actions builds the foundation necessary for understanding the scope and implications of the risk associated with DoD conducting kinetic covert action.

### ***The Unique Nature of Traditional Military Activities***

As an exception to the statutory definition of covert action, at least one practitioner has described the statutory exclusion of traditional military activities from covert action's definition as "the exception that swallows the rule."<sup>42</sup> Undeniably, the convergence of DoD and CIA operations has contributed to the blurring of the exception.<sup>43</sup> But the exception need not swallow the rule. The challenge is not in defining what is a "*military activity*," since, on a very basic level, anything and everything done by uniformed members of DoD<sup>44</sup> is a "military" activity. Rather, the requirement—and accompanying challenge—is to provide a clear understanding of those operations that are *traditional* military activities. That definition can be consequential, functional, or historical—or a combination of some or all three approaches. The statute's legislative history provides the best answer:

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

---

<sup>42</sup> Gross, *supra* note 32, at 7.

<sup>43</sup> See note 12, *supra*, and accompanying text.

<sup>44</sup> The concept of "uniformed" personnel is critical; in a very general (and legal) sense, it is the uniform that distinguishes an individual as a member of a nation's armed forces. See, e.g., *Geneva Convention Relative to the Treatment of Prisoners of War*, note 88, *infra*. At least one commentator has argued that the uniform need not be "standard" to ensure the requirement is met; see W. Hays Parks, "Special Forces' Wear of Non-Standard Uniforms," 4 *Chi J Intl L* 493 (2003). Although beyond the scope of this paper, there is continued debate surrounded who is a lawful target (which, in turn, impacts who is entitled to prisoner of war status). See, e.g., Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva; ICRC, 2009) (Melzer's article has generated a significant amount of scholarly and practical debate).

*the conferees intend to draw a line between activities that are and are not under the direction and control of the military commander. Activities that are not under the direction and control of a military commander should not be considered as "traditional military activities."*<sup>45</sup>

That definition, albeit non-binding, frames the necessary follow-on analysis.

The core of the definition is both functional and historical; it turns on who is in charge. Those activities under the direction and control of a military commander meet the requirement to be excepted from the statute; those *not* under the direction and control of a military commander are *not* traditional military activities. “Command” being a unique military construct, the legislative history’s definition would seem to draw a simple, bright line. But that distinction is not as clear-cut as it would seem, especially where the Director asserted having “command” over a DoD element with subordinate military commanders.<sup>46</sup> Clearly defining those activities that are traditional military activities in order to appropriately except them from the statutory definition of covert action requires clarifying the nature and scope of the necessary leadership by a “United States military commander.” What level (rank) of command is required? Under a constitutional and domestic law lens, must the chain of command from that “military commander” run directly back to the Commander-in-Chief *solely* through military channels (i.e., must it run thru the Secretary)? If not, can it run through some other executive branch official (i.e., the Director)? Under Goldwater-Nichols,<sup>47</sup> what is the role of the Geographic Combatant Commander? In short, what does the wiring diagram look like? These are critical questions, illustrated in Figure 1, *below*, by three basic possibilities, each of which contains multiple possible permutations not captured in the diagram.

---

<sup>45</sup> H.R. Rep. No. 102-115, at 5898 (1991) (Conf. Rep.) (emphasis added).

<sup>46</sup> See note 7, *supra*.

<sup>47</sup> The Goldwater-Nichols Department of Defense Reorganization Act of 1986 (Pub.L. 99-433; 100 Stat. 992) (1 Oct. 1986) (hereinafter “Goldwater-Nichols”).

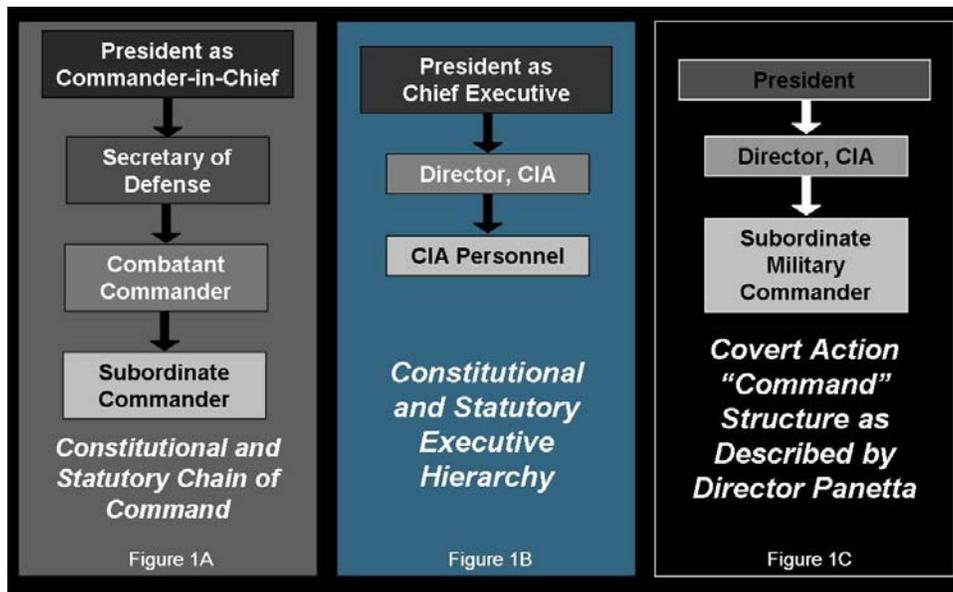


Figure 1

Figure 1A reflects the DoD chain of command as outlined in Title 10. It illustrates the broadest historical, functional, and consequential definition of traditional military activity. Rooted in the uniquely military concept of *command*, it provides a clear chain of command, beginning President’s constitutionally-defined role as the Commander-in-Chief. It largely clarifies questions of congressional oversight, results in unquestioned jurisdiction, and forms the basis of the strongest legal argument for combatant immunity. Figure 1B represents the President as Chief Executive, exercising oversight and control of the CIA, but in a manner legally and practically distinct from the command exercised over military personnel in 1A. Finally, Figure 1C represents the paradox created by the covert action statute’s attempts to overlap the parallel structures of 1A and 1B.

Under the current Congressional Authorization for the Use of Military Force,<sup>48</sup> the President is exercising his authority as Commander-in-Chief where those powers are most broad.<sup>49</sup> But it

<sup>48</sup> Public Law 107-40 [S. J. RES. 23, 107<sup>th</sup> Congress] (18 September 2001). The Act authorized the President:

is exactly here where the exercise of those powers blurs the clear lines of Figures 1A and 1B. In light of the changed nature of both the enemy and the “battlefield,” some have called for a new statutory framework, often couched in terms of “Title 60.” Regardless of those arguments, the existing framework remains the law. Any blurring, even ostensibly out of operational necessity, creates risk.

The answers, therefore, to the questions posed above about the nature and structure of the chain of command are too important to be left to *ad hoc* arrangements made in moments of operational exuberance where the implications of such efforts to do the right thing in the near term are not subject to the appropriate level of intellectual rigor. Determining the requirements for “military command” determines whether or not the activity is covered by the statute. If not classified as a traditional military activity and thus falling under the ambit of the statute, the activity may place those military personnel tasked by the President to conduct the operation at risk. Categorization as a traditional military activity is fundamental to ensuring US soldiers are, at a minimum, cloaked in the legal armor of combatant immunity. This, in turn is the core of state’s monopoly on the legitimate use of force. So who is in charge or command of a covert action and does it matter?

---

[T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The vote in the Senate was 98 to 0; in the House, 420 to 1. It is worth noting that the Authorization continues to this day *in its original form*.

<sup>49</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

### *Chain of Command or Control?*

Beginning with George Washington’s administration, the Secretary of War (later the Secretary of Defense), has served without interruption as a member of the President’s cabinet.<sup>50</sup> In conjunction with the President in his constitutional role as Command-in-Chief, the Secretary embodies the founders’ vision of civilian control over the military. The core of the practice is enshrined in Article II of the Constitution: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”<sup>51</sup> While clearly placing the President atop the military chain of command, the Constitution is silent on the role or even existence of the Secretary. However, unbroken US practice for exercising civilian control over the military has been an unbroken chain of command from the President, through his Secretary of War/Navy/Defense, to a subordinate uniformed commander. Command authority then flowed—and flows—down to the lowest appropriate level. As a cabinet level official, appointment of the Secretary requires the “Advice and Consent of the Senate.”<sup>52</sup> The Secretary is not an “inferior Officer.” Thus, while the President can relieve him and replace him with an inferior officer (i.e., the Deputy Secretary), he cannot simply interchange him with different official, individually congressionally confirmed to fulfill separate and unique duties.<sup>53</sup> The Secretary is not fungible with other executive branch officials individually nominated and confirmed by the Senate for a specific role within the Executive branch.

---

<sup>50</sup> In 1789, upon creation of the Department of the Navy, the Secretary of War ceded responsibility for the Navy to the Secretary of the Navy, until the responsibilities of the Secretary of War and Secretary of the Navy were again consolidated under the Secretary pursuant to the National Security Act of 1947.

<sup>51</sup> U.S. Const. Art 2.

<sup>52</sup> *Id.*

<sup>53</sup> Unlike cabinet-level officials or other officials whose appointment requires the Senate’s confirmation, authority to appoint “inferior Officers” is vested “in the President alone.” *Id.* See also The Federalist No. 51 (James Madison) (arguing for the need for established institutions vice reliance on the good will of incumbent leaders).

The US military hierarchy has changed over the Nation's history. Some were more semantic than substantive, like changing the Secretary's title from that of Secretary of War to Secretary of Defense. Others, far more substantive, included the changes under Goldwater-Nichols<sup>54</sup> which, *inter alia*, streamlined the military warfighting chain of command to run from the President as Commander in Chief through the Secretary and directly to unified combatant commanders rather than through the service chiefs (*see* Figure 1a, *supra*). While noteworthy, what has not changed is the fundamental fact that the civilian leader between the President as Commander in Chief and his senior *uniformed* commander has remained a specific person, individually confirmed by the Senate.<sup>55</sup> Civilian control of the military, coupled with the Senate's "Advice and Consent" on that leadership, is an inviolate constitutional principle. As such, assertion of executive authority by the President to "trade out" duties between cabinet level officials seems implausible. That is not to say the President cannot place military personnel under CIA control, but *control* is not the same as *command*. Command is an inherently military concept<sup>56</sup> which relies on constitutional authority, customs and practices of the service, and the legal authority of the Uniform Code of Military Justice. Furthermore, while a discussion of certain DoD doctrinal command and control arrangements (i.e., operational control, tactical control, and, support) are beyond the scope of this paper, combatant command is statutory,<sup>57</sup> not doctrinal, and thus an important part of this discussion in light of Goldwater-Nichols. Therefore, removing military personnel from their

---

<sup>54</sup> Goldwater-Nichols, *supra* note 47.

<sup>55</sup> *See* Figure 1A, *infra*.

<sup>56</sup> *See, e.g.*, Department of the Army Regulation 600-20, *Army Command Policy* (18 March 2008), noting that command is a "privilege" that is "exercised by virtue of office and the special assignment of members of the United States Armed Forces holding military grade who are eligible to exercise command. The Regulation goes on to note that "A civilian, other than the President as Commander-in-Chief...may not exercise command. However, a civilian may be designated to exercise general supervision over an Army installation or activity (for example, Dugway Proving Ground)," para. 1-5(a), p. 1.

<sup>57</sup> 10 U.S.C. §161 *et seq.*

DoD hierarchy changes the fundamental nature of those military personnel. Most critically, it arguably strips them of the law of war protections critical to the legitimate conduct of combat activities. This change of status is critical in light of Panetta’s assertion that he was in “command” of the raid on Osama bin Laden’s compound—the paradox illustrated in Figure 1C.<sup>58</sup>

This uniquely military chain of command is more than just established practice; it is the law. The United States Code picks up where the Constitution leaves off. Title 10 defines the specific duties of the Secretary<sup>59</sup> and Title 50, the specific duties of the Director.<sup>60</sup> They are not the same, nor are they interchangeable. Where the minimal overlap occurs, it is limited to intelligence activities. Thus, Title 50 also includes the Secretary’s specific duties with respect to the National Foreign Intelligence Program.<sup>61</sup> However, before outlining the specific duties of both of those cabinet officials, Congress makes explicitly clear in the statute’s “Congressional declaration of purpose” that the Department of Defense (and its subordinate service elements) shall function “under the direction, authority, and control of the Secretary of Defense” in order to “provide for their unified direction under civilian control of the Secretary of Defense.”<sup>62</sup> This is an unequivocal reference back to the constitutional principle of civilian control of the military. The statute goes on to highlight that the purpose of placing the services under the Secretary is to “provide for the establishment of...[a] clear and direct line of *command*.”<sup>63</sup> Then, in addition to

---

<sup>58</sup> See Panetta interview, *supra* note 7; see also Figure 1C.

<sup>59</sup> 10 U.S.C. §113.

<sup>60</sup> 50 U.S.C. §403-4.

<sup>61</sup> 50 U.S.C. §403-5.

<sup>62</sup> 50 U.S.C. §401.

<sup>63</sup> 50 U.S.C. §401 (emphasis added). The use of the term “command” is critical in light of the Geneva Convention’s repeated requirement for a signatory’s forces to fall under a “responsible *commander*.” See also Figure 1A, *supra*.

the Secretary's already defined duties in Title 10,<sup>64</sup> this section of Title 50 separately and distinctly outlines the Director's and Secretary's specific duties with respect to intelligence.

As it did in its "declaration of purpose" in Title 50, Congress is equally clear in Title 10 in granting the Secretary full authority over DoD. The statute clearly states that there shall be "a Secretary of Defense, who is the head of the Department of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate."<sup>65</sup> The statute goes on to allow the Secretary to "perform any of his functions or duties, or [to] exercise any of his powers through" other persons, but those persons must be from within the Department of Defense.<sup>66</sup> Despite that apparent iron-clad lock on authority over DoD, there are two caveats to the Secretary's "authority, direction, and control."

First and foremost is the critical caveat that the Secretary's authority is "subject to the direction of the President," and second, it is subject to "section 2 of the National Security Act of 1947."<sup>67</sup> The latter caveat addresses those military personnel that fall under the scope of the National Foreign Intelligence Program, discussed below. The former caveat, "subject to the direction of the President," appears at first glance to be classic exception that swallows the rule; Congress appears to have given the President some authority over limiting the Secretary's "authority, direction, and control" over military personnel. But even in limiting the Secretary and empowering the President, Congress did not specifically authorize nor did they appear to intend any change to the fundamental nature of *command* of military forces. The constitutional and statutory structure (including Senate confirmation of executive branch officials) discussed

---

<sup>64</sup> The Secretary's authorities over the bulk of DoD forces (e.g., special operations forces who are not part of the intelligence community) are outlined in 10 U.S.C. §113(a), *et seq.*

<sup>65</sup> 10 U.S.C. §113(a).

<sup>66</sup> 10 U.S.C. §113(d).

<sup>67</sup> 10 U.S.C. §113(b).

above make that clear. Concurrently, in defining the Director's authorities over military personnel, Congress appears to have maintained that limitation.

Congressional scoping of the "Authorities of the Director of Central Intelligence"<sup>68</sup> does not comprehend CIA control (and therefore not command) over DOD operational (i.e., non-intelligence) assets. While the statutory scope of the Director's duties includes the "transfer of funds or personnel with the National Foreign Intelligence Program," those transfers are specifically limited to "personnel authorized for an element of the intelligence community." And while some components of the Department of Defense are also elements of the Intelligence Community, operational elements of DoD's Special Operations Forces, *inter alia*, are not. While the statute clearly envisions the transfer of control of DoD *intelligence* assets to the CIA in order to address things like "unforeseen requirements" and "higher priority intelligence activit[ies],"<sup>69</sup> it limits those transfers of funds and personnel to *only* between those programs within the National Foreign Intelligence Program.<sup>70</sup>

Transfers that occur within this framework trigger Congressional reporting requirements. When there is a transfer of personal between DoD and the CIA (in either direction), the Director is required to "promptly submit" to *both* the congressional intelligence committees and the Senate and House Armed Services Committees "a report on any transfer of personnel made pursuant to this subsection."<sup>71</sup> No transfers between other elements of the intelligence community or other elements of the executive branch require such notification, clearly indicating a heightened concern by Congress over the use of DoD assets by the CIA and visa-a-versa.

---

<sup>68</sup> 50 U.S.C. §403, *et seq.*

<sup>69</sup> 50 U.S.C. §403(d), *et seq.*

<sup>70</sup> *Id.*

<sup>71</sup> 50 U.S.C. §403(d)(5).

Therefore, where under a very liberal reading of the Secretary's statutory authority it appears the President may have broad power to limit the Secretary's control over all or some element of DoD, the Director is limited to accepting personnel or funds from DoD only where they are already within the National Foreign Intelligence Program (and thus already within DoD's Joint Military Intelligence Program). Furthermore, the congressional scope of the Director's authority lacks an explicit Presidential caveat similar to the Secretary's. Thus, the caveat is not an exception that swallows the rule. The Goldwater-Nichols Act bolsters this analysis.

The Goldwater-Nichols reforms granted the newly-formed geographic combatant commanders very specific, nearly inviolable command authority over military personnel operating within their areas of responsibility. Its statutory directive is clear with respect to the chain of command: "Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs (1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command."<sup>72</sup>

Goldwater-Nichols goes on to require that:

(4) Except as otherwise directed by the Secretary of Defense, *all* forces operating within the geographic area assigned to a unified combatant command *shall* be assigned to, *and under the command of*, the commander of that command. The preceding sentence applies to forces assigned to a specified combatant command only as prescribed by the Secretary of Defense.<sup>73</sup>

The clear statutory default command arrangement is that *all* DoD forces *shall* work for the relevant geographic combatant commander.

Once again, however, we find a requirement with enumerated exceptions. The two exceptions to geographic combatant command control over military personnel operating in their area of responsibility are: (1) "as otherwise directed by the Secretary of Defense" and, (2) those

---

<sup>72</sup> 10 U.S.C. §162, *et seq.*

<sup>73</sup> 10 U.S.C. §162(a), *et seq.*

forces not assigned to the relevant combatant command by the Secretary. The first would apply, for example, to those military personnel assigned to U.S. Embassies as Defense Attachés or Foreign Area Officers and under the Ambassador's control and the Defense Intelligence Agency's command.<sup>74</sup> Here, the Secretary has placed those individuals under a commander other than the geographic combatant commander while still maintaining his place as Secretary in the chain of command. The second exception is what covers DoD's conduct of covert action, since only the President, and not the Secretary, has the authority to task DoD to conduct a covert action. The statute is silent on whether or not the Secretary must remain in the chain of command between the President and either the combatant commander of the location where the covert action will occur or the commander of the element directed, by the President, to conduct a covert action.<sup>75</sup> But in light of the constitutional limitations and historic precedent at the time of its implementation, Goldwater-Nichols' silence on that point is telling. There was no intent to change the fundamental command structure of military personnel conducting traditional military activities.

In implementing that portion of Goldwater-Nichols, DoD doctrinally defines combatant command as a:

[U]nified or specified command with a broad continuing mission under a *single commander* established and so designated by the President, *through the*

---

<sup>74</sup> Military personnel assigned to the Defense Intelligence Agency and stationed in a given country working for the Ambassador as part of his or her country team operate under a unique framework outside the geographic combatant commander's combatant command authority. Those personnel are not there to conduct kinetic military operations. The law of war-based protections of combatant immunity are replaced by the treaty based-protections of diplomatic immunity; the uniform is often replaced by a business suit. For those military personnel in country but falling under the geographic combatant commander's combatant command authority (including, for example, those conducting non-covert kinetic operations), ambassadorial "control" follows the same argument as Director "control;" it is *not* the same as *command*. While it would be appropriate for the Ambassador, as the President's representative to the country to have a veto (e.g., the Ambassador telling military personnel they cannot do a certain act in the country), that is not the same as the Ambassador having the authority to affirmatively task military personnel.

<sup>75</sup> This assumes, *arguendo*, that a DoD element could conduct a covert action and not be under the relevant geographic combatant commander's command authority.

*Secretary of Defense* and with the advice and assistance of the Chairman of the Joint Chiefs of Staff.<sup>76</sup>

As a matter of statute, DoD doctrine, and resulting practice, the chain of command includes the Secretary. But the more recent and arguably more specific covert action statute, reinforced by EO 12333, puts the Director “in charge” of the conduct of covert actions.<sup>77</sup> A reasonable deduction from that CIA “ownership” of covert action is that any non-CIA employee tasked to support a covert action “belongs” to the CIA. But being detailed to an organization that organically lacks the legal hierarchical command structure of DoD does not mean that command structure transfers wholesale with the individual or individuals. Military personnel properly detailed to the Agency can remain subject to the Uniform Code of Military Justice to the exclusion of “policies and regulations” of the CIA, but only if DoD has adopted procedures to that effect. But that transfer of personnel doesn’t grant the Director or any subordinate official within the CIA the command authority that comes with an officer’s commission or the customs and traditions of their respective Service.<sup>78</sup>

There is a resulting disconnect, rooted in the difference between CIA leadership being “in charge” and DoD leadership being “in command.” This is far more than semantics. Being “in charge” is *not* the same thing as being in command; legal authority unique to military forces flows through command.<sup>79</sup> This analysis of CIA supremacy stumbles in light of the statute’s broader language that, if the President finds the covert action is necessary, he may authorize its conduct “by departments, agencies, or entities of the [U.S.] Government.”<sup>80</sup> This broad

---

<sup>76</sup> See JP 1-02, *supra* note 32, at 57 (emphasis added).

<sup>77</sup> Executive Order 12333, *supra* note 41; *see also* 50 U.S.C. §413(b)(a)(3).

<sup>78</sup> 5 U.S.C. § 3331.

<sup>79</sup> That disconnect raises the question of whether an “order” given by the Director would be a lawful order, *requiring* a uniformed member of DoD to comply.

<sup>80</sup> 50 U.S.C. §413(b).

statement implies that a covert action *could* be conducted *exclusively* by the DoD. And, in fact, EO 12333 specifically envisions that.<sup>81</sup> This raises the fundamental overriding question of whether placing any DoD element under Agency control is even necessary, regardless of the ability to mitigate other risks identified here.

One of the two caveats to the Secretary's authority is worth revisiting: subject to "section 2 of the National Security Act of 1947."<sup>82</sup> Section 2 of the Act makes it clear the Congress intended to provide for "a comprehensive program for the future security of the United States," based on "integrated policies and procedures" for the departments and agencies."<sup>83</sup> That congressional "declaration of policy" also makes clear that the DoD shall be under the "direction, authority, and control of the Secretary of Defense;" the Constitution unequivocally grants the authority to "make Rules for the Government and Regulation of the land and naval Forces" to the Congress.<sup>84</sup> Military forces are unique and a clear chain of command is integral to the maintenance of good order and discipline. Nowhere does Congress ever appear to have granted the President the authority to insert anyone outside of DoD into the chain of command between himself as Commander in Chief and the relevant senior uniformed commander. Enshrined in the U.S. Constitution, codified in statute, and ratified through practice across time, from George Washington's cabinet and throughout countless wars (and a variety of other conflicts), even if Congress had explicitly implicitly provided the President the legal authority (or at least flexibility) to reroute the chain of command, doing so creates risks. Soldiers engaged in kinetic operations rightfully rely on the protections of law of war to accomplish their missions.

---

<sup>81</sup> Executive Order 12333, note 41, *supra*.

<sup>82</sup> 10 U.S.C. §113(b).

<sup>83</sup> 50 U.S.C. §401.

<sup>84</sup> U.S. Const. Art 1 sec. 8.

If those protections are to be removed, the soldiers must be aware of the risks they are being asked to assume. And state practice in accepting that risk by realigning military personnel under an intelligence framework to conduct kinetic activities creates future risk not only for her forces, but for those of her allies. Such a decision must be fully informed at all levels.

***Pacta sunt servanda:***<sup>85</sup> ***Chain of Command in the International Law Context***

Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War defines the requirements necessary to ensure a combatant's lawful status and his guarantee of Prisoner of War status, if captured. That status confers combatant immunity. The Convention prescribes four requirements for individuals to enjoy lawful combatant status and, with that status, combatant immunity. To be a lawful combatant, an individual must: (1) Be commanded by a person responsible for their subordinates, (2) wear a fixed distinctive insignia recognizable at a distance, (3) carry their arms openly, and (4) conduct their operations in accordance with the laws and customs of war.<sup>86</sup> These four requirements predate the Geneva Conventions and have long been considered customary international law.<sup>87</sup> Absent that status and immunity, once captured, the individual is subject to criminal prosecution by the capturing party for his wartime conduct; his deliberate targeting and killing of the enemy becomes criminal. One critical requirement for obtaining prisoner of war status is that the individual be a member of the armed

---

<sup>85</sup> Latin for "agreements must be observed," this is a basic principle of international law. *Black's Law Dictionary* (Sixth ed, 1990), at 1109.

<sup>86</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 4 (A)(2)(a)-(d).

<sup>87</sup> See, e.g., Herbert C. Fooks, *Prisoners of War*, (Federalburg, MD; J. W. Stowell Printing; 1924), at 25. Fooks, citing to the 1874 Conference of Brussels and the 1899 Hague Conference answers his own question, "Who should be subject to capture because of having been entrusted with arms by the State to protect their country in any way?" with a simple list, beginning with, "In the first place, individuals composing the national forces." Of note, nowhere in that list are spies or saboteurs. With the exception of a *levee en masse*, no individuals outside the *traditional* military structure, including its battlefield support elements, are listed.

forces of a party to the conflict.<sup>88</sup> The text of the Convention itself does not define “armed forces,” and is silent on the basic requirements of what constitutes an “armed force.” Written in the aftermath of World War II, there was widespread general acceptance as to what constituted an “army,” but that does not mean there was no debate. For example, the Geneva Conventions’ drafters received input from a group of Georgetown University School of Foreign Service students, all of whom who had been prisoners of war.<sup>89</sup> That group provided specific input on the role “guerillas, spies, saboteurs and paratroopers” played in complicating the otherwise simple analysis that a member of a belligerent party’s armed forces is automatically a prisoner of war, if captured.<sup>90</sup> They noted the “real problem of distinguishing a regular member of armed forces from others who may or may not be entitled to the same protection.”

Following the post-colonial liberation wars, the Conventions addressed the issue in 1977. The rapporteur’s Commentary to the Geneva Conventions’ Additional Protocols provides necessary insight into what constitutes an army for purposes of, *inter alia*, obtaining combatant immunity, noting that:

As there is no part of the army which is *not subordinated to a military commander at whatever level, this responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down* to the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task.<sup>91</sup>

---

<sup>88</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 4.A.(3).

<sup>89</sup> Dr. Edmund A. Walsh, Chairman, Institute of World Polity, *Prisoners of War* (Georgetown, D.C.; Ransdell Press, 1948), at 2.

<sup>90</sup> *Id.*, at 21.

<sup>91</sup> Jean Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Yves Sandoz, Christophe Swinarki & Bruno Zimmerman eds., 1987), para. 3553 (emphasis added). Although the US signed Additional Protocol I on 12 December 1977, she has never ratified it. Regardless, many of the Protocol’s articles are considered customary international law and are thus binding on all states, regardless of whether or not they have ratified them. Additional Protocol II is not relevant to this discussion. US reluctance to ratify Protocol I stemmed from a fear that doing so would grant prisoner of war status and privileges to various

In language strikingly similar to the legislative history’s scoping of traditional military activities,<sup>92</sup> the Commentary’s definition raises immediate concerns about supplanting the Secretary with the Director. The Geneva Conventions’ drafters unambiguously understood that as a prerequisite to obtaining prisoner of war status, one must be a member of a military force with an unbroken *military* chain of command. Under the Constitution and Title 10, that military chain of command flows, at a minimum, from the President as Commander in Chief to his Secretary to the relevant Combatant Commander. If the accepted understanding of the Geneva Conventions’ drafters was there is *no* part of an army that is *not* subordinated to a military commander at some level (noting the Commander in Chief, while a civilian, is a “commander”), replacing the Secretary with the Director in the chain of command raises real concerns.

The requirement for a *military* chain of command stems from the “dual principle of responsible command and its corollary command responsibility.”<sup>93</sup> The Fourth Hague Convention of 1907 requires that the commander be “responsible for his subordinates.”<sup>94</sup> In defining “responsible command,” the Protocols’ Rapporteur noted the consensus that “a ‘responsible’ command cannot be conceived of without the persons who make up the command structure being familiar with the law applicable in armed conflict.”<sup>95</sup> Coupled with the

---

liberation movements and functionally elevate them to state status. Ironically, it is these very protections that are at risk for military personnel conducting kinetic covert actions.

<sup>92</sup> *Id.*

<sup>93</sup> Elihu Lauterpacht, Christopher J. Greenwood, A. G. Oppenheimer, Karen Lee, *International Law Reports: Volume 133* (Cambridge; Cambridge Univ. Press, 2008), at 62.

<sup>94</sup> Regulations Respecting the Laws and Customs of War on Land, annex to Convention (No. IV) Respecting the Laws and Customs of War on Land, October 18, 1907, art. 1, 36 Stat. 2277.

<sup>95</sup> Pictet, *supra* note 91, art. 43, para. 1672.

Protocol's requirement for specially trained legal advisors<sup>96</sup>, any arrangement which subordinates military personnel, conducting a kinetic military operation, to CIA control is inherently risky. As noted by the Deputy Under Secretary of State during the 1955 hearing on the Geneva Conventions before the Senate Committee on Foreign Relations, U.S. "conduct has served to establish higher standards and [the United States] can only benefit from having them incorporated into a stronger body of conventional wartime law."<sup>97</sup> The DoD General Counsel went on to note that the US "Armed Forces have always attempted to comply scrupulously"<sup>98</sup> with these laws of armed conflict and their underlying principles.

Our own military history bears out our fundamental belief in the rules regarding combatant immunity. The U.S. was arguably the first nation to codify these requirements. The 1863 Lieber Code (General Order 100) defined "prisoner of war" as including "a public enemy armed or attached to the hostile army...all soldiers."<sup>99</sup> It noted that these individuals are "entitled to the privileges of a prisoner of war."<sup>100</sup> General Order 100 also noted that those who don't comply

---

<sup>96</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) Art. 82, Jun. 10, 1977, 1125 U.N.T.S. 3; *see also* Pictet, *supra* note 91, at art. 82, paras. 3340-3345.

<sup>97</sup> Statement of Hon. Robert Murphy, Deputy Under Secretary of State, *Hearing before the Committee on Foreign Relations, United States Senate* (Eighty-Fourth Congress; First Session, 3 June 1955).

<sup>98</sup> Statement of Hon. Wilber M. Brucker, General Counsel, Department of Defense, *Hearing before the Committee on Foreign Relations, United States Senate* (Eighty-Fourth Congress; First Session, 3 June 1955).

<sup>99</sup> General Orders Number 100, *Instructions for the Government of the Armies of the United States in the Field* (April 1863), arts. 48-80; complete text available online at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp). Article 49 states that:

A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

<sup>100</sup> *Id.*, art. 49.

with the rules are not privileged belligerents: “Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter,”<sup>101</sup> The same guidance is provided for spies, who are “punishable with death by hanging by the neck.”<sup>102</sup> “Armed prowlers...who steal within the lines of the hostile army for the purpose of...killing...are not entitled to the privileges of the prisoner of war.”<sup>103</sup> The Lieber Code is noteworthy, not only in its status as a historical first, but also in its intended effect: written for application in a non-international armed conflict (i.e., not to regulate conduct between states, but rather to govern a state’s conduct toward its own citizens), its goal was to ensure Union forces maintained the moral high ground in order to make reconciliation with and reintegration of the Confederate states and their population possible.

Enforcement of the laws of armed conflict rests, in part, on the principle of reciprocity. One party to a conflict provides the protections to those they capture in the belief (and hope) their enemies will do the same. Commendable German treatment of US prisoners of war and the United States’ treatment of German prisoners of war during the Second World War exemplify this principle; horrific Japanese treatment of US prisoners of war show, despite humane treatment by the United States of Japanese prisoners of war, it is an imperfect process. However, maintenance of the moral high ground is critical. If the raid on Abbottabad had gone poorly, and the Pakistani government had captured US personnel, for the US Government to assert that those personnel captured were entitled to the high standard of prisoner of war treatment, those Soldiers and Sailors must have been in compliance with law of war. A non-military chain of command

---

<sup>101</sup> General Orders Number 100, *supra* note 99, art. 63.

<sup>102</sup> *Id.*, art. 88.

<sup>103</sup> *Id.*, art. 84.

“at whatever level” could prove problematic to ensuring the rights of that status attached to those military personnel conducting the covert action.

### ***Conclusion***

“From its inception as a nation, America has venerated the rule of law.”<sup>104</sup> Both DoD military operations under Title 10 and CIA-led covert action under Title 50 are necessary and legal tools to ensure the Nation’s security. However, where traditional military activities have a rich history that rests upon a large body of domestic law and codified rules and accepted customary international law, covert action does not. The United States has uniquely codified the general practice of covert action; the specific procedures, however, are not a matter of public record. The conduct of covert action as an instrument of national power presents multiple dilemma: moral, ethical, and legal. After all, although permissible under US domestic law, almost every covert action is illegal in country where the actions are conducted.<sup>105</sup> Maintaining the moral high ground becomes that much more critical.

Public discussion of the specifics of a covert action is inimical to the basic premise and statutory framework. That notwithstanding, the extensive subsequent public commentary by Executive branch officials that followed the May 2011 raid on bin Laden’s Abbottabad compound provided some clarity to this otherwise necessarily secretive practice. In the process, Panetta’s comments notably highlighted a significant tangible, “letter of the law” legal risk inextricably linked to broader policy decisions. Current practice, as described by Panetta places

---

<sup>104</sup> United States War Department, *The 1863 Laws of War* (Mechanicsburg, PA: Stackpole, 2005), xi.

<sup>105</sup> See, e.g., Richard A. Clarke, *Against All Enemies: Inside America’s War on Terror* (New York, NY; Free Press, 2004) quoting former Vice President Al Gore: “of course it’s a violation of international law, that’s why it’s a *covert* action.” In fact, covert action has been described by one senior CIA official as the “ultimate hypocrisy of democracy.” Non-attributable lecture at the National Defense University’s Industrial College of the Armed Forces by a senior CIA official (24 October 2011); notes on file with the author.

military personnel at avoidable risk and threatens to, over time, undermine the very protections our soldiers rely on when conducting kinetic military operations.

The risk can—and should—be mitigated by properly classifying the actions of military personnel. Classifying a traditional military activity as anything else undermines the very categorization and the inherent law of war protections. DoD can undoubtedly conduct secretive (i.e., clandestine and/or unacknowledged) actions as traditional military activities and enjoy the full body of those internationally recognized protections. However, nothing in the constitutional or statutory framework envisions placing military personnel under CIA control in a manner that can effectively preserve the command relationships necessary to fulfill the requirements for individual operators conducting kinetic operations to be cloaked with combatant immunity. Yet the US Government’s killing of Osama bin Laden utilized a “command” structure that lacked the necessary element of command.

This is not to assert, categorically, that conducting this operation under the covert action statute was wrong. Basic analysis reveals that there were likely three potential outcomes; success, failure, or something in between (i.e., aborting the mission) that would have influenced a decision to conduct the mission as a covert action. The basic continuum of potential outcomes is simple:



*FIGURE 2*

Preserving the ability to abort the mission would arguably necessitate conducting the operation as a covert action in order to ensure the ability to deny that the U.S. Government violated sovereign Pakistani airspace. Success, as evident, resulted in robust disclosure of the U.S. Government’s role, obviating the plausible deniability protections of the statute. It is virtually

impossible to imagine a successful scenario in which the U.S. Government would not publicly acknowledge the capture or killing of “public enemy number one.” In fact, there is tremendous value in making such a pronouncement.<sup>106</sup> Similarly, failure would have almost certainly forced disclosure, again negating the protections of the statute. Although ultimately successful, the crashed helicopter’s remains left on the target site proved that. Thus, a non-catastrophic driven decision to abort—perhaps even in light of Pakistani detection—provides the sole outcome where the U.S. Government would likely have desired to hide behind the statute’s shield and disavow any such attempt. Thus, conducting the operation as a covert action provided an insurance policy. However, the cost of allowing that policy to “lapse” in light of post-success disclosures undermines the ability of such “insurance” to provide protection in the future.

The raid on Abbottabad stands in contrast to the secretive rescue of a U.S. citizen in Somalia on January 24, 2012, which was conducted by “a small number of joint combat-equipped U.S. forces.”<sup>107</sup> In his brief letter to Speaker of the House, sent “consistent with the War Powers Resolution,”<sup>108</sup> President Obama noted that the operation had been conducted by special operations forces.<sup>109</sup> By all indications, this was a traditional military activity. Had US forces been captured, the United States would have been absolutely right to assert their status as that of prisoner of war, with all the attendant privileges and protections.<sup>110</sup>

---

<sup>106</sup> “Extreme in risk, precise in execution and able to deliver a high payoff, the impacts of the direct approach are immediate, visible to public (sic) and have had tremendous effects on our enemies’ networks throughout the decade.” Posture Statement of Admiral William H. McRaven, Commander, United States Special Operations Command, before the 112<sup>th</sup> Congress Senate Armed Services Committee (6 March 2012).

<sup>107</sup> Letter from President Barak Obama to Hon. John Boehner, Speaker of the House of Representatives, entitled “Notification of Special Forces Operation” (Washington, D.C.; U.S. Gov’t. Printing Office, 2012) (hereinafter “Notification from the President”).

<sup>108</sup> 50 U.S.C. §1541, *et seq.* (Public Law 93-148).

<sup>109</sup> Notification from the President, *supra* note 107.

<sup>110</sup> It goes without saying, however, that against whom the United States would assert these rights—the Government of Puntland, the Somali Transitional Federal Government, al Shabaab, al Qaida, or some element of pirates—remains unclear.

Covert action, to remain viable, effective, and in compliance with the statute, must remain secret. Only then is the plausible deniability inherent in the statute's framework possible. In response to the 9/11 Commission Report recommending DoD assume responsibility for directing and executing those covert actions that could be classified as paramilitary operations, both the Secretary of Defense and Director of the CIA advised the President against that change.<sup>111</sup> This decision highlights the need for continued distinction between covert action and traditional military activities. Where DoD participation is necessary, the better course of action is simply to conduct the operation as an unacknowledged traditional military activity. This ensures those Soldiers, Sailors, Airmen, and Marines going in to harm's way have *every* protection the Nation they serve can provide them—or a clear understanding of the additional risks they are assuming on behalf of their Nation.

---

<sup>111</sup> See, e.g., Richard A. Best and Andrew Feickert, *Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress* (Washington, DC; Congressional Research Service, Updated 2006).

## *Appendix 1*

### **50 U.S. Code Section 413b: Presidential Approval and Reporting of Covert Actions**

**(a) Presidential findings.** The President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government unless the President 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, which determination shall be set forth in a finding that shall meet each of the following conditions:

(1) Each finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than 48 hours after the decision is made.

(2) Except as permitted by paragraph (1), a finding may not authorize or sanction a covert action, or any aspect of any such action, which already has occurred.

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

(4) Each finding shall specify whether it is contemplated that any third party which is not an element of, or a contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the covert action concerned, or be used to undertake the covert action concerned on behalf of the United States.

(5) A finding may not authorize any action that would violate the Constitution or any statute of the United States.

#### **(b) Reports to congressional intelligence committees; production of information**

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 Director of National Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a covert action—

(1) shall keep the congressional intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures; and

(2) shall furnish to the congressional intelligence committees any information or material concerning covert actions which is in the possession, custody, or control of any department, agency, or entity of the United States Government and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.

**(c) Timing of reports; access to finding**

(1) The President shall ensure that any finding approved pursuant to subsection (a) of this section shall be reported to the congressional intelligence committees as soon as possible after such approval and before the initiation of the covert action authorized by the finding, except as otherwise provided in paragraph (2) and paragraph (3).

(2) If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.

(3) Whenever a finding is not reported pursuant to paragraph (1) or (2) of this section, the President shall fully inform the congressional intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice.

(4) In a case under paragraph (1), (2), or (3), a copy of the finding, signed by the President, shall be provided to the chairman of each congressional intelligence committee. When access to a finding is limited to the Members of Congress specified in paragraph (2), a statement of the reasons for limiting such access shall also be provided.

**(d) Changes in previously approved actions.** The President shall ensure that the congressional intelligence committees, or, if applicable, the Members of Congress specified in subsection (c)(2) of this section, are notified of any significant change in a previously approved covert action, or any significant undertaking pursuant to a previously approved finding, in the same manner as findings are reported pursuant to subsection (c) of this section.

**(e) “Covert action” defined.** As used in this subchapter, the term “covert action” means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, but does not include—

(1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;

(2) traditional diplomatic or military activities or routine support to such activities;

(3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or

(4) activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad.

**(f) Prohibition on covert actions intended to influence United States political processes, etc.** No covert action may be conducted which is intended to influence United States political processes, public opinion, policies, or media.