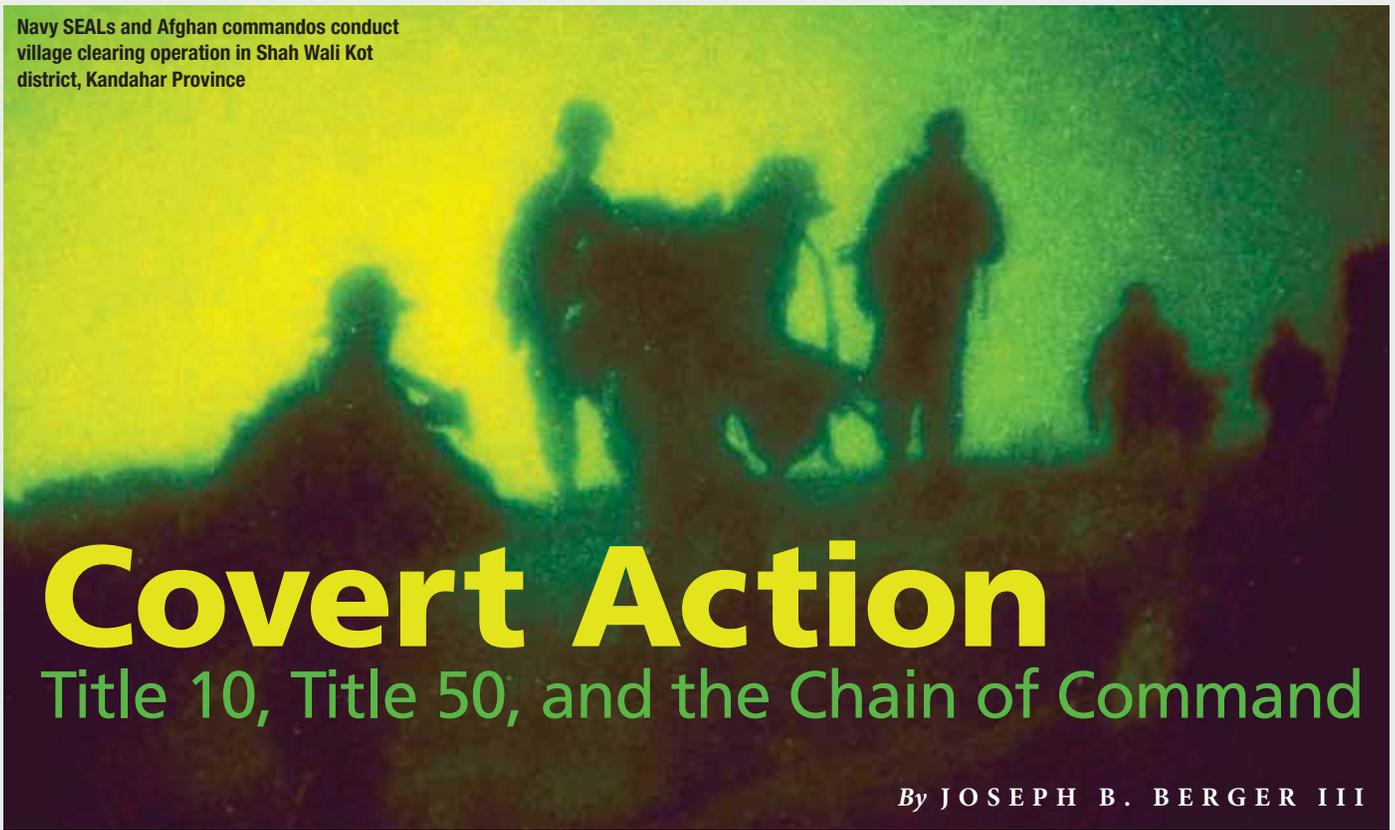


Navy SEALs and Afghan commandos conduct village clearing operation in Shah Wali Kot district, Kandahar Province



Covert Action

Title 10, Title 50, and the Chain of Command

By JOSEPH B. BERGER III

U.S. Army (Daniel P. Shook)

Recent media reports have Pentagon officials considering “putting elite special operations troops under CIA [Central Intelligence Agency] control in Afghanistan after 2014, just as they were during last year’s raid on [Osama bin Laden’s] compound.”¹ This shell game would allow Afghan and U.S. officials to deny the presence of American troops in Afghanistan because once “assigned to CIA control, even temporarily, they become spies.”² Nearly simultaneously, Department of Defense (DOD) leaders were warned to “be vigilant in ensuring military personnel are not inappropriately utilized” in performing “new, expanding, or existing missions,” ensuring the force is aligned against strategic choices “supported by rigorous analysis.”³ Placing Servicemembers—uniformed members of the Army, Navy, Marine Corps, and Air Force—under CIA control demands such rigorous analysis. The raid on bin Laden’s compound provides a framework.

In his May 1, 2011, televised address, President Barack Obama reported “to the American people and to the world that the United States ha[d] conducted an operation that killed Osama bin Laden.”⁴ President Obama initially detailed little beyond noting

that he had directed “the[n] Director of the CIA [Leon Panetta], 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” was done “at [his] direction [as President].” In the following days, senior executive branch officials garrulously provided explicit details, from the now-iconic White House Situation Room photograph to intricate diagrams of the Abbottabad compound and the assault force’s composition. Most noteworthy was Panetta’s unequivocal assertion the raid was 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 [William] McRaven because he was on site, and he was actually in charge of

*the military operation that went in and got bin Laden.*⁵

Despite his self-effacing trumpeting of Vice Admiral McRaven’s role, Panetta’s comment highlights that critical confusion exists among even the most senior U.S. leaders about the chain of command and the appropriate classification of such operations.

Openly describing the raid as both a “covert operation” and “military operation,” Panetta asserted he was the “commander,” describing a chain of “command” that went from the President to Panetta to McRaven. Panetta’s public comments are problematic, as is describing a chain of command that excludes the Secretary of Defense and purports to route command authority through the CIA director. Title 50 is clear:

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

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not be apparent or acknowledged publicly, but does not include . . . (2) traditional . . . military activities or routine support to such activities.⁶

The administration did the opposite, making patently clear the raid's nature and, in exhaustive detail, the precise role of the United States. Instead of categorizing it as a covert action under the director's "command," the President could have conducted the raid as a covert action under the Secretary of Defense instead of the CIA director, or under his own constitutional authority as Commander in Chief and the Secretary's statutory authorities, classifying it as a traditional military activity and excepting it from the statute's coverage. As a traditional military activity, there would have been no legal limits on subsequent public discussion. Alternatively, conducting the raid as a covert action within a *military* chain of command removes the issues the director raised in asserting *command* authority over Servicemembers. The decisionmaking process remains shrouded, but conducting a raid into a sovereign country targeting a nonstate actor using military personnel and equipment under the "command" of the CIA director and classifying it as a covert action raises significant legal and policy questions. Such decisions threaten the legitimacy and moral authority of future U.S. actions and demand a rigorous examination of those associated risks.

The Abbottabad raid illustrates the post-9/11 security environment convergence of DOD military and CIA intelligence operations.⁷ While dead terrorists attest to this arrangement's efficacy, many directly challenge the legal and policy framework behind current DOD-CIA cooperation. The discourse focuses largely on distinctions between Title 10 and Title 50 and the legal basis for conducting apparently overlapping military and intelligence operations beyond the battlefields of Iraq and Afghanistan. Notwithstanding the potentially misleadingly simple labels of Title 10 and Title 50, these complex issues lack clear answers. Many argue the legacy structure ill equips the President to effectively combat the threat. But tweaking that structure carries risk. Thus, correctly classifying and structuring our actions within that framework are critical. The law of war is designed to protect our nation's military forces when they are engaged in traditional military activities under a military chain

of command; spies conducting intelligence activities under executive authority have no such protections. This distinction rests on a constitutional, statutory, treaty, and doctrinal framework underpinning the military concept of command authority.

U.S. power relies on moral and legal legitimacy. Exclusive state control over the legitimate use of armed force remains viable domestically and internationally *only* where exercised within an accepted framework. Thus, employing DOD forces in a nontraditional manner entails significant risk. The policy implications of classification and structure are neither semantic nor inconsequential, and must be understood by senior decision-makers; likewise, individual Servicemembers must understand the practical effects. A rigorous risk analysis should therefore inform any deviation, however permissible under domestic law.

This article focuses on the risks associated with both using military personnel to conduct kinetic covert action and using them without a military chain of command. Those risks inform the recommendation to change practice, but not the law. Specifically, the author rejects melding distinct operational military (Title 10) and intel-

U.S. power relies on moral and legal legitimacy

ligence (Title 50) authorities into the often mentioned Title 60. Properly classifying actions—either *under* the statute as a covert action or *exempted* from the statute as a traditional military activity—ensures the correct command structure is in place.⁸ Ultimately, the analysis argues for revisiting the previously rejected 9/11 Commission recommendation to place paramilitary covert action under DOD control.⁹

This article first outlines current and likely future threats and then explains the critical terms of art related to covert action and, against that lingua franca, examines why kinetic military operations should be either classified as traditional military activities or kept under a military chain of command. Analyzing the relevant constitutional, statutory, treaty, and doctrinal elements of command, this article illustrates that a raid conducted like the Abbottabad raid, while legally permissible, is best conducted as a traditional military activity.

Changed Character of the Battlefield and Enemy

In the decade since 9/11, DOD and CIA elements have become "operationally synthesi[zed]."¹⁰ A senior intelligence official recently noted that "the two proud groups of American secret warriors had been 'deconflicted and basically integrated'—finally—10 years after 9/11."¹¹ The direct outgrowth is the increased reliance on special operations forces (SOF) to achieve national objectives against a "nimble and determined" enemy who "cannot be underestimated."¹² While the United States fought wars on geographically defined battlefields in Iraq and Afghanistan and beyond, the underlying legal structure remained constant. In the wars' background, leaders, advisors, academics, and others argued about the structure of the appropriate legal and policy framework. Post-Iraq and post-Afghanistan, the United States must still address other threats, including those that al Qaeda and their associated forces present.

The threats have migrated beyond a battlefield defined by sovereign nations' borders. When asked recently in "how many countries we are currently engaged in a shooting war," Secretary of Defense Panetta laughed, responding, "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."¹³ The unresolved legal and policy challenges will likely increase in complexity on this geographically unconstrained battlefield. Remaining rooted in enduring principles is critical. DOD conduct of kinetic operations beyond traditionally recognized battlefields raises significant legal and policy concerns, especially where the U.S. Government conducts them without knowledge or consent of the host nation, as apparently happened with the Abbottabad operation.¹⁴ Properly categorizing and structuring these operations, while vexing for policymakers and their lawyers, carries much greater stakes for the Servicemembers executing them.

The Need for a Lingua Franca

Colloquial usage refers to DOD authorities as Title 10, and the CIA's as Title 50. That is technically inaccurate and misleading since DOD routinely operates under *both* Titles 10 and 50.¹⁵ Instead of Title 10, this article uses the term *military operations*; instead of Title 50, it uses *CIA operations* or the more

President delivers statement on successful special operations raid on Osama bin Laden compound in Pakistan

White House (Pete Souza)



specific *covert action*. All three terms require clarification.

CIA operations are all CIA activities except covert action. Covert action is the narrow, statutory subset of Presidentially approved, CIA-led activities.¹⁶ Unfortunately, colloquially, covert action “is frequently used to describe *any* activity the government wants concealed from the public.”¹⁷ That common usage ignores the fact that a traditional military activity, notwithstanding how “secretly” it is executed, is by statute *not* a covert action. DOD defines a *covert operation* as one “planned and executed as to conceal the identity of or permit plausible denial by the sponsor,” where “emphasis is placed on concealment of the identity of the sponsor rather than on concealment of the operation.”¹⁸ While not in conflict with the statutory definition, the DOD definition is incomplete; it fails to recognize the President’s role and ignores the exception of traditional military activities.¹⁹ Practitioners should use the statutory definition.

The concept of clandestine operations further blurs colloquial and doctrinal imprec-

sion.²⁰ DOD activities “may be both covert and clandestine . . . focus[ing] equally on operational considerations and intelligence-related activities.”²¹ Appropriately, DOD officials assert that, absent a Presidential covert action finding, they “conduct only ‘clandestine activities.’”²² They characterize *clandestine activities* as those “conducted in secret but which constitute ‘passive’ intelligence information gathering.”²³ Interchanging the terms and mixing them with intelligence functions is inaccurate and dangerous; practitioners must draw clear distinctions. The sponsorship of a covert action is hidden, not the act itself. The specific acts of the U.S. Government in influencing a foreign election (for example, posters, marches, election results, and so forth) would be visible, but not the covert sponsorship of those acts. For clandestine acts, the act itself (for example, intercepting a phone call) must remain hidden. The CIA and DOD can conduct clandestine operations without Presidential approval, whereas covert action triggers statutory requirements for a Presidential finding and congressional notification. Some have argued DOD’s “activities

should be limited to clandestine” activities, as this would ensure military personnel are protected by the law of war,²⁴ a critical point examined in detail later.

Military operations are DOD activities conducted under Title 10, including activities intended or likely to involve kinetic action. Pursuant to an order issued by the Secretary of Defense, they are conducted by military personnel under DOD command and in accordance with the law of war. They specifically exclude DOD’s intelligence activities (for example, the Joint Military Intelligence Program); like the CIA’s, those intelligence activities are conducted pursuant to Title 50.

Statutorily assigned responsibility helps distinguish between CIA operations and military operations. Although the President can designate which department, agency, or entity of the U.S. Government will *participate* in the covert action, the statute implicitly tasks the CIA as the default *lead* agency: “Any employee . . . of the [U.S.] Government other than the [CIA] directed to participate in any way in a covert action shall be subject either to the policies and regulations of the [CIA], or to

written policies or regulations adopted . . . to govern such participation.²⁵

Executive order 12333 (EO 12333) makes that default tasking explicit:

The Director of the [CIA] shall . . . conduct covert action activities approved by the President. No agency except the [CIA] (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. . . .) may conduct any covert action activity unless the President determines that another agency is more likely to achieve a particular objective.²⁶

The statute, coupled with EO 12333, unequivocally places all covert action squarely under the CIA's control; the narrow exception for DOD is currently inapplicable. While the Executive order expressly tasks the director with conducting covert action, it does not task the Secretary of Defense.²⁷ Default CIA primacy and the absence of statutory specificity in defining traditional military activities create risk when DOD conducts kinetic covert action.

The Unique Nature of Traditional Military Activities

One practitioner described traditional military activities' exclusion from covert action's definition as "the exception that swallows the rule."²⁸ But while DOD-CIA operational convergence blurs the issue, the exception need not swallow the rule. Functionally, anything done by a uniformed member of a nation's armed forces is a "military" activity; the nuanced requirement is to understand which 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 clarification, noting the conferees intended 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) . . . where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly. In this regard, 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."²⁹

That nonstatutory definition frames the follow-on analysis. That functional and historical definition turns on who is in charge.

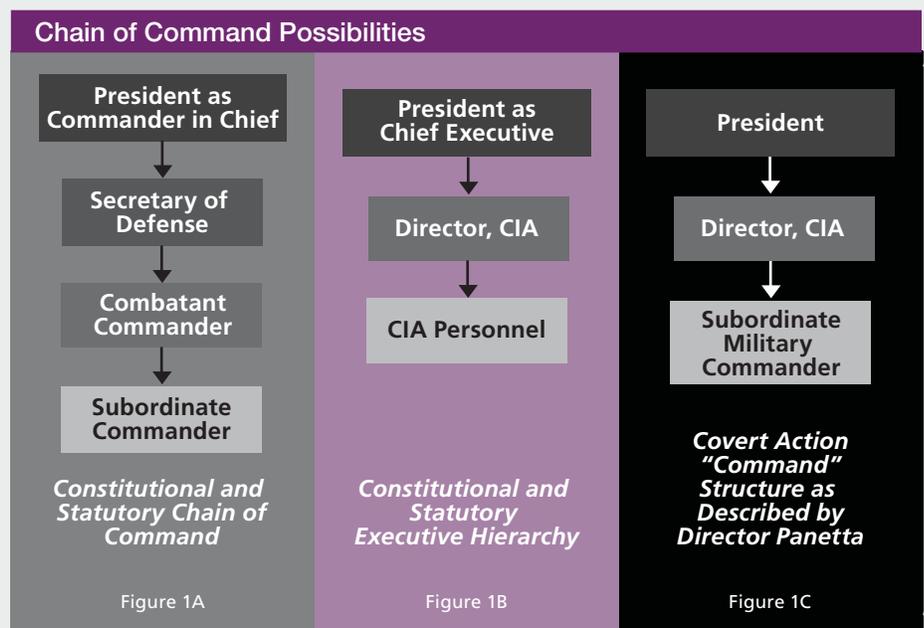
Activities under the "direction and control of a military commander" meet the requirement to be excepted from the statute; those with a different command and control arrangement are *not* traditional military activities. "Command" is unique to the military and the definition appears to draw a bright line rule; but the CIA director blurred the line by asserting "command" over a DOD element.³⁰ The confusion questions the necessary nature and scope of leadership by a "military commander." What level or rank of command is required? Must the chain of command from that military commander run *directly* back to the Commander in Chief *solely* through military channels? *Must* it run through the Secretary of Defense? *Can* it run through the director if there is a military commander below him? Given Goldwater-Nichols,³¹ what about the geographic combatant commander? In short, what does the wiring diagram look like? These questions highlight three baseline possibilities as depicted in the figure below.

Part 1A of the figure reflects DOD's Title 10 chain of command, illustrating the broadest historical, functional, and consequential definition of traditional military activity. The

clear chain is rooted in the uniquely military concept of *command* and the President's constitutionally defined role as Commander in Chief. It clarifies congressional oversight responsibility, results in unquestioned jurisdiction, and forms the basis of the strongest legal argument for combatant immunity. Part 1B represents the President as chief executive, exercising oversight and control of the CIA under Title 50. This hierarchy lacks the legal command authority exercised over military personnel in 1A. Finally, part 1C represents the paradox created by the covert action statute's attempts to overlap the parallel structures of 1A and 1B; it is often described as Title 60.

The current Congressional Authorization for the Use of Military Force allows the President to "use all necessary and appropriate force" to prevent "future acts of international terrorism against the United States."³² This statutory grant of power creates the paradox: here, where the Senate vote was 98 to 0 and the House vote was 420 to 1, the President's executive authority (as Commander in Chief *and* chief executive) is greatest,³³ the exercise of those powers blurs the clear lines of parts 1A and 1B of the illustration. Merging the two, although permissible under the covert action statute, creates risk.

Consequently, questions about the nature and structure of the chain of command demand rigorous scrutiny and cannot be left to ad hoc arrangements. Defining military command determines whether or not the activity is a traditional military activity *and* therefore not under the



ambit of the statute. The criticality of this categorization is twofold: it is the core of the state's monopoly on the legitimate use of force and cloaks Servicemembers in the legal armor of combatant immunity.

Chain of Command, or Control?

Since George Washington's Presidency, the Secretary of War (later Defense) has served without interruption as a Cabinet member. The President's role, enshrined in the Constitution, is clear: "The President shall be Commander-in-Chief of the Army and Navy of the United States."³⁴ With the Secretary of Defense, this embodies the Founders' vision of civilian control of the military. The Secretary of Defense's appointment requires the "Advice and Consent of the Senate."³⁵ While the President *can relieve* him and replace him with an inferior officer (that is, the Deputy Secretary of Defense), Senate-confirmed executive branch officials are not fungible. He *cannot interchange* officials individually confirmed to fulfill separate and unique duties—something James Madison warned about in *Federalist 51*.³⁶

Longstanding U.S. practice is an unbroken chain of command from the President, through his Secretary of Defense, to a subordinate uniformed commander. Even Goldwater-Nichols's³⁷ streamlining the military warfighting chain of command to run from the President through the Secretary and directly to the unified combatant commanders did not

tion, "A civilian, other than the President as Commander-in-Chief . . . may *not* exercise command."⁴⁰ Goldwater-Nichols allows the President to exercise command through his Secretary of Defense. Command rests on constitutional and statutory authority (including the Uniform Code of Military Justice) and the customs and practices of the Service. Removing military personnel from that hierarchy—illustrated in part IC of the figure—changes their fundamental nature. This is Panetta's assertion: he was in "command"⁴¹ of the raid on Osama bin Laden's compound.

Titles 10 and 50 define the specific duties of the Secretary of Defense⁴² and Title 50 the CIA director's.⁴³ The duties are neither identical nor interchangeable. In Title 50, Congress explicitly states that DOD shall function "under the direction, authority, and control of the Secretary of Defense" in order to "provide for their unified direction under civilian control."⁴⁴ Placing the Services under the Secretary of Defense is necessary to "provide for the establishment of [a] clear and direct line of *command*."⁴⁵ Congress is equally clear in Title 10, granting the Secretary complete authority over DOD: "there shall be a Secretary of Defense, who is the head of the [Department], appointed . . . by the President, by and with the advice and consent of the Senate."⁴⁶ The statute allows the Secretary to "perform any of his functions or duties, or [to] exercise any of his powers through" other persons, but only persons from within DOD.⁴⁷

assets, nor did it grant the President a caveat like that with the Secretary of Defense's authority.⁴⁹ Although the director's duties include the transfer of "personnel within the NFIP," which includes DOD personnel, such transfers are limited to personnel within DOD's Joint Military Intelligence Program (JMIP).⁵⁰ SOF are not part of the JMIP. When DOD does transfer *any* JMIP personnel to the CIA, the director must "promptly" report that transfer to both the intelligence oversight and Armed Services Committees of both houses.⁵¹ Transfers between other executive branch elements trigger no such requirements. Congress only intended CIA control over DOD *intelligence* assets and was clearly concerned about even that. Goldwater-Nichols reinforces this analysis.

Goldwater-Nichols codifies geographic combatant commanders' nearly inviolable *command* authority: "all forces operating within the geographic area assigned to a unified combatant command *shall* be assigned to, *and under*" his command.⁵² Two exceptions supplant that authority. Servicemembers assigned to U.S. Embassies (for example, the Defense Attaché) are under the Ambassador's *control* and the Defense Intelligence Agency's *command*. For those Servicemembers, diplomatic protections have replaced law of war protections, but the Secretary of Defense remains in the chain of command. The second exception, carved from Goldwater-Nichols's "unless otherwise directed by the President" language, covers DOD participation in covert action.⁵³ Goldwater-Nichols's silence on the Secretary of Defense remaining in the chain of command indicates Congress did not intend to change the default hierarchy. DOD recognized that point by defining *combatant command* as being "under a single commander" and running "*through the Secretary of Defense*."⁵⁴ All these say nothing about covert action.

The statute and EO 12333 put the director "in charge" of the conduct of covert actions.⁵⁵ CIA "ownership" means any non-CIA employee supporting a covert action "belongs" to the CIA. However, the CIA lacks DOD's legal command structure and no CIA official possesses the *command* authority inherent in an officer's commission.⁵⁶ The CIA can only be in charge, not in command. The director cannot give a lawful *order* that would be legally binding on Servicemembers. The Constitution unequivocally grants Congress the authority to "make Rules for

Goldwater-Nichols codifies geographic combatant commanders' nearly inviolable command authority

alter that fundamental practice.³⁸ Combatant commanders simply replace Service chiefs. The civilian leader *between* the Commander in Chief and his senior uniformed commander remains unchanged—a specific individual confirmed by the Senate to execute statutory duties. The inviolate concept of civilian control of the military and the Senate's Advice and Consent requirement make assertion of any executive authority to "trade out" duties between Cabinet officials implausible. The President can place military personnel under CIA *control*, but *control* is not *command*.

Command is the inherently military "privilege" that is "exercised by virtue of office and the special assignment of members of the US Armed Forces holding military grade."³⁹ In fact, under the Army regula-

Two caveats exist to the Secretary of Defense's "authority, direction, and control": the Secretary's authority is "subject to the direction of the President" and the 1947 National Security Act.⁴⁸ The latter covers DOD personnel within the National Foreign Intelligence Program (NFIP). The former appears to be an exception that swallows the rule. But even in empowering the President to limit his Secretary's authority, Congress did not specifically authorize any change to the fundamental *command* of military forces. Likewise, in defining the director's *limited* authorities over military personnel, Congress maintained the *military command* structure over military operations.

Congress neither allows the director command nor control of DOD operational

Special operations forces use fast-rope insertion technique during assault and secure building training



U.S. Army (Jason Cauley)

the Government and Regulation of the land and naval Forces.⁵⁷ Those rules, the Uniform Code of Military Justice, never contemplated CIA personnel exercising command authority over Servicemembers. The CIA's ownership of covert action is limited. Exclusive CIA control fails elsewhere; the statute authorizes the President to task "departments, agencies, or entities"⁵⁸ to conduct covert action. The implication is that DOD can conduct a covert action exclusively. EO 12333 specifically envisions that.⁵⁹ Placing DOD elements under CIA control to conduct a kinetic operation is arguably unnecessary.

This chain of command is constitutionally enshrined, codified, and ratified through longstanding practice; even if Congress had explicitly authorized the President to reroute it, doing so creates risk. First, it removes the law of war's protections upon which Servicemembers conducting kinetic operations rely. In such an event, Servicemembers must be made aware they are no longer protected. Second, as a state practice, realigning military personnel under a nonmilitary framework to conduct kinetic activities creates precedential risk for U.S. allies. Such a decision must be fully informed at all levels.

Chain of Command: International Law Context

National armies engaged against each other have, throughout modern history, been cloaked in the law of war's combatant immunity. Absent that immunity, a captured

individual is subject to *criminal* prosecution for his wartime conduct. His deliberately targeting and killing others become nonmilitary and therefore criminal. In World War II's aftermath, widespread acceptance of what constituted an "army" rendered a definition unnecessary: "Individuals composing the national forces" automatically enjoyed combatant immunity.⁶⁰ However, for those *outside* their nation's military hierarchy, specificity was necessary. The Third Geneva Convention grants prisoner of war status—which confers combatant immunity—to those who are subordinate to a responsible *commander*, wear a fixed, distinctive insignia recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the laws and customs of war.⁶¹

The command requirement stems from the "dual principle of responsible command and its corollary command responsibility."⁶² The Hague Convention required that a commander be "responsible for his subordinates."⁶³ The Geneva Convention recognized "*no part of [an] army . . . is not subordinated to a military commander,*" applying this "from the Commander-in-Chief down to the common soldier."⁶⁴ The later protocols "could not conceive" of a hierarchy "without the persons who make up the command structure being familiar with the law applicable in armed conflict."⁶⁵ This is DOD's unchallenged area of expertise.⁶⁶ Like Congress's definition of traditional military activity,⁶⁷ the commentary's definition, when coupled with the require-

ments for those *not* considered part of the Nation's army, is the parallel to Servicemembers conducting kinetic covert action under CIA control. Combatant immunity necessitates prisoner of war status; for those not acting as part of the army, that status requires a *military* chain of command. Replacing the Secretary of Defense with the CIA director eviscerates this.

U.S. history records a fundamental belief in the rules for combatant immunity.⁶⁸ First, to codify these requirements, the 1863 Lieber Code defined *prisoner of war* as including "all soldiers."⁶⁹ The code noted noncompliance with the rules meant no combatant immunity: spies were "punishable with death by hanging by the neck."⁷⁰ "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."⁷¹ The code's noteworthy purpose was *not* to regulate conduct *between* nations, but for application in a non-international armed conflict and maintaining the moral high ground necessary to facilitate reconciliation with and reintegration of the confederate states.

The law of war's efficacy rests on the principle of reciprocity. One party provides the protections to its prisoners believing and hoping its enemies will respond in kind. Commendable German and U.S. treatment of each other's prisoners during World War II exemplifies this principle; Japanese treatment of U.S. prisoners at Bataan proves its imperfections. Regardless, maintaining the moral



Special Operations Task Force West Marines investigate Taliban presence in Zanghlav, Herat Province

U.S. Army (Kimberly K. Fritz)

high ground is critical. Had Abbottabad gone poorly, the United States would have asserted that U.S. personnel in Pakistani custody were entitled to the high standards of prisoner of war treatment. That would have required those Soldiers and Sailors to be in compliance with the law of war. The nonmilitary chain of command may have been problematic in making that assertion.

Conclusion

“From its inception . . . America has venerated the rule of law.”⁷² Traditional military activities occur against a rich fabric of domestic and international law. Covert action, while uniquely codified, presents multiple dilemmas. Although permissible under U.S. domestic law, covert action is generally illegal in the target country.⁷³ Again, maintaining the moral high ground is critical.

Although inimical to covert action’s fundamental premise, overt executive branch commentary following the Abbottabad raid highlighted the legal risk associated with policy decisions. Placing Servicemembers under CIA command threatens to undermine the protections they rely on when conducting kinetic military operations, especially where the activity is more accurately classified as a traditional military activity.

The risk can—and should—be mitigated by first properly classifying the activity. Classifying a traditional military activity as anything else undermines the very categorization and its inherent law of war protections.

DOD can undoubtedly conduct secretive (that is, clandestine and/or unacknowledged) actions as traditional military activities and enjoy the full body of the law of war’s protections. The current framework neither envisions nor facilitates placing Servicemembers under CIA control and preserving the command relationships necessary to cloak them in combatant immunity. The Abbottabad raid utilized this risk-laden approach.

This is not to assert that conducting the raid as a covert action was illegal. There were three likely outcomes: success, failure, or something in between (that is, aborting the mission). Neither success nor failure required covert action’s plausible deniability. The United States immediately publicly acknowledged killing of “public enemy number one”; regardless, the crashed helicopter disclosed the U.S. role. A noncatastrophic driven decision to abort (for example, Pakistani detection of violation of their sovereign airspace) provides the sole outcome where the United States would likely have hidden behind the statute’s shield, disavowing all. The covert action classification provided an insurance policy, yet the cost of allowing that policy to “lapse” through post-success disclosures undermines the plausibility of such “insurance” in the future.

Compare the Abbottabad covert action with the recent rescue of a U.S. citizen in Somalia, conducted secretly, but not covertly, by “a small number of joint combat-equipped U.S. forces.”⁷⁴ This comparison illustrates that such activities can be conducted

as traditional military activities, maintaining secrecy and preserving individual Servicemember protections. The need for continued distinction between covert action and traditional military activities and, where covert, the need for DOD-conducted operations to maintain a military chain of command, drive these recommendations. The United States should revisit the rejection of the 9/11 Commission’s recommendation that DOD assume responsibility for paramilitary covert operations.⁷⁵

Where DOD participation is necessary and primary, the operation should be conducted as an unacknowledged traditional military activity. If the risk analysis drives a decision to conduct the operation as a covert action, the President should maintain the military chain of command. This ensures Servicemembers going in harm’s way have every protection the Nation they serve can provide them—or a clearer understanding of the additional risks they are assuming on behalf of their Nation. **JFQ**

NOTES

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

² *Ibid.* Emphasis added.

³ 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, March 2, 2012.

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

⁵ Interview of Leon Panetta by Jim Lehrer on *PBS Newshour*, “CIA Chief Panetta: Obama Made ‘Gutsy’ Decision on Bin Laden Raid,” May 3, 2011, video of interview available at <www.pbs.org/newshour/bb/terrorism/jan-june11/panetta_05-03.html>.

⁶ 50 U.S.C. §413b(e). Emphasis added.

⁷ 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*, vol. 63 (Summer 2011), 1235.

⁸ 50 U.S.C. §413b(e)(2).

⁹ National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, July 2004, 415, available at <www.9-11commission.gov/report/911Report.pdf>. See also Richard A. Best, Jr., *Covert Action: Legislative Background and Possible Policy Questions* (Washington,

DC: Congressional Research Service, 2011), available at <www.fas.org/spp/crs/intel/RL33715.pdf>.

¹⁰ Mustin and Rishikof, 1236.

¹¹ Mark Ambinder, "The Secret Team That Killed bin Laden," *National Journal Online*, May 3, 2011, available at <<http://nationaljournal.com/whitehouse/the-secret-team-that-killed-bin-lawden-20110502>>.

¹² Remarks as prepared for delivery by Attorney General Eric Holder at Northwestern University School of Law, March 5, 2012, available at <www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

¹³ Interview of Leon Panetta by Scott Pelley, *60 Minutes*, January 29, 2012, available at <www.cbsnews.com/video/watch/?id=7396828n&tag=contentMain;contentAux>.

¹⁴ See, for example, Adam Levin, "Bin Laden raid was humiliating to Pakistanis, Gates and Mullen say," *CNN Online*, May 18, 2011, available at <http://articles.cnn.com/2011-05-18/us/pakistan.bin.laden_1_gates-and-mullen-bin-pakistanis?_s=PM:US>.

¹⁵ See generally Andru E. Wall, "Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities, and Covert Action," *Harvard National Security Journal* 85, no. 3 (2011).

¹⁶ 50 U.S.C. §413b(e).

¹⁷ Mustin and Rishikof, 1240.

¹⁸ Joint Publication (JP) 1-02, *Department of Defense Dictionary of Military and Associated Terms* (Washington, DC: The Joint Staff, November 8, 2010, as amended through November 15, 2011), 81, available at <www.dtic.mil/doctrine/new_pubs/jp1_02.pdf>.

¹⁹ 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 monograph, U.S. Army War College, 2009.

²⁰ See Greg Miller, "CIA Is in Baghdad, Kabul for Long Haul: Large Covert Presence Part of U.S. Plan to Exert Power More Surgically," *The Washington Post*, February 8, 2012, A1.

²¹ JP 1-02, 53.

²² 50 U.S.C. §413b(a)(1) through (5) for the requirements for Presidential findings.

²³ Best.

²⁴ *Ibid.* See also William Safire, "Covert Operation, or Clandestine?" *The New York Times*, February 14, 2005, available at <www.nytimes.com/2005/02/13/arts/13iht-saf14.html>.

²⁵ 50 U.S.C. §413b(a). Emphasis added.

²⁶ Executive order 12333, *United States Intelligence Activities* (As amended by Executive Orders 13284 [2003], 13355 [2004], and 13470 [2008]), para. 1.7(a)(4), available at <www.fas.org/irp/offdocs/eo-12333-2008.pdf>. Emphasis added.

²⁷ *Ibid.*, para 1.10(a) through (l).

²⁸ Gross, 7.

²⁹ H.R. Rep. No. 102-115, at 5898 (1991) (Conf. Rep.). Emphasis added.

³⁰ Panetta interview by Lehrer.

³¹ The Goldwater-Nichols Department of Defense Reorganization Act of 1986 (P.L. 99-433; 100 Stat. 992), October 1, 1986.

³² P.L. 107-40 [S. J. RES. 23, 107th Congress], September 18, 2001. The act authorized the President "to 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."

³³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³⁴ U.S. Constitution, Article 2.

³⁵ *Ibid.*

³⁶ *The Federalist Papers, No. 51* (James Madison arguing for the need for established institutions vice reliance on the good will of incumbent leaders).

³⁷ Goldwater-Nichols, note 32.

³⁸ 10 U.S.C. §162, and the following.

³⁹ See, for example, Department of the Army Regulation 600-20, *Army Command Policy*, March 18, 2008, para. 1-5(a), 1.

⁴⁰ *Ibid.*

⁴¹ Panetta interview by Lehrer; see also figure 1C.

⁴² 10 U.S.C. §113 and 50 U.S.C. §403-5 (defining the Secretary's specific duties with respect to the National Foreign Intelligence Program).

⁴³ 50 U.S.C. §403-4.

⁴⁴ 50 U.S.C. §401.

⁴⁵ *Ibid.* Emphasis added.

⁴⁶ 10 U.S.C. §113(a).

⁴⁷ 10 U.S.C. §113(d).

⁴⁸ 10 U.S.C. §113(b).

⁴⁹ "Authorities of the Director of Central Intelligence," 50 U.S.C. §403, and the following.

⁵⁰ *Ibid.*

⁵¹ 50 U.S.C. §403(d)(5).

⁵² 10 U.S.C. §162(a), and the following.

⁵³ 10 U.S.C. §162, and the following.

⁵⁴ JP 1-02, 57. Emphasis added.

⁵⁵ Executive order 12333; see also 50 U.S.C. §413(b)(a)(3).

⁵⁶ 5 U.S.C. § 3331.

⁵⁷ U.S. Constitution, Article 1, sec. 8.

⁵⁸ 50 U.S.C. §413(b).

⁵⁹ Executive order 12333.

⁶⁰ See, for example, Herbert C. Fooks, *Prisoners of War* (Federalburg, MD: J.W. Stowell Printing, 1924), 25. See also Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 4.A.(3).

⁶¹ *Ibid.*, art. 4 (A)(2)(a)-(d). Emphasis added.

⁶² Elihu Lauterpacht et al., *International Law Reports*, 133 (Cambridge; Cambridge University Press, 2008), 62.

⁶³ 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.

⁶⁴ Yves Sandoz, Christophe Swinarki, and Bruno Zimmerman, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 3553. Emphasis added.

⁶⁵ *Ibid.*, art. 43, para. 1672.

⁶⁶ See, for example, Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of international armed conflicts (Protocol I) Art. 82, June 10, 1977, 1125 U.N.T.S. 3; see also *Commentary on the Additional Protocols*, art. 82, paras. 3340-3345.

⁶⁷ H.R. Rep. No. 102-115.

⁶⁸ Statement of Hon. Wilber M. Brucker, General Counsel, Department of Defense, *Hearing before the Committee on Foreign Relations, United States Senate*, 84th Cong., 1st sess. Brucker notes during 1955 hearing on the Geneva Conventions before the Senate Committee on Foreign Relations that the U.S. "Armed Forces have always attempted to comply scrupulously" with these laws of armed conflict and their underlying principles.

⁶⁹ General Orders Number 100, *Instructions for the Government of the Armies of the United States in the Field*, April 1863, arts. 48-80, available at <http://avalon.law.yale.edu/19th_century/lieber.asp>. Emphasis added.

⁷⁰ *Ibid.*, art. 88.

⁷¹ *Ibid.*, art. 84.

⁷² United States War Department, *The 1863 Laws of War* (Mechanicsburg, PA: Stackpole, 2005), xi.

⁷³ See, for example, Richard A. Clarke, *Against All Enemies: Inside America's War on Terror* (New York: 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."

⁷⁴ Letter from President Barack Obama to Hon. John Boehner, Speaker of the House of Representatives, entitled "Notification of Special Forces Operation" (Washington, DC: Government Printing Office, 2012). The President noted the letter was sent "consistent with the War Powers Resolution." See 50 U.S.C. §1541, and following (P.L. 93-148).

⁷⁵ See, for example, Richard A. Best, Jr., and Andrew Feickert, *Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress* (Washington, DC: Congressional Research Service, updated 2006).