

## The Continuing Quandary of Covert Operations

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In May 2011, shortly after a special operations team of Navy SEALs killed al Qaeda leader Osama bin Laden, there was a fresh surge of enthusiasm for covert operations. That is unfortunate because, behind the scenes, secret warfare is actually in crisis. We need to re-examine the suitability and constitutionality of covert operations and, among other things, devise a sound constitutional framework for conducting them.

### I. HOST COUNTRY REACTIONS: PAKISTAN

A delegation of Pakistani officials recently completed a visit to Washington for very private talks about a secret war. Representing that nation's premier spy agency, the Inter-Services Intelligence (ISI), and headed by its chief, Lieutenant General Ahmed Shuja Pasha, the Pakistani delegation came to America to rein in the CIA. While CIA spokesmen put the best possible face on this event – calling the talks “productive” – there was no real meeting of the minds. The raid on bin Laden, executed without reference to Pakistani sovereignty, added insult to injury, since Pakistani demands to be kept fully informed of U.S. activities were clearly ignored in the SEAL operation. And just to pile on, American pundits, including former CIA director Leon Panetta, proceeded to accuse Pakistan of complicity or incompetence, given bin Laden's presence in a Pakistani garrison town. Observers should be in no doubt that this moment marks a watershed in the South Asian secret war. Much like the Tet Offensive in the Vietnam conflict, the event signifies the instant when U.S. capabilities peak, past which further escalation on any plane becomes less probable.

There are political and diplomatic reasons for this, and the limit will be imposed by the host nation rather than any unraveling of domestic support for U.S. actions. The secret warriors have trampled too often on the sovereignty of the nation with whom they professed to be allied, in the service of larger purposes that only Americans knew. No doubt the Obama administration and the CIA under its new director, David Petraeus (and, for that matter, Panetta) hope they can induce the Pakistanis to back down. Indeed, a reasonable interpretation of the Petraeus appointment is that Obama is signaling that the United States is committed to its secret war regardless of attitudes in Islamabad. But there is good reason to believe

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that no matter what degree of success Obama and Petraeus have at getting the ISI and Pakistani authorities to relent, any such move will have purely temporary effects. We have reached the watershed.

President Barack Obama came to office as a true believer in the war in Afghanistan, to which the secret war in Pakistan is the corollary. Obama presided over the greatest escalation of that shadow conflict since its inception. Carried out by remote strikes from the sky – Predator drones firing missiles and targeted by high technology intelligence gathering and old-fashioned spying inside the country, the Pakistani operations have attained considerable momentum. The “AfPak” policy review conducted in Washington in late 2009 resulted in a decision to accelerate those activities. In 2010, the number of Predator strikes inside Pakistan exceeded the total number of such missions carried out in all previous years of the war combined.

For reasons of effectiveness and operational security the CIA and the U.S. Special Operations Command, the responsible entities, have endeavored to conduct these activities in a unilateral fashion to the greatest extent possible, as the attack on bin Laden demonstrates so vividly. Worried about relationships between the ISI and the Taliban resistance, which Pakistani intelligence had a hand in creating, American officials undoubtedly thought that by these means they were optimizing the secret war. Early last year, when charges swirled that ISI interference was blocking certain efforts at Afghan reconciliation, CIA officers no doubt felt their fears had been confirmed. And the CIA’s ramp up of drone attacks in 2010 was further fueled by an understandable desire to retaliate for the Taliban suicide bombing of an agency base at Camp Chapman in Afghanistan, which brought the greatest loss of CIA officers’ lives in the annals of U.S. covert operations since the embassy bombing at Beirut in 1983.

Rejecting claims that the ISI had done anything other than contribute to the joint mission, Pakistanis complain of American unilateralism. Over the following months a succession of events cast ridicule and opprobrium on secret war efforts. Complaints arose that the drone attacks were killing innocent civilians. A “high level” intermediary in Afghan government-Taliban reconciliation feelers was revealed as a fraud. A campaign of Taliban bombings of ISI facilities put the Pakistanis on notice that their cooperation with the CIA was at their own peril – in a land already ultra-sensitive about any indication that the United States is dominating its national government. Relatives of Pakistani civilians who died in a December 2009 drone attack filed suit against the United States and the CIA in a Pakistani court, naming the CIA station chief and blowing his cover – shades of Diem in Vietnam in 1963. The station chief had to be recalled just a few months into his tour of duty. In this tinderbox, the action of CIA contract officer Raymond A. Davis, who shot dead two Pakistani men he thought were following him in Lahore, could only ignite intense

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Pakistani feelings. The Pakistani official response was predictable, and General Pasha's visit to the CIA was merely its overt expression. Now the SEAL raid to kill bin Laden calls into question whatever assurances the CIA gave its regional ally.

Regardless of any short-term amelioration that may result, the handwriting is on the wall for the CIA's secret war. Unilateral operations must necessarily be greatly curtailed, and any that survive will be highly dangerous. Without doubt, another U.S. commando-style raid inside Pakistan will have disastrous consequences whatever its tactical outcome. Activities in concert with the ISI face an increased prospect of compromise. Drone attacks must be cut back considerably. Taliban forces, which used Pakistan as a rear base, will have wider freedom of action. Since al Qaeda had diminished to a shadow threat, the true meaning here is a larger security morass inside Afghanistan, where the United States is challenged to show progress. The Pakistani side of the AfPak equation will become even more indeterminate than previously.

## II. MORE FAILURES THAN SUCCESSES

These events suggest that the moment has come to review once more the questions surrounding the modalities for and effectiveness of covert operations and the special warfare activities that infuse them. Almost three decades ago, at the height of the flap over CIA mining of Nicaraguan harbors in 1983, President John F. Kennedy's national security adviser McGeorge Bundy wrote of these mechanisms that "the dismal historical record of covert military and paramilitary operations over the last 25 years is entirely clear."<sup>1</sup> Bundy, of course, was the presidential aide who had presided over the horrible fiasco of the CIA's invasion of Cuba at the Bay of Pigs, and he had accumulated reasons for skepticism.

There is another side. Time has passed. Perhaps the story is different today. Proponents of these methods see them as a "third option" between doing nothing and having a war. Voices of that sort are heard today in discussions of the dilemma about what is to be done regarding the present upheaval in Libya and the dogged determination of Libyan dictator Muammar Gadhafi in the face of widespread popular rejection.

I surveyed the entire field of covert operations in considerable detail in the 1980s in my book *Presidents' Secret Wars*, and returned to this subject in 2006 for an even broader inquiry in *Safe for Democracy*. Here I propose to take various conclusions from those investigations and review them in the light of events, both historical and current.

Theories of covert operations are preoccupied with tactical considerations – menus of measures and conditions for success. This

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1. JOHN PRADOS, *SAFE FOR DEMOCRACY: THE SECRET WARS OF THE CIA* 629 (2006).

proposition remains true. It is odd – or perhaps it is not – that neither advocates nor practitioners have been able to articulate a supple, nuanced overarching schema that fits covert operations into Great Power politics in a responsible way. The third option between “soft power” and “hard power” remains inchoate and fuzzy. Operations are approved willy nilly based on longstanding predisposition or fleeting perceptions of opportunity. Calculations uniformly focus on the short term. The truth remains that there is no reasonable technique of cost-benefit analysis to apply to proposals for covert operations.

The war on terror has not changed that. Only short-term thinkers can have thought that U.S. employment of torture, renditions, arbitrary detention, and military tribunals would inure to America’s benefit. Since the role of extraordinary methods of interrogation in acquiring the “actionable” intelligence that supported the attack on bin Laden has brought forth a fresh wave of defenders of torture, let me dwell on that point for a moment. Advocates justified torture as necessary in the contingency of extreme threat – where the lives of thousands or millions hung in the balance for want of immediate information. The new legion of defenders argues that success in killing bin Laden, one man, makes that all right. Actually it is quite the opposite. The hunt for this al Qaeda leader consumed almost ten years. *There was no urgency at issue.* Moreover, there is absolutely no reason to believe that over ten years the same information could not have been elicited by conventional methods, as did FBI interrogator Ali Soufan with al Qaeda enabler Abu Zubaydah. Resort to extreme techniques comes at the price of manifesting the arrogance of American power and quite likely will lead to placing the United States in the dock of international criminal law.

America’s most valuable resource is the image and texture of its democracy. This is blindingly clear in the Middle East today, where the Mediterranean littoral boils with the long-suppressed democratic longings of peoples in several countries. Regardless of how the Arab Spring plays out, the image of freedom that the United States so long exemplified is its most powerful tool. The texture of that democracy has been tarnished quite directly by recent covert operations. Even in the Pakistani secret war, where the instruments of force are conventional military weapons in high technology array, the impression that the remote trackers of the CIA act as judge, jury, and executioner contravenes democratic principles and is harmful to this nation.

Proponents might argue that the Pakistani secret war reduces the scale of the security threat in Afghanistan, and they would go on to assert that covert operations are not without their successes. Until the 1980s, the examples most often used to illustrate success were the CIA operations in Iran in 1953 and in Guatemala the following year. Those examples are

almost never offered today, and for good reason – blowback. This is the phenomenon of successes rebounding to become failures.<sup>2</sup> In the Iranian case, the CIA role in the overthrow of an elected leader became a factor in the fall of the Shah of Iran and the establishment of a regime that has been an implacable enemy ever since.<sup>3</sup> To the degree that Iran's current authoritarian leadership has become an actual state sponsor of terrorism – often aimed at American interests – that “successful” CIA operation has been a negative for U.S. national security. As for Guatemala, the oligarchs emplaced by the CIA went on to conduct a vendetta against indigenous populations, abetted by CIA “assets,” exposing the United States to charges of collusion in genocide.<sup>4</sup> These are enormous downsides. In terms of their official CIA rationales – as Cold War offensives – neither CIA covert operation materially affected the balance, although failure at the time *would* have triggered shifts, forcing those nations into the arms of the USSR.

Thus even where operations end with short term success, changing patterns of international relations can make them embarrassments later. The CIA's operations off the China coast in the early 1950s and those in Tibet in the late 1950s and 1960s began to look very different in the 1980s, when the United States sought to cooperate with the People's Republic, including in new wave covert operations inside Cambodia and Afghanistan. At a recent conference, a senior CIA historian explicitly argued that covert operations should *only* be judged in the short term – and went on to assert that nearly eighty percent of CIA covert operations had been mounted in support of democracy – even including the Iranian operation in that category.<sup>5</sup> It is precisely this kind of thinking that makes covert operations such a blunt instrument.

There have, in general, been only two kinds of covert CIA operation: those that fail and those that come close to failure. Every operation counted a success had at least one moment when it stood at the brink of disaster. In the Iranian coup of 1953, at a certain point the Shah froze up and had a case of nerves. In the Guatemalan coup, the CIA-recruited anti-government army refused to fight. In Afghanistan in the 1980s, the anti-Soviet resistance essentially ran out of gas just before the Reagan administration determined to commit new, high technology weapons in the conflict – and there were difficulties with the ISI in those days too.

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2. CHALMERS ROBERTS, *BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE* (2004).

3. JOHN PRADOS, *PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS SINCE WORLD WAR II 91-98* (1986).

4. *Id.* at 98-106.

5. David Robarge, *CIA Covert Action and Democracy*, presented at the conference, *Landscapes of Secrecy: The CIA in History, Fiction and Memory*, University of Nottingham, Apr. 29, 2011.

In 1991, in an earlier incarnation and up for nomination as Director of the CIA, Robert M. Gates told the senators assembled that were it not for the secret war in Afghanistan he would have had grave doubts about the efficacy of covert operations.<sup>6</sup> Two decades later, with the United States embroiled in its own Afghan war, fighting in Pakistan to isolate that battle zone, and with the CIA support to Islamic fundamentalists having spawned the war of terror, that affirmation rings hollow. Today's friend can be tomorrow's enemy, and vice versa. This shines a strong light on the rudimentary cost-benefit analyses used to authorize these activities.

There have been successes in covert operations, though observers can dispute which ones, where, and when. I would argue that most successes have resulted from activities carried out in conjunction with military operations. Korean War partisan projects might be one example, though some analysts maintain that individual programs carried out in the field mostly failed. The creation of Montagnard and Hmong tribal secret armies in Vietnam and Laos during the Southeast Asian conflict is another example. In these projects, the CIA and its military special warfare cohorts were obliged to create ethnic nationalisms among local minorities as a mechanism for social mobilization. Those emerging nationalisms, in turn, triggered differences between them and state governments, not to mention between those nations and the United States. As a matter of policy there was only one choice Washington could make in these circumstances – against the minorities it had mobilized.

There is a lesson for prospective guerrillas in all of this. The United States acts in its own interests, those of the Great Power. There is little true identity of purpose between the restive local minority and the Americans. Smart guerrillas will avoid playing the U.S. game, preventing Americans from exerting true control. More recently, the same phenomenon appeared in the so-called “Sunni Awakening,” which many credit for turning around the Iraqi war in 2006-2007. Parallel interests and efforts can attain shared goals, but the danger is ever present that the Great Power will go its own way. American withdrawals in Iraq pulled the rug out from under Sunni collaborators, and the Baghdad government has done much to suppress the Sunni movement that awakened. This remains a work in progress, but however it turns out, the hazards of alliance with CIA secret warriors have been highlighted.

Such difficulties play against the secret warriors' favorite tactic of late, which has been to substitute money – in the form of hard cash, U.S. dollars – for ideological or cultural affinity. In the old days, the CIA sought affinities or searched for common political ground. When it found that such avenues did not exist, the United States became an avid sponsor of “Third

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6. *Nomination of Robert M. Gates: Hearings Before the S. Select Comm. on Intelligence*. 102d Cong. 607 (1991) (statement of Robert M. Gates, nominee to be Dir. of Cent. Intelligence Agency).

Force” movements. This happened in the Albanian covert operation of the late 1940s, with the CIA siding with Chinese Nationalists in the civil war there, in Tibet (1950-1960s), and in the Cuban operations of the 1960s, to name a few.

In more recent years, the fractionation of domestic policies in many lands has impeded the emergence of either broad affinities *or* Third Force movements. Politics has become tribal – *except on the other side*. The broadest transnational affinity today is that of Islamic fundamentalism. CIA dollars that recruited tribes in Somalia, Iraq, and Afghanistan have difficulty competing with that, and rented armies often prove temporary allies. The broadest value to which the CIA could appeal – democracy – is the one that has been soiled by covert operations.

One special problem of working through local proxies is that the Great Power incurs political liability as a result of the proxies’ acts. The most obvious case arises directly from tribal differences, where recruiting one group means making enemies of another. For all its sophisticated intelligence, the CIA often lacks the detailed knowledge that might enable it to choose among alternatives. This sort of problem twice surfaced in Iraq – first in the 1990s when an early CIA attempt to overthrow Saddam Hussein collapsed amid internecine Kurdish differences. It happened again during and after the 2003 invasion, when Iraqi exiles recruited by military special warfare operatives not only blinded the United States to potential alliances with mainstream Iraqi groups but then linked up with U.S. adversary Iran.

Because creating movements has most often relied upon recruiting prominent individuals, the CIA has tended to become associated with oligarchs. This occurred in covert operations in China (1950s), Indonesia (1957-1958), Chile (1970s), Nicaragua (1980s), Angola (1980s), and elsewhere in Latin America, Africa, and Asia. The same dynamic has applied in CIA security operations *against* resistance movements. Certainly Washington’s Afghan and Pakistani allies today represent elites in those countries. In the Sunni Awakening – the single recent case of a mass movement – the U.S. action in walking away from the local ally is bound to complicate future endeavors of this kind.

There is also the separate problem of leaks. A robust covert operation involves many discrete actions across a spectrum, each with its own possibility of revelation. An operation big enough to have real capability is bound to generate sparks. Leaks are unavoidable. Even when secrecy is preserved, covert operations are not secret to the target populations. This was true as early as the Bay of Pigs in 1961. The Laotian secret war was not a real “secret.” The anti-Saddam coup activity of the 1990s became known to Iraqi security forces.

Specific covert operations have become political footballs, as happened in Nicaragua and Afghanistan in the 1980s and again with Iraq. When a covert initiative becomes the subject of legislation, as in the 1998

Liberation of Iraq Act, important constraints are imposed on secret warriors. Worse, in those cases the secret warriors' local allies become interest groups that have political weight to apply against their Agency handlers. The machinations of Iraqi exile groups after 1998 were a significant factor in the run up to the 2003 invasion, among other things generating bogus "intelligence" that helped President George W. Bush lead the United States into an aggressive war. Let me state that another way: A local ally mobilized by the CIA acquired sufficient weight to become a factor in *maneuvering the United States into a war*.

In terms of contributions to U.S. relations with the Third World, covert operations, especially paramilitary actions, have had minimal positive results. When relationships with target nations and populations have improved, that has happened despite, not because of, CIA covert operations. In all such CIA projects to date, contrary to the claims of Agency historians, there is hardly a case of a representative democracy resulting from such an operation. Perhaps Nicaragua and Angola are exceptions, but there the outcomes arguably resulted more from regional diplomacy by other states, combined with the exhaustion of the combatants on both sides. These factors led target governments to open up their political systems to CIA-backed contenders. In Nicaragua, this took a decade, in Angola more than two, and in both cases the CIA was gone when the political conflicts were resolved. Moreover, in Angola, CIA backing activated a fundamentally anti-democratic movement, which resumed its warfare when the outcome of elections was not to its liking. A cynic could make the argument that CIA operations have been useful for igniting perpetual conflict.

There are multiple cases of oligarchs, having been put in power by CIA operations, carrying out fierce repression of real and perceived political opponents. Guatemala is an object case, but so are Chile, Guyana, Indonesia, and now Iraq. Repression is not democracy. In short, covert operations have resulted in upheaval and untold suffering in many nations while contributing little to Washington's quest for democracy.

Finally, paramilitary operations are seductive, affording the illusion that major results can be obtained for minimal outlay. But, for the limited number of covert operations for which data exists, no major initiative of this kind *ever* ended within its allotted budget. Like defense contractors who offer new weapons cheaply, secure in the belief that once government has committed to systems development, it will have little alternative but to accept massive cost overruns, covert operations proposals are more than they seem. The Iran operation of 1953 was estimated at \$800,000 to \$1.6 million, but the price escalated to close to \$80 million.<sup>7</sup> Secret warriors asked for \$26 million for the Guatemalan operation of 1954, but its cost ultimately came in nearer \$160 million. The Bay of Pigs was originally offered at \$19 million, but exacted more than \$330 million. The CIA spent

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7. The costs of the covert operations cited here are stated in 2010 dollars.



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\$17.9 billion in Afghanistan in the 1980s, with a matching fund from Saudi Arabia, plus smaller contributions from Pakistan, Egypt, China, Britain, and France.

In summary, at least on the paramilitary side, a relatively short ledger of successes compares to a lengthy list of failures, some of them egregious. Even advocates of covert operations, of late, have come around to argue that secret action is no substitute for an articulated foreign policy.

### III. BENEFITS AND COSTS OF “POLITICAL ACTION”

Intelligence specialists often distinguish between the terms “covert operations,” referring to the entire genus of secret activities, and “covert action,” with which they denote the narrower category of propaganda and manipulation efforts in foreign lands. A better term for these, one that does not confuse the debate, is “political action.” As compared to paramilitary operations, political action seems attractive because it does not engage forces and is relatively inexpensive.

The paradigmatic political actions are those carried out in Italy from 1948 through the early 1970s, credited with preventing that country from “going communist” and ensuring the pro-West orientation of the Italian state. The CIA’s tools in these political actions are money, media, and message, and its instruments right-wing political groups or, in the most sophisticated use of these methods, the Third Force.

Unfortunately, the actual effectiveness of political action is indeterminate and the imponderables huge. History is what it is. It is impossible to know what would have happened had the Italian Communist Party taken power. The Communists could have taken Italy into the Socialist Camp or, like the French Socialist Party in power in the late 1940s and again in the 1980s, maintained the tradition of close association with the West. What *can* be said is that CIA intervention never succeeded in emasculating the Italian Communists, and that some of the right-wing political forces mobilized (P-2, Gladio) triggered political embarrassment, even decades later, when the original subversion was revealed. The contribution of CIA manipulations to Italian political instability – Italy’s governments through these decades averaged only nine months in power – is also not calculable. The CIA engaged in similar political actions in France, Japan, the Philippines, Bolivia, and elsewhere.

Among other episodes in CIA political warfare are some the Agency would prefer to deny, such as the contribution of Agency political actions to the tragic Hungarian Uprising of 1956, which the CIA insisted had nothing to do with broadcasts by its proprietary Radio Free Europe.

A successful political action took place in British Guiana (today Guyana) between 1962 and 1964, forcing out a socialist prime minister in

favor of a right-wing oligarch – who by the 1980s was accusing the United States of trying to undermine him.

The most notorious Agency political action was its interference in Chilean elections and then economic manipulation that ousted Chilean President Salvador Allende in 1973. The Italy-style covert intervention in Chilean elections was successful in 1964 but failed in 1970. The Chilean episode also shows what *did* work – economic warfare in the form of trade restrictions and denial of multilateral loans.<sup>8</sup>

Many paramilitary operations embody an element of political action, which is instrumental in creating Third Force movements. During Cuban operations in the 1960s, political action helped solidify a Cuban exile movement that became a factor in American politics and contributed to a freeze in Cuban-American relations that endured over more than four decades. In the 1980s, political action in favor of Nicaraguan rebels helped make the covert operation in Nicaragua controversial in American politics, leading to limits imposed on the secret warriors that finally impelled the Reagan administration into the extra-constitutional misadventure that has become known as the Iran-Contra Affair.

Blowback is a major danger in CIA political action. Whether it is the phony article planted in a foreign newspaper that is picked up by U.S. media, the supposedly disciplined local ally who becomes a renegade, or the foreign peoples who believe too much in CIA propaganda, the dangers are real. The phony article gone domestic puts the CIA in the position of having engaged in an illegal intervention in domestic politics. The Hungarian Uprising subjected the United States to charges of having fomented a revolution it had no intention of supporting.

Thus political action represents a wild card. As the Iran-Contra Affair illustrates, it also contains an inherent temptation to escalate. And political action is irretrievable. Once the article is planted or the payoff made to the foreign politician, actions cannot be taken back. These events are like buried bombs which, dug up accidentally – or purposely – can detonate at any future time. Moreover, such actions exist within shifting local and global political environments. Something considered unobjectionable today may be revealed at a time when such activities are widely viewed as abhorrent. It is *precisely* for reasons like these that short-term cost-benefit analysis is not acceptable as a covert operations decision tool.

Most instructive, in recent years American political parties have moved to create “democratic institutes” that overtly perform some of the functions formerly the province of CIA political action. Since the 1990s such entities have become well-established.

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8. PRADOS, *supra* note 3, at 315-321.

## IV. OPERATIONAL CHALLENGES IN COVERT ACTION TODAY

Apart from their special characteristics and unpredictable consequences, covert operations are subject to serious operational difficulties. Although the current U.S. budget allots \$55 billion for national intelligence programs (and about \$80 billion if Pentagon programs are included), and in spite of a CIA buildup in progress for more than a decade, the Agency today would not be capable of carrying out the Bay of Pigs project. Simply put, the CIA is no longer a full-service covert operations provider.

There are many reasons for this. The two major culprits, in my view, are the continued predominance of technological solutions and the degree of CIA cooperation with U.S. military services. The latter is paradoxical since inter-service – or “purple” – cooperation has been a fixed idea in the United States for longer than the CIA’s current buildup. The addiction to technology has had effects other than simply producing new machines which Agency officers are anxious to use, though that is a problem. It has also meant that CIA officers are inculcated in a different culture: more remote activity, more headquarters micromanagement, less field experience, less independent innovation.

Elements of traditional tradecraft are in danger of being lost. The December 2009 massacre of CIA officers at Camp Chapman in Afghanistan, apart from anything else, indicated that higher-ups want the immediate gratification of remotely viewing spies, and that field personnel are rusty at such functions as agent handling. The January 2011 incident at Lahore, when a CIA contract officer felt the need to kill individuals who seemed merely threatening to him, illustrated the same thing. Under these circumstances, it may be more understandable that the new formula for creating a paramilitary movement is simply to throw cash at tribal chieftains. CIA officers might now lack the skills necessary to recruit committed fighters.

Another significant indicator is the increasing prevalence of private contractors in intelligence work. To use the new jargon, these people engage in “international risk mitigation.” These private contractors have been controversial in Iraq and Afghanistan. Their defenders argue that the companies represent a great pool of talent. That is precisely what is perturbing. We have reached the point when a larger repository of field experience exists among retired CIA officers, now working in private industry, than in the corps of active officers. Yet the private contractors have different restrictions and chains of command. Iran-Contra has already shown the dangers of off-the-books operators. It is thus disturbing to find Dewey Clarridge, one of the CIA officers implicated in Iran-Contra, today operating a private intelligence company in AfPak. Much more attention needs to be devoted to understanding the private company situation in order to avoid the danger of rogue intelligence operations.

#### V. SUITABILITY AND CONSTITUTIONALITY, PROBLEMS AND SOLUTIONS

Reviving the covert operations capability from its present atrophied state immediately raises overarching questions as to the suitability and constitutionality of covert operations techniques. The issues need to be addressed much more systematically. Within the terms of this discussion, a branch able to do little more than rent armies is not a proper covert operations unit. Moreover, the present formula of a high tech marriage between secret intelligence – primarily technical collection – and remote action (drones) is *not* a robust covert action capability either. It *is* attractive. Much like reconnaissance satellites, such mechanisms can be managed and budgeted with some ease, and have a certain apparent responsiveness. But that does not make them supple instruments, nor does such activity amount to a covert operation. At the core, it is a conventional military action.

The Pakistanis today complain of a drone campaign out of control and they are right. When the drones are striking, on average, every three days, that is aerial interdiction, not a targeted covert operation. CIA lawyers insist that every individual drone target is selected from careful accumulation of evidence resulting in a proposal to neutralize, put in a memorandum and approved at a high level. That is not possible, given the number of targets struck, without expanding the target set far beyond the top levels of adversary leadership. Former CIA Director Panetta has affirmed that al Qaeda activists still in the region number only forty to fifty persons. By Pakistani accounts, most Predators now strike much lower level operatives, and of the Taliban, not al Qaeda. This follows perfectly from the fact that the top leaders have learned to exercise complete communications security, while CIA high technology surveillance depends on those data to acquire the targets. The drones are fishing, and the big fish are not biting. The bin Laden attack – apart from potential controversies about his assassination, or U.S. relations with Pakistan – shows that old school methods still work. Someone off the grid could be hunted down and dealt with. But the momentum of the technologically-driven covert operation has arguably reached the point of no return.

This is not an intelligence approach; it is a military one. Today's CIA is increasingly an auxiliary of the U.S. military. Since the 1990-1991 Persian Gulf war, and the Somali and Bosnian peacemaking operations that followed, the Pentagon has made increasing demands for improved national intelligence "support to military operations." Larger numbers of military personnel have been seconded to the CIA, and military culture increasingly pervades the Agency. The support has become the operation. Director Panetta's predecessor was an Air Force general. His successor is an Army general. Support for military operations has involved a learning curve, but increasingly the intelligence agencies are cast as adjuncts to the military.

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The high “operational tempo” demanded by Director Michael Hayden, Panetta’s predecessor, in fact required the CIA to work more like the military, discarding careful intelligence work in favor of “actionable intelligence,” further emphasizing technical collection programs. Under Director David Petraeus, another general, it is a safe prediction that this trend will continue.

Under Secretary of Defense Donald Rumsfeld, the Pentagon moved strongly to supplant CIA operations. Under the slogan “military preparation of the battlefield,” the U.S. Special Operations Command tried to recruit agents, conduct operations, and do all manner of things traditionally reserved to the clandestine service. Secretary of Defense Robert Gates cut back some of those efforts and negotiated with the CIA regarding the roles and missions of each. Needless to say this has been made easier as the agency became more militarized.

In *Presidents’ Secret Wars*, written amid the excesses of Reagan-era covert operations, I argued for vesting authority for the covert operations function within the Department of Defense (DoD). That was partly a matter of the DoD providing more of the full-service covert operations panoply within its Special Operations Forces – a point illustrated by the bin Laden attack – and partly a reflection of the sense that military regulations should ensure more proper legal controls. In *Safe for Democracy*, written in 2006, I was not so confident, and argued for preserving the main lines of covert operations authority within the CIA. But the CIA was guilty of excesses in the struggle against terrorism and has become excessively militarized, while the military remains as clumsy as ever. Today I am not comfortable with either solution. The presumptive authority for covert operations remains where it has been, with the CIA, but the Agency has become militarized, has lost skills, and still lacks a proper mechanism for cost-benefit analysis. Covert capability needs to rebuild tradecraft, refine its decision devices, and be placed within a proper legal framework.

This brings us to the final, legal questions. I have consistently held, and still do, that *no legal authority for covert operations exists under the U.S. Constitution*. The underpinning for presidential approval of covert operations rests entirely on the ambiguous “such other functions” clause of the National Security Act of 1947. The CIA’s own General Counsel concluded on multiple occasions that covert operations did not fall within the scope of that language.

Should the President instead rely upon his authority as Commander in Chief of the armed forces, the problem is that the CIA is not an “armed force.” Even if it were, the President would then have to be deemed to be acting under the provisions of the War Powers Resolution of 1973. This requires congressional approval of an action within sixty to ninety days. We can debate whether Congress has abdicated its responsibilities for enforcement of this statute, but the fact remains that it is the law of the land.

Alternatively, were the CIA to be construed as an unofficial armed force for the purpose of conducting paramilitary action – which is, after all, an act of force – then the Constitution (Article I, Section 8) *expressly* reserves to the Congress *all* authority to issue “Letters of Marque.” The eighteenth century equivalent of grants of unofficial combatant status, given to privateers, Letters of Marque authorize the use of force by private individuals (read CIA operatives).

The system of “presidential findings” (“Memoranda of Notification”) that exists today was cobbled together through the 1970s and 1980s by a Congress anxious to assert some sort of oversight and an Executive eager to avoid it. These presidential findings are functional equivalents of Letters of Marque. Since statutory law does not and cannot supersede the Constitution, the current system still fails to meet constitutional requirements.

Congress and the Executive spent more than a decade from the 1980s into the 1990s fighting each other to regularize the format and content of presidential findings, which became a staple of congressional oversight debates. The wounds had barely healed when, after 9/11, the Bush administration further exploited the presidential finding system regarding non-covert operations matters (National Security Agency telephone monitoring) as covered by the system, by manipulating questions of what legislators (“Big Eight,” “Big Four,” the intelligence oversight committees, no one?) had to be informed on particular issues, and by continuing to dispute the issue left outstanding in the 1990s – what constituted “current” notification.

The proper constitutional solution under Article I, Section 8, is to craft a mechanism for congressional approval of presidential findings. That would locate responsibility squarely and settle the matter of definitions. Congress would be entitled to whatever information is required to reach its decisions, and its affirmative action would give covert operations a degree of political cover they presently lack.

The legitimate vehicle for the expression of this formula is a CIA charter, or more precisely a charter covering the intelligence community as a whole. Charter legislation is the place to reframe all the questions of regulation and responsibility for various aspects of intelligence agency roles and missions that have been raised here and in other recent assessments of covert operations. Congress and the Executive failed to reach agreement on intelligence charter legislation during the Carter administration. It is long overdue, and its necessity has only been confirmed by recent excesses.