

# Conducting Shadow Wars

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## INTRODUCTION

When al Qaeda launched the 9/11 attacks, it also thrust the United States on a decade-long (and counting) search for the best way to combat the unconventional threat posed by terrorism. That search evolved into a competition of sorts between the military's Special Operations Forces (SOF) and the paramilitary operatives of the Central Intelligence Agency (CIA) for the prestige and resources that went with leading the fight against terrorism. Within less than a decade, however, various officials involved in counterterrorism policy were trying to combine the two groups of operators in a way that maximized the advantages and minimized the risks and constraints of each group.

Many critics of the George W. Bush administration's wholehearted push into the realm of shadow wars – covert operations in countries with which the United States was not at war – assumed that the situation would improve when Barack Obama became President. To the surprise of many, if not most, of his campaign supporters, however, President Obama has, in some ways, become an even more ardent supporter of shadow wars than his predecessor. And, as this article will show, just about every indication points to a further expansion of this hybrid military and intelligence activity in countries beyond war zones. It is imperative, therefore, that we more clearly understand how these shadow wars are being conducted and by whom, and whether they are subject to adequate oversight and accountability.

## I. THE PLAYERS

### A. CIA

Ever since its creation in 1947, the CIA has traditionally been the designated covert operator in the United States. That is, if Washington wanted to influence the political, economic, or military conditions in another country without showing its hand, the CIA was its chosen instrument. Accordingly, just six days after 9/11, President Bush signed a top secret presidential finding that granted the CIA broad authority for

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pursuing al Qaeda suspects around the world. That finding laid the basis for what became known as the “GST program” (the initials of its classified name): dozens of highly classified individual projects that allowed the CIA to maintain secret prisons abroad, capture al Qaeda suspects and render them to third countries for interrogation, use interrogation techniques that amounted to torture, and maintain a fleet of aircraft for these purposes. The finding also permitted the CIA to create paramilitary teams to hunt and kill designated individuals anywhere in the world (although this aspect of GST apparently never became operational and was ended by CIA Director Leon Panetta in the spring of 2009).<sup>1</sup>

As the United States prepared to pursue al Qaeda and the Taliban in Afghanistan in the aftermath of 9/11, the CIA also began following a familiar strategy of establishing, funding, and training its own local proxy militia. It began to assemble what would become a 3,000-strong army, consisting mostly of Afghans, organized into a number of Counterterrorism Pursuit Teams (CTPT). These teams have “conducted operations designed to kill or capture Taliban insurgents,” and have also often gone “into tribal areas to pacify and win support.”<sup>2</sup> While the CTPTs have operated largely in Afghanistan (thus within a war zone), they have also reportedly crossed over into Pakistan on several occasions.<sup>3</sup>

The third and certainly best known facet of the Agency’s involvement in offensive operations in countries beyond the Iraq and Afghanistan war zones has been its drone missile attacks in Pakistan and, increasingly in mid-2011, in Yemen. The first targeted drone killing was of Qaed Salim Sinan al-Harethi, a suspect in the 2000 bombing of the USS Cole, in Yemen in November 2002.<sup>4</sup> The use of drone attacks was originally quite controversial, as Washington had condemned Israel’s policy of targeted killing as recently as two months before 9/11.<sup>5</sup> That controversy notwithstanding, the United States began using drone attacks in Pakistan as a solution to the problem raised by Taliban and al Qaeda fighters from Afghanistan who hid in Pakistan’s tribal border regions, where Pakistani forces were either unable or unwilling to root them out and where U.S. forces were prohibited from operating on the ground. The drone attacks in

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1. Dana Priest, *Covert CIA Program Withstands New Furor, Anti-Terror Effort Continues To Grow*, WASH. POST, Dec. 30, 2005, at A1. On Panetta and the end of the program, see Siobhan Gorman, *CIA Had Secret Al Qaeda Plan*, WALL ST. J., July 13, 2009, at A1.

2. BOB WOODWARD, *OBAMA’S WARS* 8 (2010).

3. Craig Whitlock & Greg Miller, *U.S. Covert Paramilitary Presence in Afghanistan Much Larger Than Thought*, WASH. POST, Sept. 22, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/22/AR2010092206241.html?sid=ST2010092106707>.

4. David S. Cloud & Greg Jaffe, *U.S. Kills Al Qaeda Suspect in Yemen*, WALL ST. J., Nov. 5, 2002, at A8.

5. Jane Mayer, *The Predator War*, NEW YORKER, Oct. 26, 2009, at 36, available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer).

Pakistan were used originally against specific “high-value” targets selected with the help of the Pakistani government. The targeting rules were significantly expanded in mid-2008, however, to include suspected lower-level militants whose names are not known.<sup>6</sup> Under the expanded authority, the CIA can target and kill individuals on the basis of “pattern of life” analysis – when various sources of intelligence point to someone “whose actions over time have made it obvious that they are a threat,” according to a senior U.S. counterterrorism official.<sup>7</sup>

While the targeting change led to an increase in drone strikes during Bush’s last six months in office, there is no doubt that Obama increased the pace dramatically. From the Bush administration’s high of 33 strikes in 2008, the number rose to 53 in 2009 and 118 in 2010.<sup>8</sup> By mid-2011, the pace had slowed in Pakistan as a result of the rising tension in the Washington-Islamabad relationship, but there were reports of plans to significantly increase the CIA’s drone program in Yemen.<sup>9</sup>

### B. SOF

After 9/11, the military side of the preparations for war in Afghanistan prompted Secretary of Defense Donald Rumsfeld’s realization that CIA operatives were able to get on the ground and make contact with the rebels of the Northern Alliance far more deftly than the military’s SOF operatives. Rumsfeld took that lesson to heart and set about building SOF’s capacity and authority and ensuring that they would never again have to rely on the CIA to accomplish a mission.

Special operations forces include units that conduct overt, or “white,” operations, and those that conduct classified, or “black,” operations, including both covert (where the sponsor is unacknowledged) and clandestine (where tactical secrecy is essential) missions. Those involved in white special operations include Army Special Forces (Green Berets), most Ranger units, most of the Navy SEALs (Sea, Air, Land), and numerous aviation, civil affairs, and psychological operations units. These white special operators are largely involved in training selected foreign forces in counterterror, counterinsurgency, and counternarcotics tactics,

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6. David S. Cloud, *CIA Drones Have Broader List of Targets*, L.A. TIMES, May 5, 2010, at 1; Scott Shane, Mark Mazzetti & Robert F. Worth, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, at A1; Adam Entous, Siobhan Gorman & Matthew Rosenberg, *Drone Attacks Split U.S. Officials*, WALL ST. J., June 4, 2011, at A1.

7. Cloud, *supra* note 6, at 1.

8. *The Year of the Drone*, NEWAMERICA.NET (May 21, 2011, continually updated), <http://counterterrorism.newamerica.net/drones>.

9. Greg Miller, *CIA Will Direct Yemen Drones*, WASH. POST., June 14, 2011, at A1.

helping with various civil government projects, and disseminating information to foreign audiences through the mass media.

The black operators fall under the Pentagon's Joint Special Operations Command (JSOC), which commands the elite units of each service's special operations forces, including Special Forces Operational Detachment-Delta (Delta Force), Naval Special Warfare Development Group (DEVGRU, or SEAL Team 6, although it has a new, classified name), the Air Force's 24th Special Tactics Squadron, the Army's 160th Special Operations Aviation Regiment and 75th Ranger Regiment, and a highly classified Intelligence Support Activity team (known as ISA, or more recently as Gray Fox, although its name changes frequently). These units (also known as special mission units) specialize in direct action, or "kinetic," operations such as hunting terrorists and rescuing hostages.

By 2011, it was clear that Rumsfeld and his successor, Robert M. Gates, had substantially expanded Special Operations Command (SOCOM, the formal command under which SOF are organized). The Administration's SOF budget request for fiscal year (FY) 2012 was \$10.5 billion, roughly three times its 2001 budget. And at close to 60,000 personnel (20,000 of whom are SOF operators), SOCOM had almost doubled in size.<sup>10</sup> Rumsfeld also significantly boosted SOCOM's authority and prestige. In 2004, after an intense bureaucratic struggle between the Pentagon and both the CIA and the State Department, President Bush signed the Unified Command Plan 2004, designating SOCOM as the "lead combatant commander for planning, synchronizing, and as directed, executing global operations" in the war on terror.<sup>11</sup>

The same year, Rumsfeld signed, with Bush's approval, the Al Qaeda Network Execute Order (AQN ExOrd), which gave SOF broad new authority to attack al Qaeda anywhere in the world and to conduct offensive strikes in more than twelve countries, including Syria, Pakistan and Somalia. The AQN ExOrd also streamlined the approval process for the military to act outside designated war zones, replacing the previous cumbersome case-by-case approval process. The AQN ExOrd did retain the requirement for high-level administration approval in some cases. Targets in Somalia, for instance, must be approved by the Secretary of Defense, and those in a few selected countries, including Pakistan and Syria, require the approval of the President.<sup>12</sup>

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10. Andrew Feickert & Thomas K. Livingston, *U.S. Special Operations Forces (SOF): Background and Issues for Congress* (Cong. Res. Serv. RS 21048), July 15, 2011, at 7.

11. *Capability and Force Structure of the United States Special Operations Command To More Effectively Combat Terrorism: Hearing Before the Subcomm. on Emerging Threats and Capabilities of the S. Armed Servs. Comm.* 109th Cong. (2006) (statement of Vice Admiral Eric T. Olson, U.S. Navy Deputy Commander, U.S. Special Operations Command), at 3, available at [http://www.globalsecurity.org/military/library/congress/2006\\_hr/060405-olson.pdf](http://www.globalsecurity.org/military/library/congress/2006_hr/060405-olson.pdf).

12. Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid Al Qaeda in Many*

An amendment to the FY 2005 National Defense Authorization Act represented a further step along SOCOM's road to independence. Congress granted SOCOM forces the authority, for the first time, to spend money to pay informants, recruit foreign paramilitary fighters, and purchase equipment or other items from foreigners (so-called Section 1208 funds).<sup>13</sup> Previously, only the CIA had been authorized to disburse such funds, meaning that SOF had to rely on the CIA to provide the funds for various operations.<sup>14</sup> Congress originally granted SOF spending authority of \$25 million.<sup>15</sup> That amount has since been increased to \$40 million,<sup>16</sup> and SOCOM is requesting \$50 million in its FY 2012 budget request.

Although President Obama was reportedly initially reluctant to rely on SOF, and specifically JSOC, operations in countries outside the war zones as much as his predecessor had, his attitude began to change after SEAL Team 6 accomplished the high-profile task of rescuing the captain of the *Maersk Alabama* from pirates in the Indian Ocean in April 2009, just three months into his term.<sup>17</sup> While the rescue mission demonstrated how effective JSOC units could be, it also highlighted some of the bureaucratic impediments in utilizing them, as the rescue plan had encountered a delay in deploying the SEAL team.

Combined with the ongoing terrorist threat, these factors led the Obama administration to enact several significant changes in terms of how JSOC is tasked for missions. Most important, the Administration gave JSOC standing authority to use whatever military resources it needs anywhere in the world in pursuit of its counterterrorist mission, avoiding what had been sometimes costly delays while the military bureaucracy processed the proper requests for use of a submarine, for instance, for a particular mission. The leaders of JSOC, General Stanley A. McChrystal from 2003 to 2008 and Vice Admiral William H. McRaven from 2008 to 2011, had been slowly developing this authority for several years, but during the summer of 2009, Obama extended it and formalized it into policy.<sup>18</sup>

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*Countries*, N.Y. TIMES, Nov. 10, 2008, at A1.

13. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, §1028, 118 Stat. 1811, 2086-87 (2004).

14. Richard A. Best, Jr. and Andrew Feickert, *Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress* (Cong. Res. Service RS 22017), Aug. 3, 2005, at 5.

15. National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356.

16. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190.

17. Marc Ambinder, *Then Came 'Geronimo'* (May 12, 2011), <http://www.nationaljournal.com/magazine/practicing-with-the-pirates-these-navy-seals-were-ready-for-bin-laden-mission-20110505>.

18. Marc Ambinder, *Obama Gives Commanders Wide Berth for Secret Warfare* (May 25, 2010), <http://www.theatlantic.com/politics/archive/2010/05/obama-gives-commanders->

Another notable change was that commanders of regional combatant commands (Central or Southern Command, for example), as well as theater commanders in Iraq and Afghanistan, received authority to use SOF personnel, including JSOC, in forming task forces in their regions (rather than only SOCOM having that authority). While JSOC effectively had a global range since the 2004 AQN ExOrd, the 2009 changes were intended to make efforts to use military capabilities outside of war zones “more systematic and long term.”<sup>19</sup>

Although Administration officials usually talk about the increase of SOF operations in terms of the white mission of training other countries’ special operations forces, there have been several indications that the increased pace includes the JSOC type of lethal missions as well. JSOC has tripled in size since 9/11 to over 4,000 soldiers and civilians, and is involved in more than 50 operations in a dozen countries,<sup>20</sup> including drone attacks in Pakistan and Yemen.<sup>21</sup> Moreover, one senior military official told *The Washington Post* in the context of an article about SOF, that “Obama has allowed things that the previous administration did not.”<sup>22</sup> In the same article, a second military official similarly noted that Obama administration officials “are talking publicly much less but they are acting more. They are willing to get aggressive much more quickly.”<sup>23</sup> A former top JSOC commander reportedly described the changes implemented during 2009 in somewhat more colorful language: “Obama gave JSOC unprecedented authority to track and kill terrorists, to ‘mow the lawn.’”<sup>24</sup>

One final indication of JSOC’s increasing prominence came with the news in early 2011 that it had built a new Targeting and Analysis Center (TAAC) near the Pentagon to help it monitor the increased use of special operations missions against suspected militants around the world. Modeled after the National Counterterrorism Center (NCTC), the TAAC combines JSOC’s elite special operators with at least 100 counterterrorism analysts from various intelligence agencies in an effort to speed up information sharing and shorten the time between picking up a piece of intelligence and

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wide-berth-for-secret-warfare/57202/.

19. Mark Mazzetti, *U.S. Said To Expand Secret Action for Middle East Region*, N.Y. TIMES, May 25, 2010, at A1.

20. Marc Ambinder, *The Secret Team That Killed Bin Laden* (May 3, 2011), <http://www.nationaljournal.com/whitehouse/the-secret-team-that-killed-bin-laden-20110502>.

21. On Pakistan, see Jeremy Scahill, *The Secret US War in Pakistan*, NATION, Nov. 23, 2009, <http://www.thenation.com/article/secret-us-war-pakistan>. On Yemen, see Siobhan Gorman & Adam Entous, *CIA Plans Yemen Drone Strikes*, WALL ST. J., June 14, 2011, at A8.

22. Karen DeYoung & Greg Jaffe, *U.S. ‘Secret War’ Expands Globally as Special Operations Forces Take Larger Role*, WASH. POST, June 4, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/03/AR2010060304965.html>.

23. *Id.*

24. Ambinder, *supra* note 17.

acting on it.<sup>25</sup> Symbolically and operationally, the new targeting center clearly establishes JSOC as the lead agency in the counterterrorism battle.

## II. LEGAL DISTINCTIONS

So what's the difference? Once the nation is engaged in shadow wars, does it really make a difference whether the CIA or SOF conducts them? The answer here is yes, given current U.S. law. Shadow wars raise the fundamental question of whether they are subject to the appropriate amount of consideration, oversight, and accountability. There are important differences between CIA and SOF operations on these points. Shadow wars fall squarely into the murky realm of covert action, defined in U.S. law as activity that is meant "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>26</sup> Covert actions are thus legally distinct from clandestine missions. "Clandestine" refers to the tactical secrecy of the operation itself; "covert" refers to the secrecy of its sponsor. The 1991 Intelligence Authorization Act (IAA), the governing legislation on covert action, codified two requirements for any such action: first, there must be a written presidential finding stating that the action is important to U.S. national security, which cannot be issued retroactively, and second, the administration must notify the congressional intelligence committees of the action as soon as possible after the finding has been issued.<sup>27</sup>

The other significant feature of the IAA is that, in response to the Reagan administration's use of the National Security Council staff to conduct covert action in connection with the Iran-Contra scandal, the IAA expressly applied its requirements to "any department, agency, or entity of the United States Government."<sup>28</sup> In other words, Congress no longer assumed that only the CIA could or would conduct covert operations. This would seem to indicate that where SOF are conducting unacknowledged operations in countries with which the United States is not at war, they are, in fact, acting covertly and should follow the same regulations for presidential findings and congressional notification that the CIA does.

The IAA also included, however, a few designated exceptions to the definition of covert action. The most relevant one for this discussion states that "traditional . . . military activities or routine support to such activities"

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25. Kimberly Dozier, *Building a Network To Hit Militants*, ASSOCIATED PRESS, Jan. 6, 2011, available at <http://abcnews.go.com/US/wireStory?id=12549389>.

26. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, §503(e), 105 Stat. 429, 442 (codified as amended at 50 U.S.C. §413b(e) (2006)).

27. *Id.* at §413b(a)-(b).

28. *Id.* at §413b(a).

are deemed not to be covert action<sup>29</sup> and thus do not require a presidential finding or congressional notification (and would therefore be authorized under Title 10 of the U.S. Code, which governs military authorities). While the IAA itself does not define “traditional military activities,” the House of Representatives conference committee report on the legislation states that the phrase is meant to include actions “preceding and related to hostilities which are either anticipated . . . 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.”<sup>30</sup>

According to the conferees, the determination of whether unacknowledged activities are traditional military activities depends “in most cases” upon whether they constitute “routine support” for anticipated or ongoing hostilities involving the United States.<sup>31</sup> The conferees, referencing the Senate Select Committee on Intelligence’s report,<sup>32</sup> considered “routine support” to be unilateral activities to provide or arrange for logistical or other support for U.S. military forces in the event of a military operation that is intended to be publicly acknowledged (even if that operation subsequently does not occur).<sup>33</sup> Examples cited by the Senate committee included caching communications equipment or weapons in an area where such a future military operation is to take place, acquiring property to support an aspect of such an operation, and obtaining currency or documentation for use in such an operation.<sup>34</sup> “Other-than-routine” activities that would constitute covert action if conducted on an unacknowledged basis include recruiting or training foreign nationals to support a future U.S. military operation, efforts to influence foreign nationals to take certain actions during a future U.S. military operation, and efforts to influence and affect public opinion in the country concerned.<sup>35</sup>

Covert operations conducted by SOF during wartime clearly do not require a presidential finding and congressional notification. For special operations in countries with which the United States is not at war, however, the definition leaves a gray area around the interpretation of the word “anticipated.” It is most commonly thought of in the literal sense of “preparing the battlefield,” a term the Pentagon has since updated to “operational preparation of the environment.”<sup>36</sup> The legislative history

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29. *Id.* at §413(e)(2).

30. H.R. REP. NO. 102-166, at 30 (1991) (Conf. Rep.), *reprinted in* 1991 U.S.C.C.A.N. 243, 252.

31. *Id.*

32. S. Rep. No. 102-85, at 47 (1991) (Conf. Rep.), *reprinted in* 1991 U.S.C.C.A.N. 193, 240.

33. H.R. REP. NO. 102-166, at 30.

34. S. REP. NO. 102-85, at 47.

35. *Id.*

36. U.S. Dep’t of Def., *Irregular Warfare (IW): Joint Operating Concept (JOC)* 19



defines “anticipated” as meaning that approval has been given by the President and the Secretary of Defense “for the activities and for operational planning for hostilities.”<sup>37</sup> During the Bush administration, the Pentagon asserted that this language included events taking place “years in advance” of any involvement of U.S. military forces.<sup>38</sup>

But that assertion begs the question. When SOF conduct an unacknowledged operation in a country where U.S. troops are not already present, how can they know (in all cases), much less prove, that it is in anticipation of the involvement of the regular armed forces later on (particularly when it’s *much* later on), and thus not a covert action that requires a presidential finding and congressional notification? Similarly, if the covert operation is an attack on suspected terrorists, is it realistic to say it is in anticipation of future U.S. military hostilities? Critics charged that the Bush administration was shifting ever more covert activity from the CIA to the military in a deliberate strategy to exploit the “traditional military activities” loophole and evade congressional oversight. As one military intelligence official characterized the Pentagon’s view: “Everything can be justified as a military operation versus a [covert] intelligence [operation] performed by the CIA, which has to be informed to Congress. . . . [Pentagon officials] were aware of that and they knew that, and they would exploit it at every turn. . . . They were preparing the battlefield, which was on all the PowerPoints: ‘Preparing the Battlefield.’”<sup>39</sup>

Beyond broadly defining the word “anticipated,” the Bush administration bolstered its expansive interpretation of the “traditional military activities” exception to the covert action definition by arguing that the “global war on terrorism” was just that – a war – and therefore any military action taken to prosecute it, acknowledged or not, was not a covert action. To support this argument, Administration officials pointed to the congressional Authorization for Use of Military Force (AUMF) passed in response to the attacks of September 11, 2001.<sup>40</sup> That resolution authorizes 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. . . .”<sup>41</sup> There has been continued debate about just how broadly the resolution should be interpreted, but the Bush administration decided that it

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(2007), available at <http://www.fas.org/irp/doddir/dod/iw-joc.pdf>.

37. H.R. REP. NO. 102-166, at 30.

38. Jennifer D. Kibbe, *The Rise of the Shadow Warriors*, FOREIGN AFFAIRS, Mar./Apr. 2004, at 102, 106.

39. Scahill, *supra* note 21.

40. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

41. *Id.* at 2.

grants the President virtually unlimited legal authority as long as he “determines” that a particular target has some connection to al Qaeda.<sup>42</sup>

Some in the Bush administration interpreted the situation even more broadly, contending that, as a result of the 9/11 attacks, any act undertaken as part of the “war on terror” was part of the self-defense of the United States and, thus, a traditional military activity that does not require a presidential finding or congressional notification.<sup>43</sup>

For its part, through mid-2011, the Obama administration has justified its use of SOF beyond the war zones by invoking the 2001 AUMF. Critics, however, were pointing out that some of the Administration’s terrorist targets, such as al Qaeda in the Arabian Peninsula could not credibly be said to have been connected to 9/11 in any way.<sup>44</sup>

### III. OVERSIGHT COMPLEXITIES

Whether covert operations are receiving the appropriate oversight becomes an even more complex issue when one considers the question of which congressional committee(s) should be doing the oversight. Legally, the ultimate arbiters of what constitutes covert action are the House and Senate Intelligence Committees, which exert a potential veto through their control of the intelligence authorization process. However, there are numerous ways in which their authority is circumscribed. First, funding authorization for a special operations mission shifts in the Senate to the Armed Services Committee (in the House, it remains with the House Permanent Select Committee on Intelligence, or HPSCI, assuming of course, that it has been disclosed to the committee. Since the Pentagon usually defines SOF missions as “traditional military activities,” it tends to send its funding requests directly to the armed services committees.)

Second, because the intelligence budget has always been largely hidden within the defense budget, the armed services committees have ultimate control over the great majority of the intelligence authorization process in any case. They must sign off on intelligence authorization bills before they go to the full House and Senate for votes. Third, appropriations for a special operations mission would fall to the defense subcommittees of the House and Senate appropriations committees. Finally, appropriations for most intelligence activities are included as a classified section of the defense appropriations bill, meaning that the real control over the

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42. *See, e.g.*, letter from Assistant Attorney General William E. Moschella to House and Senate Intelligence Committees, Dec. 22, 2005, *available at* [http://www.pegc.us/archive/DOJ/OLA\\_NSA\\_letter\\_20051222\\_X.pdf](http://www.pegc.us/archive/DOJ/OLA_NSA_letter_20051222_X.pdf).

43. Interview with Department of Defense official, Apr. 9, 2003.

44. *See, e.g.*, DeYoung & Jaffe, *supra* note 22 (quoting John B. Bellinger III); Mayer, *supra* note 5.

intelligence purse lies with the appropriations defense subcommittees anyway.

Beyond the inevitable turf wars that all of this divided jurisdiction creates, the critical question is whether intelligence, and specifically covert action, issues are receiving appropriate congressional oversight. One indication that they are not is that neither the armed services committees nor the appropriations defense subcommittees have as much time or expertise to spend on intelligence matters as the intelligence committees do. In one comparison, in August 2009, the Senate Select Committee on Intelligence (SSCI) had forty-five staffers to analyze the intelligence budget (including covert action issues), while the Senate Appropriations Subcommittee on Defense had just five people assigned to intelligence issues, each of whom also had responsibilities for other parts of the defense budget.<sup>45</sup> In addition, Pentagon officials understand the current jurisdictional set-up all too well, and have effectively cultivated relationships with the armed services committees and appropriations defense subcommittees that help ensure a favorable reception for their interpretation of the “traditional military activities” exception.

In his January 2009 nomination hearings to become the Director of National Intelligence (DNI), Dennis C. Blair acknowledged some difficulty in distinguishing between covert action and certain military operations.<sup>46</sup> In response to a written question from SSCI asking how he differentiated between “covert action, military support operations, and operational preparation of the environment,” Blair conceded that “[t]here is often not a bright line between these operations . . . .”<sup>47</sup> He then said that efforts to distinguish between them should be guided by two criteria. First, the President and others in the chain of command over military and intelligence assets “must have broad flexibility to design and execute an operation solely for the purpose of accomplishing that mission.” And, second, such operations “must be very carefully considered and approved by appropriate authorities,” including the “relevant committee of Congress . . . .”<sup>48</sup> Besides raising the question of whether “accomplishing the mission” should, in fact, be the “sole” consideration taken into account in mission planning, Blair’s criteria do nothing to answer the fundamental question the committee had asked, or to clarify which are the relevant committees in each of those instances.

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45. Jennifer Kibbe, *Congressional Oversight of Intelligence: Is the Solution Part of the Problem?* 25 INTELLIGENCE & NAT’L SECURITY 24, 30 (2010).

46. *Nomination of Admiral Dennis Blair To Be Director of National Intelligence: Hearing Before the S. Comm. on Intelligence*, 111th Cong. 15 (2009) (statement of Admiral Dennis C. Blair, U.S. Navy (Ret.)), available at [http://www.dni.gov/testimonies/20090122\\_testimony.pdf](http://www.dni.gov/testimonies/20090122_testimony.pdf).

47. *Id.*

48. *Id.*

It was clear in June 2009 that some members of Congress sensed that SOF were conducting unacknowledged missions that were falling through the oversight cracks. In its report on the Intelligence Authorization Act for FY 2010, the HPSCI noted “with concern” that “[i]n categorizing its clandestine activities, DOD frequently labels them as ‘Operational Preparation of the Environment’ (OPE) to distinguish particular operations as traditional military activities and not as intelligence functions. The Committee observes, though, that overuse of this term has made the distinction all but meaningless.”<sup>49</sup> HPSCI further complained that, “[w]hile the purpose of many such operations is to gather intelligence [which would mean they are not covert actions], DOD has shown a propensity to apply the OPE label where the slightest nexus of a theoretical, distant military operation might one day exist. Consequently, these activities often escape the scrutiny of the intelligence committees, and the congressional defense committees cannot be expected to exercise oversight outside of their jurisdiction.”<sup>50</sup>

Representative Rush Holt expressed similar concerns at a HPSCI Subcommittee hearing in October 2009:

There is a lot that one could imagine that is going on in the world these days, whether it be remote killings or assassinations or intelligence collection that falls – or other kinds of actions – that fall somewhere between Title 10 [military authorities] and Title 50 [intelligence authorities], depending on who does them and how they are done. It has become practice here on the Hill not to brief some of these activities. It is not clear whether some of those activities are briefed to anyone. But, in any case, they are often not briefed to the Intelligence Committees when I think a reasonable person would say [those activities] are intelligence activities or [that] there are significant intelligence components of the activities.<sup>51</sup>

One of the witnesses reinforced Holt’s point that although certain operations may appear to be under the intelligence committees’ jurisdiction, “because they are considered at least by the Defense Department to be a part of a military operation, they say jurisdiction belongs to the Armed Services Committee. And . . . sometimes the Armed Services Committees get notice and sometimes they don’t, of what is being done in preparation for a military operation . . . .”<sup>52</sup>

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49. H. Rep. No. 111-186, at 48 (2009) *reprinted in* 2010 U.S.C.C.A.N. 1005, 1014.

50. *Id.* at 49.

51. *Legal Perspectives on Congressional Notification: Hearing before the Subcomm. on Intelligence Cmty. Mgmt. of the Permanent Select Comm. on Intelligence* 111th Cong. 55 (2009).

52. *Id.*

Apart from the complexity of defining covert action and delineating committee jurisdictions, another problem in ensuring that there is appropriate oversight of shadow wars is that they can be authorized and operated under what are known as “special access programs” (SAPs). Special access programs impose “need-to-know and access controls beyond those normally provided for access to confidential, secret, or top secret information.”<sup>53</sup> According to the Executive Order that created SAPs, this “beyond top secret” designation is only to be used when an agency head determines that the vulnerability of or threat to specific information is great enough that normal classification procedures are inadequate.<sup>54</sup> The law specifying the reporting requirements for the Pentagon’s SAPs states that the Secretary of Defense must submit an annual report to the armed services committees and the appropriations defense subcommittees listing a “brief description” of each program, including its “major milestones,” its actual cost for each year it has been active, and its estimated costs in the future.<sup>55</sup> However, the SAP reporting process has been criticized for falling far short of effective oversight. William Arkin, a military analyst, has described the approach followed by the executive branch as a whole, not just the Defense Department: “A list of names gets sent forward with a one or two-line description of what the program is, and there are literally a half dozen people within the entire U.S. Congress who have a high enough clearance to read that report. So, when you’re talking about hundreds of programs, and then you’re talking about layers of different types of special access programs, I think we can all agree they don’t get very effective oversight.”<sup>56</sup> The Pentagon’s list of SAP codenames alone reportedly runs to 300 pages.<sup>57</sup>

In addition, there is a category of SAP known as a “waived SAP.” In this category, the agency head can waive the reporting requirement for a program if she determines that its inclusion in the report to Congress “would adversely affect the national security.”<sup>58</sup> In the case of defense SAPs, the Defense Secretary must provide the information to the chairpersons and ranking minority members of the armed services committees and the appropriations defense subcommittees. The problem with this procedure, however, is that by limiting the information to those select few, the regulations can effectively prevent meaningful oversight

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53. U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (as amended May 15, 2011).

54. Exec. Order No. 12,958, *Classified National Security Information*, 3 C.F.R. §333 (Apr. 17, 1995), *reprinted as amended in* 50 U.S.C. §435 note (2006).

55. Special Access Programs: Congressional Oversight, 10 U.S.C. §119 (2006).

56. William Arkin, Interview with Amy Goodman, *Democracy Now!* (Pacifica Radio, Jan. 27, 2005).

57. Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, at A1.

58. 10 U.S.C. §119(e)(1) (2006).

(much as the Gang of Eight procedure does with the intelligence committees' notification of covert action).<sup>59</sup>

#### IV. COMBINING FORCES

So far, this article has discussed SOF and CIA forces separately, partly because that is largely how they originally functioned in the aftermath of 9/11 and partly for the sake of clarity. The reality, though, has become a good bit more complex and is seemingly becoming more so by the day. The CIA faced the aftermath of 9/11 with a greatly reduced paramilitary division, its ranks having been decimated by post-Cold War budget cuts. Suddenly, it was being asked to smooth the way into Afghanistan as well as to pursue al Qaeda and its affiliates around the world. As at other times in its history when it has needed additional manpower, the CIA borrowed or "opconned" (assumed operational control over) members of SOF to help with the workload. Even while Rumsfeld was fighting fierce bureaucratic battles against the CIA to ensure JSOC took the lead in counterterrorism, there were reports of how well CIA and JSOC operators on the ground were working together.

Moreover, as the "war on terror" expanded, although some lingering turf battles continued to treat the two entities as distinct, their operators and missions appeared to be increasingly meshing in various ways. In discussing some of the operations that have taken place under the 2004 AQN ExOrd, for instance, senior U.S. officials said some of the military missions have "been conducted in close coordination with the CIA," while in others, "the military commandos acted in support of CIA-directed operations."<sup>60</sup> Similarly, the Obama administration's campaign in Yemen was described in June 2011 as being "led by" JSOC and "closely coordinated" with the CIA.<sup>61</sup>

Much of the bureaucratic tussling was gradually alleviated through the improved personal relationships among the key figures as Robert Gates took over from Donald Rumsfeld at the Defense Department, General Michael Hayden became CIA Director, and General James Clapper replaced Stephen Cambone as the Under Secretary of Defense for Intelligence. Another close relationship, that between CIA Director Panetta

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59. The law provides that, in the case of a covert action, if the President deems it necessary in "extraordinary circumstances," the President can meet his obligation to keep the intelligence committees "fully and currently informed" by notifying just the leadership of each chamber and the leadership of the two intelligence committees, the so-called Gang of Eight, as well as any other members of the congressional leadership he wishes to include. Presidential Approval and Reporting of Covert Actions, 50 U.S.C. §413b(c)(2) (2006). For discussion of how the Gang of Eight limits oversight, see Kibbe, *supra* note 45.

60. Schmitt & Mazzetti, *supra* note 12.

61. Mark Mazzetti, *U.S. Is Intensifying a Secret Campaign of Yemen Airstrikes*, N.Y. TIMES, June 8, 2011, at A6.

and JSOC Commander William H. McRaven, yielded an unprecedented agreement in 2009 setting out rules for joint missions.<sup>62</sup>

Meanwhile, by 2006 there were indications that counterterrorism policy makers were consciously thinking about how to formally combine what they saw as the advantages of the two organizations. Michael Vickers, then with the Center for Strategic and Budgetary Assessments but soon to become the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, emphasized in a congressional hearing that “[m]aking full use of authorities in the Global War on Terror” is critical, “particularly the flexible detailing and exploitation of the CIA’s Title 50 authority.”<sup>63</sup> In other words, by detailing JSOC personnel to the CIA, an administration could leverage the CIA’s clearer legal authority to act covertly to conduct JSOC operations on a more wide-ranging basis. Notably, according to all accounts available at time of writing, this was the way the bin Laden raid was conducted on May 2, 2011. One Administration official described the bin Laden strike as the “proof of concept” for the Administration’s new strategy in the fight against terrorism, implying that more such operations will be in the offing.<sup>64</sup>

#### V. RISKS ... AND PENDING QUESTIONS

The involvement of the United States in covert operations in countries with which it is not at war shows no signs of slowing down. In May 2010, John O. Brennan, the White House Counterterrorism Director, explained that the United States would not “merely respond after the fact” of a terrorist attack but would “take the fight to al Qaeda and its extremist affiliates wherever they plot and train. In Afghanistan, Pakistan, Yemen, Somalia and beyond.”<sup>65</sup> Brennan further described a “broad, sustained, and integrated campaign” and a “multi-generational” effort. Similarly, during his May 2011 confirmation hearings for his new post as Secretary of Defense, CIA Director Panetta emphasized his concern about al Qaeda’s

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62. Ellen Nakashima & Greg Jaffe, *Clapper Is Front-Runner for Intelligence Post*, WASH. POST, May 22, 2010, at A4; Siobhan Gorman & Julian E. Barnes, *Spy, Military Ties Aided bin Laden Raid*, WALL ST. J., May 23, 2011, at A2; see David Ignatius, Op-Ed., *Reshaping the Rules for War*, WASH. POST, June 3, 2011, at A17.

63. *Assessing U.S. Special Operations Command’s Missions and Roles: Hearing Before the Terrorism, Unconventional Threats and Capabilities, Subcomm. of the H. Comm. on Armed Servs.* 109th Cong. 7 (2006) (statement by Michael G. Vickers, Dir. of Strategic Studies, Ctr. for Strategic and Budgetary Assessments).

64. Gorman & Barnes, *supra* note 62.

65. Press Release, White House Office of the Press Sec’y, Remarks by Assistant to the President for Homeland Security and Counterterrorism John Brennan at CSIS (May 26, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csi>.

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“nodes” in “places like Yemen, Somalia, North Africa.”<sup>66</sup> “Our approach,” he continued, “has been to develop operations in each of these areas that will contain al Qaeda and go after them so that they have no place to escape.”<sup>67</sup>

Given the expansive potential described above, it is imperative that the holes in the current oversight regime be fixed (although that probably will not be easy given the Obama administration’s resistance in the summer of 2010 to legislative efforts to expand the Gang of Eight covert action notification rules and to give the Government Accountability Office (GAO) greater access to the intelligence community).<sup>68</sup> While the Obama administration reportedly has increased the requirements for White House, National Security Council, and Department of Defense review of JSOC operations outside of war zones, that does not obviate the need for legislative oversight.<sup>69</sup> For one thing, even if there is stricter internal review now, that would not necessarily carry over to a different administration. More importantly, however, the real question is whether there is sufficient review of the procedures and operations by people outside the circle of officials who have a vested interest in the program or the Administration. That is the central importance of requiring congressional oversight of covert operations. Congressional oversight is not always done well, and it has its own problems and constraints,<sup>70</sup> but requiring Administration officials to explain and justify their covert action decisions to the legislative branch increases the chances that potential problems will be raised before it is too late.

There is, of course, a continual balancing act that needs to be managed between allowing covert operators to act quickly on new intelligence and taking the time to conduct due oversight. Critics of strengthening legislative oversight argue that it is too cumbersome and slows down the targeting process, thus handicapping U.S. counterterrorist efforts. But when counterterrorism operations are being emphasized to the degree that they currently are, particularly in the afterglow of the successful bin Laden raid, it is all the more important to have people outside the circle asking tough questions. Not only does legislative oversight provide a sounder political basis for action but, as we have already seen in Pakistan and Yemen, lethal operations that go wrong can incur steep costs in terms of support for the

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66. *Nomination of Hon. Leon E. Panetta To Be Secretary of Defense: Hearing Before the S. Comm. on Armed Serv.*, 112th Cong. 33 (2011).

67. *Id.* at 43.

68. Eugene Mulero & Tim Starks, *Long-Delayed Intelligence Authorization Bill Clears*, CQ WEEKLY, Oct. 4, 2010, at 2295.

69. Mazzetti, *supra* note 19; Ambinder, *supra* note 18; DeYoung & Jaffe, *supra* note 22; David Ignatius, Op-Ed., *The Blurring of CIA and Military*, WASH. POST, June 1, 2011, at A18.

70. See Kibbe, *supra* note 45, and Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT’L SECURITY L. & POL’Y 539 (2012).



United States among the local population, which is where, after all, the battle against terrorism is really being fought.

In addition, given the secrecy involved, several aspects of Washington's counterterrorism programs run the risk of careening down the proverbial slippery slope. Consider, for example, the expanded drone targeting guidelines that allow the killing of unknown individuals on the basis of their "pattern of life." While officials have taken pains to emphasize the amount of evidence needed to justify identifying a particular target, as long as they do not have to present the justification to anyone outside the Administration, how can the public trust that the evidence is sufficient? As Philip Alston, U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, has noted, the drone campaign is "a lot like the torture issue. You start by saying we'll just go after the handful of 9/11 masterminds. But, once you've put the regimen for waterboarding and other techniques in place, you use it much more indiscriminately. It becomes standard operating procedure. It becomes all too easy. Planners start saying, 'Let's use drones in a broader context.' Once you use targeting less stringently, it can become indiscriminate."<sup>71</sup>

#### CONCLUSION

The current law governing covert action and laying out the requirements for congressional notification and oversight needs to be updated. The authors of the IAA, writing in 1991, could not have foreseen how the issue would change in the ensuing twenty years, in terms of both actors (with the growth of SOF)<sup>72</sup> and issues (with the rise of terrorism). In light of current circumstances, the explanation and guidelines for the "traditional military activities" exception need to be updated to tighten what has become a loophole and to enforce the requirements for covert action more stringently. As Judge James E. Baker, a former legal adviser to the National Security Council, notes, the covert action definition is "act-based, not actor-based,"<sup>73</sup> meaning whether or not something is covert action is determined by the action itself, not by whether it is being conducted by the CIA or the military. The key point is that the political and diplomatic risks of acting covertly are the same, whoever the actor.

In some cases, in fact, the risks could be worse in the case of military covert action. As counterintuitive as it may seem, the reality of

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71. Mayer, *supra* note 5 (quoting Alston).

72. See Laura Dickinson, *Outsourcing Covert Activities*, 5 J. NAT'L SECURITY L. & POL'Y 521 (2012) (discussing a further complicating factor that needs to be accounted for in any updating of the covert action legislation – the increasing role being played by private contractors).

73. James E. Baker, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 151 (2007).

international relations is that in a situation where a covert operation goes wrong, the diplomatic fallout is likely to be far worse if it is the military rather than the CIA that is involved. Most countries have intelligence agencies that conduct espionage and covert action (albeit not at the same rate as the United States). While there might well be some form of protest about a CIA covert action, most governments accept such covert action as a de facto reality and want to preserve their own right to take similar action. But if U.S. military personnel are caught conducting covert, kinetic operations in countries where the United States is not at war, such activities could be interpreted as acts of war under international law or, at a minimum, as infringements of the states' sovereignty. Realistically, there is not much that most countries could do in terms of direct retaliation. However, the United States could suffer significant damage to its global image at a time when the real battle involves turning people in "at risk" populations away from terrorism on the grounds that terrorism violates both national and international law, international human rights standards, and basic human values. It is difficult enough to make the argument against terrorism when the CIA is conducting covert operations, but it becomes significantly more difficult when the United States is using its military in unconventional ways. Moreover, the United States is likely to suffer the additional cost of losing the support of other countries that will no longer be willing to support the U.S. agenda on any number of bilateral or multilateral issues.

Military covert operations also raise the issue of what would happen to the operatives in the event that something goes wrong. CIA operatives understand from the outset that they will be working covertly and that, should they be captured, they cannot expect any formal protection from either the U.S. government or international law. Military personnel, however, begin their service under the very different understanding that if they follow all lawful orders they will receive the protection of the government and the Geneva Conventions if they are captured. But what will happen if they are captured on a covert operation? If they are captured in a country with which the United States is not at war, the Geneva Conventions may not apply. Their protection would depend in part on the particular situation and Washington's relationship with the country where they were captured. The results of capture in Pakistan would likely differ from the result of capture in Iran. However, as became evident in the aftermath of the early 2011 arrest of Raymond Davis, even Pakistan, begrudgingly cooperative with the U.S. shadow war up to that point, imposed serious costs, demanding the expulsion of over 300 covert operatives.<sup>74</sup> Although, in this case, Davis was a CIA contractor, one can

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74. Jane Perlez & Ismail Khan, *Pakistan Pushes for Drastic Cuts in C.I.A. Activity*, N.Y. TIMES, Apr. 12, 2011, at A1.

imagine the situation being even more sensitive if he had been found to be connected to the military.

There is a related risk to using military covert operators. While they may voluntarily agree to forgo their military protections, their use nonetheless may set an undesirable precedent. If some members of the U.S. military act covertly and forfeit their protection, it runs the risk of lessening the protection afforded other U.S. military personnel who are subsequently captured in overt actions.

It also seems clear that future covert operations are going to involve varying combinations of CIA and JSOC operatives. Congress needs to clarify how such joint operations should be reported (and to which committees) to ensure appropriate and effective oversight. In some respects, detailing JSOC operatives to the CIA, as was apparently done in the bin Laden raid, would seem to solve the problem, assuming that the CIA notifies Congress appropriately. But this solution to the problem raises further questions. If it is really just a JSOC raid run under the CIA's Title 50 authority (as opposed to a CIA raid run with some help from JSOC personnel), then the distinction between the two begins to erode. And, in fact, the CIA's authority over the bin Laden raid seems to have been a bit contrived. CIA Director Panetta, explaining the situation in a television interview, said that although he was formally in charge because the President had chosen to conduct the raid as a covert operation, "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>75</sup>

The bin Laden raid was reportedly done that way because the Pakistani government was not informed. But the problem with blurring or ignoring the differences between the CIA and JSOC is that the virtue of ostensible plausible deniability that accompanies CIA operations becomes extremely thin. Moreover, blurring or ignoring the differences again raises the question of what protections cover the JSOC soldiers, if any.

Former DNI Blair has floated another option as a way to resolve some of these issues. He proposed creating a new "Title 60" to govern joint CIA/military counterterrorist operations. Blair contends that the "currently divided authorities take time and inordinate legal and staff work to work out chains of command, they result in one-off arrangements, and on occasion have caused delays in execution that could have resulted in missed opportunities."<sup>76</sup> Blair calls for the creation of integrated joint interagency

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75. *CIA Chief Panetta: Obama Made 'Gutsy' Decision on Bin Laden Raid*, PBS NEWSHOUR, May 3, 2011, available 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).

76. *Ten Years After 9/11: Is Intelligence Reform Working? Part II: Hearing Before the S. Comm. on Homeland Sec. and Gov't Affairs* 112th Cong. (2011) (prepared statement of

task forces which would have access to all of the capabilities and authorities of both organizations and which would report to both the defense and intelligence committees.

Blair concedes that such an arrangement would have to deal with “some of the difficult issues” that undergird the debate about covert action. He contends that one of the key issues, plausible deniability, is a relic of the Cold War and is “generally not relevant today for counterterrorist operations, often conducted in areas where weak states cannot enforce their own sovereignty.”<sup>77</sup> Since weak states cannot enforce their national sovereignty against terrorists, the argument goes, the United States has the right to violate that sovereignty to go after the terrorists. Aside from the questions that might be raised by that interpretation of sovereignty, the problem with Blair’s dismissal of plausible deniability is that not all of the places where the United States may want to conduct counterterrorist operations fit into that category. There are plenty of other places where Washington might still want plausible deniability for operations for a variety of reasons.

Moreover, while Blair’s proposal does provide for congressional oversight, by effectively treating CIA and JSOC operators as similar entities, it would formalize the erosion of the distinction between them that has slowly evolved in operations. For the reasons already stated above, formalizing the erosion would be a dangerous option to choose. Will it be difficult to revise the covert action legislation to take account of the various post-1991 developments? No doubt. But choosing the seemingly quicker way out by combining the two in some way, either out of an abundance of faith in U.S. counterterrorist capabilities or because of an overdeveloped fear of terrorism, will only lead to problems down the road. We should not forget why the covert action legislation was adopted in the first place. As Jack Devine, a former top covert operator for the CIA summarized the dilemma: “We got the covert action programs under well-defined rules after we had made mistakes and learned from them. Now, we’re coming up with a new model and I’m concerned there are not clear rules.”<sup>78</sup>

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Dennis C. Blair, Dir. of Nat’l Intelligence), at 10.

77. *Id.* at 11.

78. Shane, Mazzetti & Worth, *supra* note 6.