

Shadow Wars

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Those of us who remember the 1980s lived through the Iran-Contra Affair and its labyrinth of arms-for-hostages deals, secret transfers of U.S. government funds, backdoor support for the Nicaraguan Contras after Congress cut off funding, and the duplicity of Reagan administration officials who tried to hide and then cover up what they were doing. Some of us even recall the covert war in Laos and Cambodia in the 1960s and 1970s where the U.S. military, the CIA, and various paramilitaries pursued Communist forces in campaigns that were common knowledge in the region but kept secret from Congress and the American people. A few seasoned chroniclers of our national security are even able to remember earlier secret support for paramilitary forces, coup attempts, and a plethora of covert operations that were undertaken by the United States as an adjunct to its Cold War with the Soviet Union.

In the post-9/11 environment, the United States confronted the Taliban, al Qaeda, and associated terrorist and insurgent groups, where the conventional military force that quickly forced Iraq's retreat from Kuwait and subdued the Milosevic regime in Kosovo in the 1990s was far less effective. Paramilitary campaigns waged by the CIA and contractors became an integral part of the counterterrorism response to these new enemies, and our military greatly expanded its own capabilities to collect intelligence and carry out clandestine operations. Over time, first in the Bush administration and now in an expanded and more aggressive strategy by the Obama administration, the United States has been conducting what *The New York Times* described as a "shadow war against Al Qaeda and its allies":

In roughly a dozen countries – from the deserts of North Africa, to the mountains of Pakistan, to former Soviet republics crippled by ethnic and religious strife – the United States has significantly increased military and intelligence operations, pursuing the enemy using robotic drones and commando teams, paying contractors to spy and training local operatives to chase terrorists.¹

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1. Scott Shane, Mark Mazzetti & Robert F. Worth, *A Secret Assault on Terror Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, at A1.

As more details have emerged, the scale and dimensions of the shadow wars being conducted by the United States have come into sharper, albeit still murky focus. Unprecedented cooperation between military and CIA personnel has spurred a campaign to target al Qaeda and Taliban targets with missile-armed drones in Pakistan, Afghanistan, Yemen, and Somalia. Military and paramilitary raids against suspected al Qaeda operatives have occurred in various locations across North Africa and in Kenya. In 2010, Bob Woodward wrote that the CIA created, controls, and funds a secret 3,000-man paramilitary force of local Afghans trained to conduct covert paramilitary operations in Pakistan against al Qaeda and Taliban targets.² Outside the Afghan battlefield, the U.S. military expanded its activities in the shadow war, pursuant to a secret Joint Unconventional Warfare Task Force Execute Order, signed in September 2009 by General David Petraeus.³ The activities authorized by the Execute Order do not require the President's approval or reports to Congress.

This remarkable and perhaps unprecedented series of developments central to our national security persuaded the *Journal of National Security Law & Policy* (JNSLP) and our guest editor for this special issue, Louis Fisher, to devote an entire issue to the shadow wars and their legal and policy implications. JNSLP Editorial Board member Lou Fisher was uniquely qualified to recruit the distinguished, interdisciplinary group of scholars and practitioners whose insights are presented in the pages that follow. Over his career of more than four decades, Lou has written the seminal works on war powers and covert operations. The authors he assembled here chronicle covert operations from the Cold War up to the present, drawing on their expertise as academics, government officials, and public interest practitioners.

As the shadow conflict intensifies and spreads alongside the Arab Spring, apparently deteriorating relations between the United States and Pakistan, and continuing tensions over the development of Iran's nuclear progress, numerous issues of law and policy cry out for the perceptive, probing, and scholarly attention they receive in this special issue of JNSLP. For example, news reports have not identified exactly which forces fighting for the United States are military and which are sponsored by the CIA or are contractors of the United States, and there has been no public acknowledgement of these aspects of the military and paramilitary campaigns in the nations where the activities reportedly take place. Which laws authorize or control these operations? To what extent must the congressional intelligence oversight committees be informed about the shadow war operations? Does their lawfulness depend on the constitutional

2. BOB WOODWARD, *OBAMA'S WARS* 8, 52, 367 (2010).

3. Mark Mazzetti, *U.S. Is Said To Have Expanded Use of Secret Actions*, N.Y. TIMES, May 25, 2010, at A1.

powers of the President as Commander in Chief? What laws govern the use of armed force by contractors acting on behalf of the United States?

One of the central questions is whether a given activity is being conducted by the CIA or the military. If a CIA paramilitary operation in Yemen requires presidential authorization and notice to the intelligence committees, do these requirements apply to secret military operations? Or to those where CIA and military units coordinate their actions in a common operation? If some or all the personnel engaged in a U.S.-sponsored covert operation are contractors, what new legal and policy risks arise?

In a May 2010 speech, President Obama's top counterterrorism adviser, John O. Brennan, said that the administration favored using "a scalpel, not a hammer" in a "multigenerational" campaign against al Qaeda and its affiliates.⁴ Apart from the murky and relatively underdeveloped legal architecture for the shadow wars, does the "scalpel" increase the potential for civilian casualties and provide further fuel for anti-American vitriol? Do the paramilitary and contract personnel involved run the risk of being denied basic Geneva Convention protections in the event of capture? Will the surrogate fighters' relationships with warlords and tribal or clan leaders lead to questionable commitment to the mission?

In September 2011, several weeks after the Special Forces operation in Pakistan that killed Osama bin Laden and two weeks before the CIA drone strike in Yemen that killed Anwar al-Awlaki, counterterrorism adviser Brennan stated that

the United States does not view our authority to use military force against Al Qaeda as being restricted solely to "hot" battlefields like Afghanistan. . . . [W]e have the authority to take action against Al Qaeda and its associated forces without doing a separate self-defense analysis each time. . . . That does not mean we can use military force whenever we want, wherever we want. International law principles, including respect for a state's sovereignty and the laws of war, impose important constraints on our ability to act unilaterally – and on the way in which we can use force – in foreign territories.⁵

4. *Securing the Homeland by Renewing American Strength, Resilience and Values, Remarks by Assistant to the President for Homeland Security and Counterterrorism John Brennan at CSIS, The White House, May 26, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csis.html>.*

5. *Strengthening Our Security by Adhering to Our Values and Laws, Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, The White House, Sept. 16, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values.htm>.*

Did Brennan provide the White House legal and policy rationale for the current campaign? To what extent does international humanitarian law or international law in general guide U.S. military or paramilitary operations? What about U.S. law?

A recently disclosed Iranian Quds Force plot to kill the Saudi ambassador to the United States by blowing up a fashionable Georgetown restaurant provides further evidence that the shadow wars are evolving, perhaps in unpredictable and dangerous new ways. Instead of a conventional military operation to attack Iranian facilities, the United States (and its likely partner, Israel) have used covert means – including the Stuxnet computer worm and (probably Israeli) bomb attacks against Iranian nuclear scientists – to attack and at least slow down Iran’s efforts to construct nuclear weapons.⁶ The Iranian government fully understands, of course, the source or sources of the covert operations against it. As we learned during the Cold War, both sides can operate in the shadows. That the Georgetown plot against the Saudi ambassador was discovered and thwarted does not mean that the next one will end the same way. Nor will other, smaller and less powerful states or non-state actors necessarily be deterred by U.S. military superiority, since covert operations may be carried out relatively cheaply.

The covert activities currently underway reach almost every corner of the globe, involve a bewildering array of state and non-state parties and alliances, and increasingly utilize ultramodern technology. The *Journal’s* intensive examination of these shadow wars is thus both necessary and timely.

6. David E. Sanger, *America’s Deadly Dynamics with Iran*, N.Y. TIMES, Nov. 6, 2011, §SR (Sunday Review), at 1.