

**PROJECTING FORCE IN THE 21ST CENTURY - LEGITIMACY
AND THE RULE OF LAW**

TITLE 50, TITLE 10, TITLE 18, AND ART. 75

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I. PROLOGUE: THE MODERN BATTLEFIELD

The Prussian strategist Carl von Clausewitz wrote that the first duty of the general and statesman is to understand the nature of the war upon which they are embarking.¹ The modern battlefield has complicated this task. The United States military is currently conducting simultaneous counterinsurgency and counterterrorism operations in Afghanistan and Pakistan (“AF/PAK”),² while the

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1. CARL VON CLAUSEWITZ, ON WAR 88 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984 ed.) (1832).

2. See generally Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005, at A01; David Kilcullen, *Counterinsurgency Redux*, 48 SMALL WARS J. 111 (2006).

Central Intelligence Agency ("CIA"), traditionally more concerned with espionage than air warfare, has been conducting a robust aerial attack campaign in Pakistan's Northwest Frontier Province.³ Conventional military forces, special operations forces, and intelligence professionals are all operating in the same area of operations, trying to enact the same strategies to meet the same policy goals but using contradictory legal authorities to do so.⁴

The modern battlefield, defined in this Article as military operations since 2001, has contributed to the operational synthesis of intelligence and military organizations. The recent news that America's most visible general officer, David Petraeus, will head the CIA and the former Director of the CIA, Leon Panetta, will take charge of the Department of Defense ("DoD"), illustrates a growing synergy between the nation's primary spy agency and the military.⁵ The melding of executive agency roles and missions recently prompted national security writer and senior fellow at the Council on Foreign Relations, Max Boot, to opine that, "[w]e're in an era of 'covert action.'"⁶ But what exactly is covert action?

Perhaps Clausewitz's guidance to understanding the nature of the counterinsurgency or counterterrorism fight is a difficult but achievable goal; understanding which forces to apply to which fight and what legal authorities authorize such action seems almost impossible. This Article seeks to clarify which forces are legally appropriate for which missions by defining and analyzing the differences between traditional military activities ("TMAs") and covert actions, and the consequences for prosecution. The first step to achieve this goal is to hear what the experts themselves say.

II. EXPERTS ON THE ISSUES

Experts in TMA and covert action convened in May to discuss legal authorities. The event, entitled "The bin Laden Operation – The Legal Framework" and sponsored by the American Bar Association's Standing Committee on Law and National Security, provided a forum to dissect when operations fall under Title 10 versus Title 50 authorities. The event summary is instructive for this Article:

[T]he panelists addressed whether the bin Laden operation

3. See Tara McKelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 21, 2011, at 34-35.

4. See generally Robert M. Gates, *A Balanced Strategy: Reprogramming the Pentagon for a New Age*, 80 FOREIGN AFF. 28 (2009).

5. See Mark Mazzetti & Eric Schmitt, *Obama to Name Pentagon Chief and C.I.A. Head*, N.Y. TIMES, Apr. 28, 2011, at A1.

6. Max Boot, *Covert Action Makes a Comeback*, WALL ST. J., Jan. 5, 2011, at A15 (stating that "covert action can be a valuable part of the policy maker's tool kit, provided that it is integrated into a larger plan").

had been properly designated a Title 50 operation rather than one under Title 10 authority. The panel included Syracuse Law professor William C. Banks; Senior Advisor to the Director of Operations for U.S. Cyber Command, Eric Greenwald; former Acting CIA General Counsel, John Rizzo; and, Deputy Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, Captain Stephanie Smart. Moderating the discussion was Special Advisor to the Committee, and Principal at Bingham Consulting Group, Suzanne Spaulding.

. . . [Professor Banks] began by noting that soon after the bin Laden operation was conducted, CIA Director Leon Panetta explained that it was a Title 50 operation and not Title 10. Professor Banks then defined “covert action” as an activity carried out by the United States government that is meant to influence political, economic, or military conditions abroad and where the role of the U.S. government will not be apparent or publicly acknowledged.⁷ He went on to highlight the major exceptions to 413b’s requirements which are traditional counter-intelligence or police activities and traditional military activities. U.S. government entities carrying out these types of activities are not bound by 413b’s requirements.

The traditional military activities exception (TMA) became a central issue of discussion for the panel as it was directly related to the bin Laden operation and has long been an area of confusion and concern vis-à-vis the oversight of covert activity. Professor Banks expressed skepticism as to how the bin Laden operation could be considered a Title 50 operation when the force that executed the mission was primarily military personnel from SEAL Team Six (or DEVGRU, as it is now known), and was commanded by Vice Admiral William McRaven, commander of the U.S. Joint Special Operations Command. He pointed out that a specific element of a TMA is that it be under the direction and control of a military commander which this operation was, thus making the bin Laden raid a TMA under Title 10 and not a covert action under Title 50.

The next panelist to speak was former Acting CIA General Counsel, John Rizzo He emphasized that covert operations are not solely the purview of the CIA, and that any U.S. government agency is technically authorized to carry out a covert operation provided that they comply with 413b, but Mr. Rizzo could not recall a single instance in his many years of dealing with this issue in which an agency other than the CIA sought and received the required written finding to conduct a covert action – even the U.S. military. (Later, during the Q & A session, Rizzo and Eric Greenwald further explained that this is partly because the CIA is the only

7. 50 U.S.C. § 413b(e) (2006) (footnote in original).

agency equipped with the internal legal mechanisms to easily comply with the oversight requirements of 413b.)

Rizzo also discussed the period during which Congress attempted to codify a statutory framework for covert actions (1990-91) and noted that creating a formal definition for “traditional military activity” had been exceedingly difficult. The definition of a TMA is not explicit in 413b, but legislative history lays out the elements as an activity being a TMA if it is: 1) conducted by military personnel; 2) under the direction and control of a U.S. military commander; 3) preceding or related to hostilities which are either anticipated to involve U.S. military forces, or where such hostilities are ongoing; and, 4) where the U.S. role in the overall operation is apparent or acknowledged publicly.⁸

Next to speak was Captain Stephanie Smart She noted that military and CIA operations are equally subject to Congressional oversight, but that the TMA exception allows for a wide range of military operations not subject to 413b. She questioned Professor Banks’ assertion that the bin Laden raid had been exclusively a Title 10 action because it was conducted under the direction and control of a military commander; Capt. Smart countered by pointing out multiple elements that can define a TMA, not just military “command and control.” She further opined that the bin Laden operation could have been carried out under Title 10 or Title 50, and that the mere involvement of the military does not exclude it from the realm of Title 50

The last panelist to speak was Eric Greenwald, whose current job is as a senior advisor to the military’s new Cyber Command Mr. Greenwald stated that during his time on the Hill, he encountered the blurry distinction between Title 10 and Title 50 authorities with regard to military operations termed “operational preparation of the environment” and intelligence activities under Title 50. While Title 50 intelligence activities are different than covert actions, this gave Mr. Greenwald experience with the often confusing interplay between Title 10 and Title 50; however, he stated that his current work with DoD has shown him how much care the military takes in ensuring that all operations are scrutinized to determine whether they properly fall under Title 10 or Title 50.

. . . .

. . . . The discussion and audience questions that followed the panelists’ opening remarks continued to swirl around the TMA exception to 413b Professor Banks and Mr. Greenwald both agreed that the definition of a TMA is a moving target

8. H.R. REP. NO. 102-115, at 5898 (1991) (Conf. Rep.) (footnote in original).

and that Congress may have intentionally meant the definition to be vague so as to allow flexibility in this area However, Mr. Greenwald pointed out that an action is not a TMA just because it is carried out by the military and that any such blanket characterization could likely thwart the congressional intent behind 413b of providing additional oversight to the type of paramilitary operations that had been carried out by CIA in the decades preceding the creation of these provisions in 1991.

One of Capt. Smart's final points highlighted the DoD's institutional process when it comes to the Title 10 versus Title 50 determination. Earlier in the discussion she pointed out that the department has a number of deconfliction mechanisms to vet operations to make sure that they are conducted under the appropriate legal authority. Later she stated that to her knowledge DoD has never sought a presidential finding for covert action under 413b. If DoD decides that an operation may more properly fall under Title 50, it does not conduct the operation or approaches the CIA and offers to turn the operation over. If the CIA accepts the operation then it will put together the required written finding and it will be conducted as a CIA operation with the military providing support on some level.

The last short issue discussed was the possibility of a "Title 60" that would basically consolidate Title 10 and Title 50 in an attempt to clarify legal boundaries in the area of covert action. The major proponent of this plan was former Director of National Intelligence, Dennis Blair, who suggested this both during his confirmation hearing and during testimony at a recent congressional hearing. The idea of Title 60 would be to provide a more clear legal framework for joint covert activities such as the bin Laden operation.⁹

Not discussed by the panel was what would have happened if Osama bin Laden had been arrested, returned to the United States, and prosecuted under criminal law, Title 18.¹⁰ Another option would have been to use the military commissions structure.¹¹ From a legal perspective, it is important to note there was an outstanding arrest warrant for bin Laden in the Southern District of New York for his involvement in 9/11, and during the last ten years, he remained on

9. Matthew C. Dahl, "Event Summary: The bin Laden Operation – The Legal Framework," *available at* http://www.americanbar.org/content/dam/aba/administrative/law_national_security/covert_action_event.authcheckdam.pdf (last visited Sept. 8, 2011).

10. *See, e.g.*, 18 U.S.C. § 2332f (2006) (criminalizing the bombings of places of public use, government facilities, public transportation systems and infrastructure facilities).

11. Military commissions were authorized by the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

the Federal Bureau of Intelligence ("FBI") Top Ten list. Since 9/11, there has been a robust debate among the three branches of our government as to the proper way to detain and prosecute detainees from the war on terrorism. At the time of this Article, the constitutionality of military commissions or the need for a special national security court still remain unclear. Under international law, there are due process regimes for prosecution that have been recognized as legitimate forums for adjudication in complex hostile situations, such as Article 75 under Additional Protocol I.¹²

As the panel discussion reflects, there is much confusion and debate on how to conceptualize the projection of force in the twenty-first century where traditional military activities and covert operations are merging. Moreover, how prosecution and detention fit our strategic approach to combat extremism has not yet been integrated into a holistic plan. Should these legitimate targets, if detained, be treated as traditional criminals, war criminals, or held as prisoners of war? Moreover, what is the best forum for trial: civil courts, military commissions, a special national security court, a foreign court, or an international court? Much of this confusion flows from the confusion of defining the modern battlefield.

III. LEGAL AUTHORITY FOR COVERT ACTION

The word "covert" carries important connotations. The term, in its colloquial usage, is frequently used to describe any activity the government wants concealed from the public eye, a usage that carries with it implications of illicit activity. However, legal usage of the word "covert" rarely evokes illicit connotations; in fact, the lawfulness of covert action is rarely debated at all. According to one treatise on covert action, "there has been a remarkably consistent national policy in favor of maintaining a competence to conduct a wide range of covert operations The national debate has, thus, focused not on the lawfulness of covert action but on the constitutional allocation of competence to control it."¹³ The real issue is over accountability and the role of the covert action from a policy perspective.

The ability to control covert action begins with its legal definition. The term "covert action" is statutorily defined as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be

12. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, *adopted by conference* June 8, 1977, 1125 U.N.T.S. 3, [hereinafter Protocol I].

13. W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 2 (1992) [hereinafter REGULATING COVERT ACTION].

apparent or acknowledged publicly . . .”¹⁴ The DoD defines covert action similarly, stating that a covert action is “[a]n operation that is so planned and executed as to conceal the identity of or permit plausible denial by the sponsor.”¹⁵ Both definitions focus on concealing the identity of the activity’s sponsor.

As important as it is to define what covert action is, it is equally important to define what covert action is not. Statutorily, covert action does not include:

- 1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;
- 2) traditional diplomatic or military activities or routine support to such activities;
- 3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or
- 4) activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad.¹⁶

Additionally, covert action is prohibited if it is “intended to influence United States political processes, public opinion, policies, or media.”¹⁷

Thus, because of 50 U.S.C. § 413b(e)(1), intelligence activities are not generally considered covert activities. Instead, intelligence collection is generally considered clandestine in nature.¹⁸ The DoD defines clandestine activities as “[a]n operation sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment.”¹⁹ Simply put, covert action

14. 50 U.S.C. § 413b(e) (2006).

15. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02 DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 132 (2001) (“A covert operation differs from a clandestine operation in that emphasis is placed on concealment of the identity of the sponsor rather than on concealment of the operation.”).

16. 50 U.S.C. § 413b(e)(1)-(4).

17. 50 U.S.C. § 413b(f).

18. See 50 U.S.C. §§ 403-04a(f) (“Under the direction of the Director of National Intelligence and in a manner consistent with section 3927 of Title 22, the Director of the Central Intelligence Agency shall coordinate the relationships between elements of the intelligence community and the intelligence or security services of foreign governments or international organizations on all matters involving intelligence related to the national security or involving intelligence acquired through clandestine means.”).

19. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02 DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 89 (2001) (“In special operations, an activity may be both covert and clandestine and may focus equally on operational

conceals the identity of the country involved in an operation; clandestine activity hides the very existence of the operation.

IV. WHO MAY CONDUCT A COVERT ACTION?

Ultimately, the ability to conduct covert action lies with the CIA, with some notable exceptions. The initial power to conduct covert action is granted to the Executive through 50 U.S.C. §§ 403-4a(d), which provides the CIA with the authority to collect, correlate, evaluate, and coordinate intelligence collection.²⁰ Additionally, in pertinent part, the CIA is authorized to “perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct.”²¹ This is the so-called “Fifth Function,” or implicit authorization for the CIA to conduct covert action.²²

This power is defined more explicitly within Executive Order 12,333, which states:

[T]he CIA shall . . . [c]onduct [covert action] activities approved by the President. No agency except the CIA (or the Armed Forces of the United States in time of war declared by Congress or during any period covered by a report from the President to the Congress under the War Powers Resolution (87 Stat. 855)) may conduct any [covert action] activity unless the President determines that another agency is more likely to achieve a particular objective²³

This provides the CIA with clear executive authority to conduct covert action pursuant to a presidential finding. Interestingly, however, there are two major caveats. The first caveat provides for U.S. Armed Forces covert action pursuant to a declaration of war by Congress, or “during any period covered by a report from the President to the Congress under the War Powers Resolution.”²⁴ The second caveat provides that another agency—any other agency—may conduct a covert action if that other agency would be “more likely to

considerations and intelligence-related activities.”).

20. 50 U.S.C. §§ 403-04a(d)(1)-(4).

21. *Id.* §§ 403-04a(d)(4).

22. Robert Chesney, *Further Thoughts on Congressional Oversight, the UBL Operation, and the Title 10/Title 50 Issue*, LAWFARE (May 3, 2011, 5:51 PM), <http://www.lawfareblog.com/2011/05/further-thoughts-on-congressional-oversight-the-ubl-operation-and-the-title-10title-50-issue/>.

23. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,945-46 (Dec. 4, 1981).

24. *Id.* at 5546. No president has ever acknowledged being bound by the War Powers Resolution, but this executive order makes it clear that any military action “consistent with” but not binding the Executive, will suffice. *See also* BERNEY DYCUS ET. AL, NATIONAL SECURITY LAW 250-51 (4th ed. 2007) (stating that President Ford reported to Congress “taking note of the provision of Section 4(a)(2) of the War Powers Resolution;” President Carter reported “consistent with the reporting provisions of the War Powers Resolution.”) (internal citations omitted).

achieve [the] particular objective.”²⁵ For example, if the Department of Energy had particular expertise in detecting nuclear radiation, it might be authorized, via presidential finding, to conduct a covert action relating to detecting nuclear radiation.

This second caveat opens the door for any agency, including Special Operations Forces (“SOF”), to conduct covert action. The DoD agrees. Joint Publication 3-05.2 defines yet another type of mission that leaves the door open for alternative uses for SOF: collateral missions.²⁶ Collateral missions are “mission[s] other than those for which a force is primarily organized, trained, and equipped, that the force can accomplish by virtue of the inherent capabilities of that force.”²⁷ The executive summary to Joint Publication 3-05.2 explains, “SOF conduct specific principal missions and can conduct collateral activities using the inherent capabilities resident in the primary missions.”²⁸ Thus, depending on the type of missions, SOF might be the primary choice for covert action if they have inherent capabilities superior to those of the CIA for a particular mission.

In summary, a covert action may be conducted by any agency the President deems appropriate. While the CIA clearly would be the primary agency to perform the Fifth Function, any agency may be authorized by presidential finding to conduct covert action exclusive of the limitations in 50 U.S.C. § 413b(e)(1)-(4). In short, the statute affords the President multiple potential choices, but the issue of accountability remains.

IV. ADDITION BY SUBTRACTION: WHAT IS A TRADITIONAL MILITARY ACTIVITY?

As previously discussed, defining covert action requires an understanding of what covert action is and is not. Referring back to 50 U.S.C. §§ 413b(e)(1)-(4), covert action is statutorily segregated from traditional intelligence and counterintelligence activities, traditional military activities, traditional law enforcement activities, and “activities to provide routine support to the overt activities.”²⁹

Implicitly, this list of “traditional” activities would seem to indicate that covert action was never meant to be traditional. Instead, it was meant to provide policy makers with an option on the “continuum between diplomacy and war.”³⁰ Covert action has not

25. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,946 (Dec. 4, 1981).

26. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-05.2, JOINT TACTICS, TECHNIQUES AND PROCEDURES FOR SPECIAL OPERATIONS TARGETING AND MISSION PLANNING GL-6 (2003).

27. *Id.*

28. *Id.* at xi.

29. 50 U.S.C. § 413b(e)(1)-(4).

30. JAMES E. BAKER, IN THE COMMON DEFENSE 149 (2007).

always been a prominent policy tool; “covert action was not an integral policy tool until the Cold War.”³¹

Applying this to the modern battlefield, if covert action is not a traditional military activity, then what is a traditional military activity? There is no legal definition. If one sought to define traditional military activities through historical practice, he or she might look to doctrinal or customary missions. A hypothetical list of such activities might include maneuver warfare, aerial attack, artillery barrages, or amphibious landings. However, this list is problematic because the tactics, techniques, and procedures involved with warfare are constantly changing. Prior to 2001, few would have listed counterinsurgency as a primary mission set of the conventional United States Army.³² Similarly, a decade ago, few security experts would have listed cyberwarfare among traditional military activities. Consequently, the term “traditional” makes merging historical military practice and modern combat realities difficult in an adaptive environment like war. To compound matters, it is extremely difficult to predict the nature of the next war or even the next evolution of the current war. The adaptive nature of war may or may not drive activities that lie within “traditional” military missions. As a result, looking to doctrinal or customary missions does not help one looking for a legal definition of a traditional military action.

Instead, in absence of positive guidance about what constitutes a traditional military activity, the most precise language can be devised by analyzing what is the absence of covert action. Defining a traditional military activity this way would consist of two elements: 1) those activities on the battlefield that are not covert action and are not authorized by presidential finding but, 2) that are authorized under traditional *jus ad bellum* sources.³³ Stated another way, traditional military activities would be overt actions (or covert actions not requiring a presidential finding such as preparations for war) authorized under *jus ad bellum*.

31. *Id.* at 148 (“Such ‘covert’ mechanisms allowed proxies to engage in hot war, while the great power conflict remained ‘cold.’”).

32. Prior to 2001, the counterinsurgency mission set was typically reserved for SOF conducting the foreign internal defense mission. *See generally* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-07.1, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FOREIGN INTERNAL DEFENSE (FID) (2004). The SOF counterinsurgency mission, with their specialized manpower, was a far cry from the “clear, hold, build” strategies made popular by Gen. H.R. McMaster in Tal Afar, Iraq, in 2005. *See* Oliver Poole, *Iraqis in former rebel stronghold now cheer American soldiers*, TELEGRAPH (Dec. 19, 2005, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1505872/Iraqis-in-former-rebel-stronghold-now-cheer-American-soldiers.html>.

33. Such *jus ad bellum* sources might include United Nations Charter Article 42 or 51 actions, or congressional declarations of war. *See* U.N. Charter arts. 42, 51.

V. POLICY IMPLICATIONS

If these definitions are accepted as true, the result is that it has become legally easier for the executive branch to order covert action than to order conventional armed conflict. To commit military troops for a traditional military action, the President must have a *casus belli* and subsequently seek *jus ad bellum* justification and (typically) international support. This would usually involve the political and diplomatic gyrations involved in garnering both domestic legal support from Congress and international legal support from the United Nations Security Council.

Alternatively, to authorize a covert action, the President may forgo these diplomatic and political gyrations and merely issue a classified finding to conduct a covert action. While the President must report this action to Congress,³⁴ the President may restrict disclosure to the “Gang of Eight” when “it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States”³⁵

Thus, while covert action is not without legal accountability, it is a much more direct way for the President to commit forces. Additionally, forces conducting covert action operate by stealth. By their nature, they will have much lower visibility in the public eye. This provides the Executive a lawful option to commit force while theoretically lessening the media accountability for those actions. As a result, covert action also vests an immense amount of authority in the Executive and the “Gang of Eight” to conduct operations without the accountability to their constituents typically found in a democratic society.³⁶

Covert action also enables unilateral action. The stealthy nature

34. See 50 U.S.C. § 413b(b) (“To the extent consistent with due regard for the protection from unauthorized disclosure of classified information . . . the Director of National Intelligence . . . (1) shall keep the congressional intelligence committees fully and currently informed of all covert actions . . . ; and (2) shall furnish to the congressional intelligence committees any information or material concerning covert actions . . . which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.”).

35. 50 U.S.C. § 413b(c)(2). The “Gang of Eight” consists of “the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, [] the majority and minority leaders of the Senate . . . [and] other . . . members of the congressional leadership . . . may be included by the President.” *Id.*

36. See *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring). “Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health.” *Id.* at 724. “[T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in . . . informed and critical public opinion which alone can here protect the values of democratic government.” *Id.* at 728 (Stewart, J., concurring).

of covert action means that the Executive would be discouraged from seeking international cooperation. Any international support would likely be limited to notifying host nations of the presence of troops, and those notifications, as a tactical matter, would likely be last minute and very directive in nature.³⁷ This type of unilateral action contrasts the cooperative intent for international law,³⁸ and, in the words of one legal scholar, “[u]nilateral action- covert or overt - generates particularly high emotions, because many view it as a litmus test for one’s commitment to international law.”³⁹ Excessive use of covert action might be deemed by some nations as a rebuke of international law or evidence of a hubristic foreign policy. The continued and constant use of this instrument when lethality is the goal raises issues of international legitimacy.

Despite these reservations, covert action can be a useful policy tool. It is much more flexible and rapid than a traditional military activity, meaning it is much more suited to countering an adaptive enemy.⁴⁰ Covert operations are generally more acute in their scope and objectives, which provides policymakers a scalpel to apply instead of the massive hammer of the U.S. military. Also, there are times when foreign policy maneuvers require stealth. One might imagine the need to retrieve unsecured nuclear material as a mission requiring immediacy and discreetness inappropriate for a large military unit.

A textbook case of covert action as a useful policy tool was the May 2011 raid on the compound of Osama bin Laden. The direct action strike was a Title 50 action conducted by DoD special operations assets.⁴¹ The likely legal scenario for this operation was that President Obama issued his finding, which authorized the CIA to “own” the operation and, under subsequent Title 50 authorities, allowed Joint Special Operations Command to conduct the raid because the President determined “that another agency is more likely to achieve a particular objective”⁴² The need for stealth,

37. Notification of covert infiltration, as a practical matter, renders the covert nature of the action null. See REISMAN & BAKER, *supra* note 13, at 14.

38. See U. N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

39. REISMAN & BAKER, *supra* note 13, at 3.

40. See generally Stanley A. McChrystal, *It Takes a Network*, FOREIGN POLICY, Mar.-Apr. 2011.

41. Kimberly Dosier & Robert Burns, *Raid Raises Question: Who's Soldier, Who's Spy?*, FOX NEWS (May 5, 2011), <http://www.foxnews.com/us/2011/05/05/raid-raises-question-whos-soldier-whos-spy/>.

42. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,945-46 (Dec. 4, 1981); see also Sean D. Naylor, *Bin Laden raid a triumph for Spec Ops*, ARMY TIMES, May 9, 2011 (describing some of the unique capabilities that might cause special operations

even from the host nation, was obvious, and the covert action provided the acute desired result.

While the bin Laden raid demonstrates a positive result and the operation shows a clear need to maintain an ability to conduct covert action, it is important to emphasize that covert action is not without policy hazards. The danger in blurring the line between covert action and traditional military activities is that policymakers will choose to authorize what might normally be characterized as a traditional military activity under the guise of a covert action in order to circumvent the need for accountability or international support. Applying traditional military force without transparency is not the *raison d'être* for a covert capability.

For a case study, one need not look further than our current military conflict in AF/PAK. Is the precision bombing campaign being conducted truly a traditional military activity or a covert action? While arguments can be made for both sides, the mission of precision bombing, especially over an extended duration, has traditionally fallen to the United States Air Force or United States Navy. The action, despite its legal authorization, is certainly overt; newspapers chronicle the airstrikes daily.⁴³ One must wonder, then, how the concept of “covert” is being understood on the modern battlefield.

VII. PROSECUTION V. LETHALITY - TITLE 18, ART. 75 AND RULE OF LAW

The use of lethality versus capture and prosecution in the covert action context raises the difficult questions of grand strategy and the final goals of the decision to project force. Unless the state has created a legitimate prosecutorial due process regime that is recognized both domestically and internationally, the missions of lethality raise the question of international sovereignty and compliance with host nation laws. These missions are potentially taking place in territories that are not per se war zones or not clearly recognized battlefields in the traditional sense. Lethality against either citizens of the host nation or noncitizens there illegally or legally, raises fundamental questions about the rule of law. Why is capture for prosecution not the first option? In international law, there is much discussion of “international armed conflicts” versus “non-international armed conflicts.” The categorization of these

forces to be chosen over CIA assets).

43. See, e.g., McKelvey, *supra* note 5; Mark Mazzetti, *C.I.A. Drone Is Said to Kill Al Qaeda's No. 2*, N.Y. TIMES, Aug. 28, 2011, at A1; *US drone 'kills 23 in training camp strike'*, ALJAZEERA (Aug. 10, 2011 7:41 AM), <http://english.aljazeera.net/news/asia/2011/08/20118106185901308.html>; See generally Scott Shane, Mark Mazzetti, & Robert F. Worth, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES, Aug. 15, 2010, at A1; *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2011*, NEW AMERICA FOUNDATION (Aug. 31, 2011), <http://counterterrorism.newamerica.net/drones>.

conflicts flows from Additional Protocol I and Additional Protocol II,⁴⁴ two conventions the United States has declined to ratify at this time. In a non-international armed conflict under Additional Protocol I, the host state may have to accord Geneva Convention rights to the “rebels” as perceived by the host state.⁴⁵ Whether the “rebel” is a legitimate target turns on a number of facts, including whether the individual is a “direct participant in hostilities,” a designation that is hotly debated in international circles.⁴⁶ In situations of some ambiguity, without capture as an option and some due process, how is the shooter sure the target is the legitimate target? Moreover, two of the principles of the law of armed conflict are the principle of distinction between combatants and civilians and the requirement of proportionality to minimize noncombatant casualties.

If capture becomes an option for strategic reasons, then a choice of using criminal courts, military commissions, special national security courts, host courts, or an international tribunal are then raised. Regardless of the court employed, the issue of appropriate due process is the central question. What is critical is that the process has legitimacy and comports with rule of law. To this end, Additional Protocol I Article 75 establishes the basic due process for individuals captured in conflict situations and deserves to be quoted in full so that the basic rights it entails are understood. It reads as follows:

Article 75—Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) Violence to the life, health, or physical or mental well-being

44. Protocol I, *supra* note 12; Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted by conference* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol].

45. See Protocol I, *supra* note 12, arts. 43-47, 50-51.

46. See Protocol II, *supra* note 44, art. 13.

of persons, in particular:

- (i) Murder;
- (ii) Torture of all kinds, whether physical or mental;
- (iii) Corporal punishment; and
- (iv) Mutilation;
- (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
- (c) The taking of hostages;
- (d) Collective punishments; and
- (e) Threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

- (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
- (b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
- (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
- (d) Anyone charged with an offence is presumed innocent until proved guilty according to law;
- (e) Anyone charged with an offence shall have the right to be tried in his presence;
- (f) No one shall be compelled to testify against himself or to

confess guilt;

(g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) Anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and

(j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply: (a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.⁴⁷

If such a regime had been in place over the last ten years, the option to capture and prosecute under an internationally recognized process would have given policy makers more choices. To a great extent, the recent changes to the military commissions rules have come very close to replicating the Article 75 guarantees. Covert actions that

47. Protocol I, *supra* note 12.

also have the option for capture and prosecution make the tool more nuanced and potentially more powerful in the struggle against violent extremism.

VIII. CONCLUSION

In summary, the modern battlefield, and the adaptive enemy therein, presents legal issues in deciding between covert action and traditional military activities. As a matter of law, the President may authorize any agency to conduct a covert action via presidential finding.⁴⁸ Alternatively, the President must justify the use of force under traditional military activities under *jus ad bellum* doctrines in domestic and international law. While covert action has an important function in providing policymakers a precise tool to use in the spectrum between diplomatic and military force, legal bodies must use caution to ensure the “Fifth Function” is being used properly and not merely to circumvent legal requirements or media accountability. This accountability is especially important since it is politically easier for the executive branch to authorize covert action. This Article has also explored the idea of expanding covert action with the potential for capture and prosecution under an internationally recognized due process regime. Understanding this increasingly blurred line will not be easy, but if the general and statesman are to truly understand the nature of the war upon which they are embarking,⁴⁹ an expanded covert action may function as a useful policy tool within the bounds of the law. In the end, as this Article has underscored, accountability married to the legitimacy of the rule of law is the core to a coherent grand strategy.

48. 50 U.S.C. § 413b(a), (e)(1)-(4).

49. CLAUSEWITZ, *supra* note 1.