Targeted Killings: Effective Advocacy Strategies

March 14-15 | Columbia Law School

Conference Notes
Targeted Killings: Effective Advocacy Strategies
Conference Notes | March 14-15, 2013 | Columbia Law School, New York, NY

These notes provide a reference point for topics covered in each session of the meeting. They consist of summaries and excerpts of documents: government reports; commentaries; and media reports. These documents represent a very small sampling of the scholarship, documentation, advocacy and legal analysis recently produced in relation to the issues to be discussed.

Organized by session, the summaries provide an orientation to the specific issues we will discuss at the meeting. The materials will be available in a printed packet distributed on Thursday.

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Session I: Where Do We Go From Here?

1. **Obama faces turning point on administration drone policy**  
   *Jeremy Herb and Justin Sink, TheHill.com (March 8, 2013)*

News article: This piece in *The Hill* describes varying degrees of congressional support for the growing criticism of the drone program from both sides of the aisle. The piece alludes to the development of standards for use of drones, and goes on to elaborate on the potential Congressional allies for critics of the targeted killing program.

2. **Obama Wants Legislation on Drones, Senate’s Defense Spending Chairman Says**  
   *John M. Donnelly, Congressional Quarterly Roll Call (March 7, 2013)*

News article: This news alert describes a Presidential push for lawmakers to establish legal standards to govern the use of drones in targeted operations, as reported by Senator Richard J. Durbin. Senator Diane Feinstein echoed these reports in comments on Monday March 11. The alert also reports a Senate Judiciary Committee hearing on drone policy to be held in April.

3. **Letter to President Obama**  
   *Democratic Members of Congress (March 11, 2013)*

Advocacy letter: This letter, signed by eight Democratic members of Congress and addressed to the President, marks an important push from the President’s party for increased transparency. The letter, which addresses attacks against both American citizens and “others” urges greater transparency to Congress and the public with respect to legal standards, and takes issue with problematic aspects of the leaked DOJ White Paper.

4. **Why a Drone Court Won’t Work – But (Nominal) Damages Might...**  
   *Stephen Vladeck, Lawfare.com (February 10, 2013)*

Blog post: This Lawfare blog post sets out the domestic legal arguments and policy against an *ex-ante, ex-parte* FISC-style court to review drone strikes. He argues that a “drone warrant” would differ from a FISA warrant because the former does not contemplate future judicial proceedings. At the policy level, Vladeck contends that courts are incompetent to make military decisions, and that they would feel immense pressure to sign off on executive requests. As an alternative, Vladeck proposes codification of a statutory cause of action for nominal damages for those unlawfully killed.

Session II: Envisioning Effective Strategies for Second-Term Advocacy

5. **Obama’s Drone Debacle**  
   *Daniel Klaidman, The Daily Beast (March 9, 2013)*

Analysis: This article explores the reasons for political tumult surrounding the recent confirmation of John Brennan for head of the CIA. It asks how the White House could have allowed the liberal base to ally with conservative forces in Congress on the issue of drone strikes. The author concludes that the lack of transparency from the Obama administration has alienated the White House from some of its core constituents. The article describes an internal strife in the White House between, on the one hand, the President and officials who pushed for greater transparency, such as Harold Koh and, on the other, “secrecy obsessed spooks and handwringing lawyers” urging classification.
6. The Inside Story of How the White House Administration Let Diplomacy Fail in Afghanistan
   Vali Nasr, Foreign Policy (March/April 2013)

   Article: The author, former Obama State Department official, describes his experience in striving, along with others at the State Department, toward a policy of diplomacy and away from one of military engagement. The author describes a culture of increased aversion to risk. In one of the most relevant portions of the article, the author relates the affect drone strikes in Pakistan had on the US’ intelligence relationship with the Pakistani government.

7. Letter in Support of Brennan Nomination
   Former Obama Administration Lawyers, published on Lawfare (January 22, 2013)

   Advocacy Letter: This letter, signed by eight former Obama Administration lawyers endorses John Brennan’s nomination for Director of the CIA. The letter describes Brennan as committed to sound legal reasoning and broad interagency oversight. It also describes him as a “leader in support of the rule of law,” and a “steadfast champion of the President’s commitment to closing the detention facility at Guantanamo.

Session III: The Growing Role of JSOC and the Future of the Drone Program

8. The Command: Deep Inside the President’s Secret Army

   Book: This book was generously shared by co-author and meeting guest Marc Ambinder. A brief synopsis: “Ambinder and Grady provide readers with a concise and comprehensive recent history of the special missions units that comprise the most effective weapon against terrorism ever conceived. For the first time, they reveal JSOC’s organizational chart and describe some of the secret technologies and methods that catalyze their intelligence and kinetic activities. They describe how JSOC migrated to the center of U.S. military operations, and how they fused intelligence and operations in such a way that proved crucial to beating back the Iraq insurgency. They also disclose previously unreported instances where JSOC’s activities may have skirted the law, and question the ability of Congress to oversee units that, by design, must operate with minimum interference.”

Session IV: Geographic Scope of Armed Conflict

9. The geographical scope of non-international armed conflict
   Anthony Cullen, The Concept of Non-International Armed Conflict in Humanitarian Law (Cambridge University Press 2010) [Excerpt]

   Book Chapter: In this section, the author uses the case law of the International Criminal Tribunal for the former Yugoslavia to analyze the geographic scope of non-international armed conflict. He concludes that there does not have to be actual combat activities in a particular area for International Humanitarian Law to extend, but restricts that analysis to the state in which combat activities are occurring.

10. Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists

   Law article: The author examines whether International Humanitarian Law applies to “the war on terror” or “the war against al-Qaeda” and concludes that it does not. While she argues that portions of the war against transnational terrorists might fall under the rubric of the laws of armed conflict, the author engages in an IHL analysis to conclude
that military targeting of transnational terrorists can only occur in limited circumstances – namely where there is an actual armed conflict in which “terrorists” are directly participating in hostilities.

   Dr. Jakob Kellenberger, Grotius Lecture to American Society of International Law, delivered March 28, 2012

Lecture: The lecturer, President of the International Committee of the Red Cross, speaks about the various complexities presented by modern armed conflict, and discusses the ways in which international law can be used to deal with new situations. He touches on developments in a variety of areas of IHL including the classification of armed conflict, the rules of detention related to armed conflict, and the role of IHL in the face of new warfare technology.

12. Administration debates stretching 9/11 law to go after new al-Qaeda offshoots
   Greg Miller & Karen DeYoung, Washington Post (March 6, 2013)

News article: The article, based on discussions with Administration officials, presents a growing debate among White House, State Department, and Pentagon officials on the bounds of the President’s domestic legal authority. According to the article, officials are concerned as to whether the current Authorization for the Use of Military Force (AUMF) can be stretched to include “associates of associates” in areas in North Africa and the Middle East. The article points toward potential codification of counterterrorism policies as “permanent procedures” in order to sustain current practice.

13. Repeal the Military Force Law
   Editorial, New York Times (March 9, 2013)

Editorial: This New York Times editorial calls for the repeal of the AUMF on the grounds that it has become the basis for a perpetual war, undermining restraints on government power. The article goes on to say that making the AUMF more specific, rather than repealing it, would further enshrine the idea of infinite war. The editorial, however, does not offer any alternative to govern what appears to be a continuing targeted operations program, and emphasizes distinctions between Presidents Bush and Obama.

   Jean Perkins Task Force on National Security and Law, The Hoover Institution (February 25, 2013)

Policy paper: This paper, presented by Robert Chesney, Jack Goldsmith, Matthew Waxman, and Benjamin Wittes, argues that the AUMF is nearly obsolete and that the nation requires a “new legal foundation for next-generation terrorist threats.” The paper proposes an approach that would require Congress to set forth general statutory criteria for use of force against new terrorist threats while allowing the executive branch to identify particular groups that are covered by that authorization of force.

Session V: Messaging for Public Opinion & Political Support

15. Visions of Drones Swarming U.S. Skies Hit Bipartisan Nerve
   Scott Shane & Michael D. Shear, New York Times (March 8, 2013)

News article: This news article chronicles the recent shift in discussion in Washington around the question of drones, particularly in the wake of Senator Rand Paul’s filibuster and John Brennan’s nomination to head the CIA. It briefly describes newly forged alliances, and commentary from critics.
16. **Media Coverage of the Drone Program**  
*Tara McKelvey, Joan Shorenstein Center on the Press, Politics and Public Policy Discussion Paper Series, Harvard University (February 2013)*

Research paper: This research piece analyzes hundreds of articles in 5 newspapers which discussed the drone program. The research, which examined the 3-year period between 2009 and 2012, concluded that media coverage of strikes across the five publications nearly doubled in that period as the program expanded its range of potential targets and its geographic scope. The research also engages in a content analysis of articles discussing the legal aspect of drone strikes, as well as a comparative analysis across publications.

17. **Questions on Drones, Unanswered Still**  
*Margaret Sullivan, New York Times (October 13, 2012)*

Editorial: This piece by the Public Editor of the New York Times examines the terminology used in journalistic reporting of civilian casualties from drone strikes. The author concludes that the publication has a responsibility to push for transparency in the interest of democratic accountability.

18. **Opinion on Drones Depends on Who’s Being Killed: Poll**  
*Emily Swanson, Huffington Post (March 11, 2013)*

Poll analysis: A recent Huffington Post/YouGov poll found that 56% of Americans say that the drone program should be used to kill high-level targets. Only 13% say that anyone suspected of being associated with a terrorist group should be targeted. A separate Pew Research poll found that the drone program’s endangering of civilians is the aspect most concerning to Americans.
Obama faces turning point on administration drone policy

By Jeremy Herb and Justin Sink - 03/08/13 07:00 AM ET

A 13-hour filibuster by Sen. Rand Paul (R-Ky.) has thrust the expanded use of drone attacks to greater public scrutiny and is putting new pressure on the White House to explain its use of drones to Congress and the public.

The same day Paul went to the Senate floor to press President Obama on whether drones could be used to kill American citizens within U.S. borders, Attorney General Eric Holder said Obama would soon speak to the public about the U.S. drone policy.

The public address by Obama highlights the administration’s understanding that it needs to give a fuller account of a program that is a hallmark of Obama’s counter-terrorism policy — but that was a covert policy not publicly acknowledged by the government just months ago.

It also suggests Obama is close to codifying a set of principles to govern the use of drone strikes for future administrations, which will govern in a world where links to terrorism are less clear and other countries are also using drones. The effort began before last year's election, born from a desire within the White House to provide Mitt Romney with a clear set of procedures and standards for the use of drone strikes, were he to be elected.

“He thinks these are important issues,” White House press secretary Jay Carney said Thursday. “He believes very much in the need to be as transparent as possible on these matters with Congress as well as with the public.”

Paul declared “victory” Thursday after his filibuster prompted the Obama administration to send the Kentucky senator a letter saying the president could not use drones to kill U.S. citizens on U.S. soil.
“It has come to my attention that you have now asked an additional question: ‘Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil?’ ” Holder wrote to Paul. “The answer to that question is no.”

The Holder letter is just the latest disclosure from the administration shedding light on a program in the shadows.

In January, NBC News obtained a Justice Department white paper explaining the legal authority for drone-killings of senior operational leaders of al Qaeda, even if they were U.S. citizens. Last year, the New York Times reported that the president had personally overseen the development of a top-secret “kill list” identifying potential targets.

Obama himself pledged greater transparency in this year’s State of the Union address.

“My administration has worked tirelessly to forge a durable legal and policy framework to guide our counterterrorism operations,” said Obama, who pledged in the “months ahead” to explain policies in an “even more transparent” way.

It’s a major shift for the White House, which did not publicly acknowledge the use of drones until April 2012, when John Brennan — whose confirmation as CIA Director was held up Wednesday by Paul’s filibuster — gave the first speech about the program.

Both the Defense Department and CIA have an arsenal of armed drones, which are used primarily to target terrorists in areas where the U.S. military is not: Yemen, Somalia and Pakistan’s Federally Administered Tribal Areas (FATA).

Yet there are more questions about the drone attacks than answers. For example, the administration has not disclosed how many people have been killed by drone strikes in their expanded use under Obama.

Some lawmakers, including Paul, have challenged the constitutionality of such attacks. In 2011, New Mexico-born Anwar al-Awlaki was killed in a drone strike in Yemen. Awlaki was an al Qaeda leader connected to attacks against the United States, including the attempted “underwear bombing” of a flight to Detroit in 2009.

Heather Hurlburt, executive director of the liberal-leaning National Security Network, said that the issue began getting more public attention last year, but the presidential campaign had curtailed public engagement from the administration.

Now that may be changing.

“This is an issue that was sort of starting to reach a bubbling point where there was talk inside and outside government about assessing the program,” Hurlburt said. “What I think the White House is now doing is picking up the public conversation, the seeds of which were in place before the campaign got really hot.”

The drone debate cuts across party lines, with Paul aligned with liberal Democrats like Sen. Ron Wyden (Ore.), the lone Democrat to join Wednesday’s filibuster.

There were questions Thursday over why more Democrats didn’t join Paul when many of them have the same concerns about Executive Branch overreach on drones.

Wyden said that he expected to see more scrutiny from Congress over the classified program going forward.
“I thought it was a day when people would see that this concern about the balance between liberty and security is a bipartisan one,” Wyden said of the filibuster. “I think you’re going to start seeing the emergence as what I sometimes call around here the checks and balances caucus. And there will be a lot of Democrats in it.”

While Paul’s filibuster received support from more than a dozen Republicans — including Senate Minority Leader Mitch McConnell (R-Ky.) — he was slammed Thursday by defense hawks Sen. Lindsey Graham (R-S.C.) and John McCain (R-Ariz.).

McCain described some of Paul’s arguments as “ridiculous,” and that some of his colleagues who joined Paul should “know better.”

He bristled at questions over whether support of the filibuster signified a shift in his party’s foreign policy views. “I have no idea, nor do I care,” McCain said. “I could care less if my view is majority or minority — I know what’s right. I’ve been involved in national security for 60 years.”

Paul shot back that McCain was “dismissive” of a legitimate issue.

“What I would say is that he’s wrong — the issue is a very important issue,” Paul told reporters. “He’s dismissive of something that involves the discussion of whether the 5th Amendment applies to American citizens and I consider that to be a very important issue.”

Sen. Jeff Sessions (R-Ala.), who did not take part in the filibuster, said Paul had shaken things up in the Senate.

“There is a sensitivity and a deep concern among the American people that too much power is being arrogated here,” Sessions said. “The president doesn’t have power to just execute somebody, and I think that concern needs to be heard. And Rand Paul made it heard last night.”

Source: 
Obama Wants Legislation on Drones, Senate's Defense Spending Chairman Says

by John M. Donnelly, CQ Roll Call

President Obama has encouraged lawmakers to establish a legal framework to govern the use of lethal drones, according to Richard J. Durbin, the Senate's assistant majority leader and the new chairman of the Appropriations Subcommittee on Defense.

"I might add that, in my conversations with the president, he welcomes this," the Illinois Democrat said of drone legislation during a Senate floor debate today. "He has invited us to come up with a legal architecture to make certain it is consistent with existing precedent in military law and other court cases as well as our Constitution." CQ Roll Call's Rob Margetta has more.

Durbin's offhand comment suggests the growing high-level interest in regulating how unmanned aircraft are used against suspected terrorists in remote areas overseas. Several lawmakers have proposed mechanisms for reviewing those targets--perhaps by a court, perhaps by Congress. Durbin's remarks also come amid a white-hot corollary debate over the potential, however seemingly remote, of using the drones to kill U.S. citizens accused of terrorism here in the United States.

Sen. Rand Paul, R-Ky., held forth on the Senate floor for nearly 13 hours--for much of yesterday and into today--to block the nomination of a new CIA chief because, he said, the president hadn't answered a question: Does the U.S. government have the constitutional authority to kill on U.S. soil an American who's suspected of ties to terrorism but not immediately engaged in an attack? Many GOP senators rushed to Paul's side yesterday to defend at least his right to get an answer.

Attorney General Eric H. Holder Jr. has answered that question, if cryptically, in writing--once Tuesday (pdf) and, we're told, again today. And he addressed it in testimony yesterday. In sum, Holder's answer is that the president cannot kill noncombatants in the United States but can--under extreme circumstances such as another Pearl Harbor or 9-11--use lethal force against U.S. citizen combatants.

"Does the president have the authority to use a weaponized drone to kill an American not engaged in combat on American soil? The answer to that question is no," wrote Holder in today's letter to Paul, as
read by White House Press Secretary Jay Carney during his daily briefing, CQ Roll Call’s Steven T. Dennis reports.

After last night’s "StandWithRand" GOP show of unity behind Paul, the party’s internal rifts over drones spilled out onto the Senate floor today, as CQ Roll Call’s Niels Lesniewski reports. Two prominent GOP senators, John McCain of Arizona and Lindsey Graham of South Carolina, criticized Paul for citing outlandish hypothetical examples such as killing Jane Fonda or someone sitting in a cafe. The Wall Street Journal editorial page also ripped Paul.

The two senators seemed concerned that the anti-drone fervor could end up curtailing U.S. military and CIA use of the assets overseas— the weapon of choice now in the war on terror.

They may have reason for concern. Given the interest in legislation on drones— and in making sure it’s drafted carefully— a hearing on drone policy at a Judiciary subcommittee that Durbin chairs is shaping up as an important venue. No date has been set yet for the hearing, but it’s expected to occur next month. This debate is something Durbin will have a say on anyway as the No. 2 Democrat in the Senate and, perhaps more directly, as the new head of the defense spending panel.
March 11, 2013

President Barack Obama
The White House
1600 Pennsylvania Ave NW
Washington, D.C. 20500

Dear Mr. President:

In response to the partial release of Department of Justice memos describing the underlying legal justifications for the targeted killings of American citizens and others in the course of counterterrorism operations, we are writing to emphasize Congress’ vital oversight role in these matters. Every American has the right to know the underlying legal rationale that ensures due process.

Authorizing the killing of American citizens and others has profound implications for our Constitution, the core values of our Nation, our national security and future international practice. The executive branch’s claim of authority to deprive citizens of life, and to do so without explaining the legal bases for doing so, sets a dangerous precedent and is a model of behavior that the United States would not want other nations to emulate.

The information from the Justice Department memo leaked on February 4, 2013, in the context of an increasing devolution of accountability, transparency and Constitutional protections in U.S. counterterrorism operations, leaves us deeply concerned about what appears to constitute overly broad authority language, including but not limited to:

1) An unbounded geographic scope;
2) Unidentified ‘high-level’ officials with authority to approve kill-lists;
3) A vaguely defined definition of whether a capture is “feasible”; 
4) An overly broad definition of the phrase “imminent threat,” which re-defines the word in a way that strays significantly from its traditional legal meaning; and
5) The suggestion that killing American citizens and others would be legitimate “under the Authorization for Use of Military Force and the inherent right to national self-defense.”

These are vague legal boundaries that raise the risk of the executive branch authorizing the deaths of American civilians otherwise protected by the Constitution and appear to effectively vitiate due process of law without meaningful oversight or accountability.
Therefore, we ask that you release, in an unclassified form, the full legal basis of executive branch claims in the areas which are the subject of this letter. The Executive’s claims of authority need to be fully articulated to the whole of Congress and the American people.

We also ask that you prepare a report to Congress outlining the architecture of your Administration’s drone program going forward, including your efforts to limit instances and remunerate victims of civilian casualties by signature drone strikes, broaden access to due process for identified targets and continue to structure the drone program within the framework of international law. A 2012 GAO study reported that 75 countries and “certain terrorist organizations” have acquired drones and either have or are seeking weaponized drones. We are growing increasingly concerned that there is a risk that our country’s “global war” doctrine will further corrode the foundations of the international framework for protection of human rights.

As you stated in your recent State of the Union address, “we must enlist our values in the fight.” We ask, therefore, that you follow through with your commitment to engage with Congress to ensure that the ways in which we target, detain, prosecute, and kill suspected terrorists are consistent with the commands of our Constitution, including our system of checks and balances.

We strongly urge you to release the documents requested in this letter for the reasons articulated above.

Thank you and we look forward to your response.

Sincerely,

Barbara Lee  
Member of Congress

John Conyers  
Member of Congress

Keith Ellison  
Member of Congress

Raul Grijalva  
Member of Congress

Donna Edwards  
Member of Congress

Mike Honda  
Member of Congress
Rush Holt  
Member of Congress

James McGovern  
Member of Congress
Why a "Drone Court" Won’t Work–But (Nominal) Damages Might…

By Steve Vladeck

Sunday, February 10, 2013 at 5:12 PM

There’s been a fair amount of buzz over the past few days centered around the idea of a statutory “drone court”–a tribunal modeled after the Foreign Intelligence Surveillance Court (FISC) that would (presumably) provide at least some modicum of due process before the government engages in targeted killing operations, but that, like the FISC, would generally operate ex parte and in secret in order to protect the government’s interests, as well. Indeed, as Scott Shane reported in Friday’s New York Times, it appears that there’s already been debate over this very issue within the Obama Administration, and former Defense Secretary Gates appeared to come out in favor of the idea on “State of the Union” on CNN Sunday morning.

As I explain (in rather painful length) below the fold, I think there are formidable legal and policy obstacles standing in the way of any such proposal–obstacles that would largely (albeit not entirely) dissipate in the context of after-the-fact damages actions. Thus, if Congress and/or the Obama Administration is truly serious about creating a meaningful regime of judicial supervision (and I realize that this is a big “if”), its real focus should be on the codification of a statutory cause of action for nominal damages ($1) for those unlawfully injured by such operations (or their heirs)–and not on the creation of a new ex ante process (and tribunal) that would raise as many questions as it answers.

I. Drone Courts and Article III

Although the “drone court” proposals floating around vary to some degree in their (sparse) details, one of the core ideas behind them is that such a body would operate much like the FISC–with the government proceeding ex parte and in camera before the court in order to obtain something tantamount to a warrant prior to engaging in a targeted killing operation. (It would presumably defeat the purpose, after all, if the target of the putative operation had notice and an opportunity to be heard prior to the attack.) The hardest question is what, exactly, the government would be seeking judicial review of at this stage…Some possibilities, among others:

1. Whether the target is in fact a belligerent who can be targeted as part of the non-international armed conflict between the United States and al Qaeda and its affiliates;
2. Whether the target does in fact present an imminent threat to the United States and/or U.S. persons overseas (although the definition of “imminent” may depend on the answer to (1)); and
3. Whether it is in fact impossible to incapacitate the target (including by capturing him) in the relevant time frame with any lesser degree of force.

Leaving aside (for the moment) the potential separation of powers issues such review would raise, there’s a more basic problem: the possible absence of a meaningful “case or controversy” for Article III purposes.

The Supreme Court has long emphasized, as it explained in Flast v. Cohen, that one of the central purposes of Article III’s “case-or-controversy requirement” is to ensure that “the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” That is to say, “adversity” is one of the cornerstones of an Article III case or controversy, and it would be noticeably lacking in a drone court set up along the lines noted above.

The standard response to this concern is the observation that the same is true of the FISC–that, in most of its cases, the Foreign Intelligence Surveillance Court operates ex parte and in camera, ruling on a government’s warrant application without any adversarial process whatsoever. And time and again, courts have turned away challenges to the FISA process based upon the same argument–that the FISC violates Article III as so constituted (see, e.g., footnote 19 of the FISA Court of Review’s 2002 decision in In re Sealed Case).

But insofar as the FISC operates ex parte, courts have consistently upheld its procedures against any Article III challenge by analogy to the power of Article III judges to issue search warrants–a process defended entirely by reference to the Fourth Amendment, which the Supreme Court has interpreted to require a “prior judicial judgment” (in most cases, anyway) that the government has probable cause to justify a search–that is, as a necessary compromise between effective law enforcement and individual rights. As David Barron and Marty Lederman have explained, the basic idea is “that the court is adjudicating a proceeding in which the target of the surveillance is the party adverse to the government, just as Article III courts resolve warrant applications proceedings in the context of conventional criminal prosecutions without occasioning constitutional concerns about the judicial power.” And part of why those constitutional concerns don’t arise in the context of search warrants is because the subject of the warrant will usually have an opportunity to attack the warrant–and, thus, the search–collaterally, whether in a motion to suppress in a criminal prosecution or a civil suit for damages, both of which would be after-the-fact. (FISA, too, creates a cause of action for “aggrieved persons.”)

To be sure, it’s already a bit of a stretch to argue that FISA warrants are obtained in contemplation of future criminal (or civil) proceedings (which is part of why Laurence Silberman testified against FISA’s constitutionality in 1978, and why the 1978 OLC opinion on the issue didn’t rest on this understanding in arguing for FISA’s constitutionality), and it’s even more of a stretch to make this argument in the context of the FISA Amendments Act of 2008 (the merits of which have yet to be reached by any court…).

But the critical point for now is that this is the fiction on which every court to reach the issue has relied. In contrast, there is no real argument that a “drone warrant” would be in contemplation of future judicial proceedings–indeed, the entire justification for a “drone court” is to pretermit the need for any
At first blush, it may seem like many of these issues would be equally salient in the context of after-the-fact damages suits. But as long as such a regime was designed carefully and conscientiously, I actually think virtually all of these concerns could be mitigated.

Finally, as one footnote to the Article III issue, it also bears emphasizing that these concerns can’t be sidestepped by having a non-Article III federal court hear such ex parte applications. Although the Supreme Court has upheld non-Article III federal courts for cases “arising in the land or naval forces,” it has consistently understood that authority to encompass only those criminal prosecutions that may constitutionally be pursued through court-martial or military commission. The idea that Congress could create a non-Article III federal court to hear entirely civil claims arising out of military action is not only novel, but difficult to square with what little the Court has said in this field.

II. Drone Courts and the Separation of Powers

In my view, the adversity issue is the deepest legal flaw in “drone court” proposals. But the idea of an ex ante judicial process for signing off on targeted killing operations may also raise some serious separation of powers concerns insofar as such review could directly interfere with the Executive’s ability to carry out ongoing military operations…

First, and most significantly, even though I am not a particularly strong defender of unilateral (and indefeasible) presidential war powers, I do think that, if the Constitution protects any such authority on the part of the President (another big “if”), it includes at least some discretion when it comes to the “defensive” war power, i.e., the President’s power to use military force to defend U.S. persons and territory, whether as part of an ongoing international or non-international armed conflict or not. And although the Constitution certainly constrains how the President may use that power, it’s a different issue altogether to suggest that the Constitution might forbid him for acting at all without prior judicial approval—especially in cases where the President otherwise would have the power to use lethal force.

This ties together with the related point of just how difficult it would be to actually have meaningful ex ante review in a context in which time is so often of the essence. If, as I have to think is true, many of the opportunities for these kinds of operations are fleeting—and often open and close within a short window—then a requirement of judicial review in all cases might actually prevent the government from otherwise carrying out authority that most would agree it has (at least in the appropriate circumstances). This possibility is exactly why FISA itself was enacted with a pair of emergency provisions (one for specific emergencies: one for the beginning of a declared war), and comparable emergency exceptions in this context would almost necessarily swallow the rule. Indeed, the narrower a definition of imminence that we accept, the more this becomes a problem, since the time frame in which the government could simultaneously demonstrate that a target (1) poses such a threat to the United States; and (2) cannot be captured through less lethal measures will necessarily be a vanishing one. Even if judicial review were possible in that context, it’s hard to imagine that it would produce wise, just, or remotely reliable decisions.

That’s why, even though I disagree with the DOJ white paper that ex ante review would present a nonjusticiable political question, I actually agree that courts are ill-suited to hear such cases—not because, as the white paper suggests, they lack the power to do so, but because, in most such cases, they would lack the competence to do so.

III. Drone Courts and the Legitimacy Problem

That brings me to perhaps the biggest problem we should all have with a “drone court”—the extent to which, even if one could design a legally and practically workable regime in which such a tribunals could operate, its existence would put irresistible pressure on federal judges to sign off even on those cases in which they have doubts.

As a purely practical matter, it would be next to impossible meaningfully to assess imminence, the existence of less lethal alternatives, or the true nature of a threat that an individual suspect poses ex ante. Indeed, it would be akin to asking law enforcement officers to obtain judicial review before they use lethal force in defense of themselves or third persons—when the entire legal question turns on what was actually true in the moment, as opposed to what might have been predicted to be true in advance. At its core, that’s why the analogy to search warrants utterly breaks down—and why it would hardly be surprising if judges in those circumstances approved a far greater percentage of applications than they might have on a complete after-the-fact record. Judges, after all, are humans.

In the process, the result would be that such ex ante review would do little other than to add legitimacy to operations the legality of which might have otherwise been questioned ex post. Put another way, ex ante review in this context would most likely lead to a more expansive legal framework within which the targeted killing program could operate, one sanctioned by judges asked to decide these cases behind closed doors; without the benefit of adversary parties, briefing, or presentation of the facts; and with the very real possibility that the wrong decision could directly lead to the deaths of countless Americans. Thus, even if it were legally and practically possible, a drone court would be a very dangerous idea.

IV. Why Damages Actions Don’t Raise the Same Legal Concerns

At first blush, it may seem like many of these issues would be equally salient in the context of after-the-fact damages suits. But as long as such a regime was designed carefully and conscientiously, I actually think virtually all of these concerns could be mitigated.

For starters, retrospective review doesn’t raise anywhere near the same concerns with regard to adversity or judicial competence. Re: adversity, presumably those who are targeted in an individual strike could be represented as plaintiffs in a post-hoc proceeding, whether through their next friend or their heirs. And as long as they could state a viable claim for relief (more on that below), it’s hard to see any pure Article III problem with such a suit for retrospective relief.

As for competence, judges routinely review whether government officers acted in lawful self-defense under exigent circumstances (this is exactly what Tennessee v. Garner contemplates, after all). And if the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or...
perhaps counterintuitively, I also believe that after-the-fact judicial review wouldn't raise anywhere near the same prudential concerns as those noted above. Leaving aside how much less pressure judges would be under in such cases, it’s also generally true that damages regimes don’t have nearly the same validating effect on government action that ex ante approval does. Otherwise, one would expect to have seen a dramatic upsurge in lethal actions by law enforcement officers after each judicial decision refusing to impose individual liability arising out of a prior use of deadly force. So far as I know, no such evidence exists.

Of course, damages actions aren’t a perfect solution here. It’s obvious, but should be said anyway, that in a case in which the government does act unlawfully, no amount of damages will make the victim (or his heirs) whole. It’s also inevitable that, like much of the Guantánamo litigation, most of these suits would be resolved under extraordinary secrecy, and so there would be far less public accountability for targeted killings than, ideally, we might want. That said, there are two enormous upsides to damages actions that, in my mind, make them worth it—even if they are deeply, fundamentally flawed:

First, if nothing else, the specter of damages, even nominal damages, should have a deterrent effect on future government officers, such that, if a targeted killing operation ever was carried out in a way that violated the relevant legal rules, there would be liability—and, as importantly, precedent—such that the next government official in a similar context might think twice, and might make sure that he’s that much more convinced that the individual in question is who the government claims, and that there’s no alternative to the use of lethal force.

Second, at least where the targets of such force are U.S. citizens, I believe that there is a non-frivolous argument that the Constitution requires at least some form of judicial process—and, compared to the alternatives, nominal damages actions litigated under carefully circumscribed rules of secrecy may be the only way to get all of the relevant constituencies to the table.

That’s a very long way of reiterating what I wrote in my initial response to the DOJ white paper, but I end up in the same place: If folks really want to provide a judicial process to serve as a check on the U.S. government’s conduct of targeted killing operations, this kind of regime, and not an ex ante “drone court,” is where such endeavors should focus.
You know it’s not a good day for the Obama administration when a paragon of the Tea Party right is roasting the president and liberal twitter feeds are lighting up in support. But that’s exactly what happened this past week when Kentucky Senator Rand Paul mounted his “talking filibuster” to block the confirmation of CIA nominee John Brennan. Paul kept up the parliamentary maneuver for 13 hours in an effort to extract answers from the administration about its covert drone program, and particularly the question of whether it is legal to target American citizens on U.S. soil.

Maintenence personel check a Predator drone operated by U.S. Office of Air and Marine
It was a strange-bedfellows moment that harkened back to the Clinton era, when government-fearing elements of the GOP joined forces with the civil-libertarian left to assail over-zealous law-enforcement tactics. And while Brennan’s nomination was never really in jeopardy—he was confirmed Thursday by a comfortable margin—Paul succeeded in forcing Obama officials to publicly address a set of national security issues that has always made them feel distinctly uncomfortable.

How could the administration have allowed itself to get tangled up in an embarrassing controversy over deeply hypothetical questions like whether the military could fire a drone strike at an American citizen sitting in a cafe? One reason, of course, is the circus that confirmations have become—proxy battles for the permanent political conflict between Republicans and the White House. But perhaps the biggest reason has been the administration’s unwillingness to share information about its drone program, which has fed the perception among both Republicans and Democrats that it has an imperious, high-handed attitude toward Congress. And when officials have answered questions from Congress, the responses have often been so pettifogging and over-lawyered that they’ve done more harm than good.

The irony is that Obama and most of his top aides are personally in favor of more rather than less transparency. But in the end, they have repeatedly deferred to secrecy obsessed spooks and handwringing lawyers whose default position has been to keep things under wraps. “It’s clear that the president and the attorney general both want more transparency,” says Matthew Miller, a former senior Justice Department official. “But the bureaucracy has once again thrown sand in the gears and slowed that down.”

Here’s your condensed U.S. drone program explainer.

“We realized this was going to be a public relations debacle,” recalls a former senior administration who advocated for greater transparency.

The drones mess also reflects Obama’s tortured, Solomonic approach to dealing with difficult national security issues. In seeking to balance transparency and security, Obama has pursued a middle path that, in the end, has satisfied nobody. And in the case of drones, that approach has been at odds with a basic Washington imperative: it is almost always better to be transparent earlier, lest you end up having to disclose
even more later. “The word on the street,” says a former administration national security official, “is they’ll end up giving away the farm, all the animals, and the John Deere equipment by the time this is done.”

One thing you can say about Team Obama: there was no lack of internal debate about the need to be more transparent. The discussions began in the aftermath of the September 30, 2011 drone strike against Anwar al-Awlaki, the Yemeni-American preacher and senior al Qaeda operative. They intensified a few weeks later when Awlaki’s son, also a U.S. citizen, was mistakenly killed in another drone attack in Yemen. “We realized this was going to be a public relations debacle,” recalls a former senior administration who advocated for greater transparency. Sure enough, academics and national security experts began writing more critically about the drone policy as well as the administration’s penchant for secrecy. One particularly stinging op-ed piece, which ran in The Washington Post, was by a former Bush administration State Department official; it appeared under the headline “Will drones strikes become Obama’s Guantanamo?”

That fall, then Deputy National Security Adviser Denis McDonough convened a series of Situation Room meetings to hash out how much to disclose, according to three senior administration officials. At one end of the spectrum was Harold Koh, the State Department’s legal adviser, who argued that the White House should make public a redacted version of the Justice Department legal opinion authorizing the targeted killings of U.S. citizens. In addition, Koh argued for turning over the un-redacted, classified version of the opinion to Congress. That position was aggressively opposed by the intelligence community and Justice Department lawyers with the Office of Legal Counsel: the spooks were opposed to any disclosures that would lift the veil on a covert CIA program, and the OLC lawyers didn’t want to release legal opinions that they viewed as privileged advice to their client, the president. Meanwhile, lawyers for the White House fretted that too much disclosure could weaken their stance in pending litigation. (The New York Times had filed a lawsuit against the administration under the Freedom of Information Act seeking the Justice Department legal opinion in the Awlaki case.)

The issue came to a head at a Situation Room meeting in November, according to four participants. By then, officials from the intelligence community, Justice, and the White House had begun moving toward a compromise position: publicly disclosing the legal reasoning behind the Awlaki killing, but keeping the full Justice Department opinion under wraps. The State Department’s Koh kept pushing for the maximum amount of disclosure. It would come down to what McDonough cheekily called the “half Monty” versus the “full Monty.”

In the end, the White House signed off on the half Monty. A Justice Department lawyer named Stuart Delery set out to produce a stripped down version of the memo. But the White House had still not decided what form the disclosure would take. One proposal was an op-ed piece that would run under Holder’s byline, but Delery’s document ended up being so long that option was scrapped. Another possibility was releasing a white paper to the public. In the end, the White House settled on letting Holder deliver a so-called “top-wave” speech, an address that would deal with a host of pressing national security issues and would include a section on the legal rationale behind killing American citizens. But, critically, the administration did not give anything separately to Congress.

Soon thereafter, a draft of the speech was sent over to the White House for approval. For reasons that remain unclear, it languished on National Security Adviser Tom Donilon’s desk for months. Then, in January 2012, it was circulated by the National Security Council for final approval. Holder delivered the speech at the University of Chicago School of Law that March. His comments did not create much of a stir at the time—other than from law professor types who quibbled with his assertion that the due process requirement contemplated by the Constitution’s Fifth Amendment did not mandate “judicial process.” Translation: Awlaki wasn’t entitled to a trial before being whacked by a CIA drone. But it did get noticed on the Senate and House Intelligence committees, which had been pushing for more access to information on the administration’s drone program as part of their oversight responsibilities. Griped one Senate staffer,
“If they were willing to talk about it publicly, they should have been willing to brief the committees more fulsomely.”

In June, Obama officials finally turned over the now-famous “white paper” to the committee, with admonitions that they not leak it. But for Congress, it was too little too late. The document did not contain a lot that went substantively beyond the Holder speech, and frustration was building among lawmakers. Democrat Ron Wyden began leading the charge for all of the Justice Department opinions relating to drones—and by this winter, Congress had its leverage to demand that they be turned over: the nomination of John Brennan, architect of the Obama drone program, to be CIA director.

In the end, the intelligence committees got most of what they wanted, including the complete, un-redacted Justice Department memo justifying the targeting of American citizens—the full Monty that Koh had argued for in the first place. But by then, Congress was hungry for more. And that’s when Rand Paul started talking.

Tags:

- Rand Paul, (/topics/rand-paul.html)
- Barack Obama, (/topics/barack-obama.html)
- U.S. Politics (/politics.html)

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It was close to midnight on Jan. 20, 2009, and I was about to go to sleep when my iPhone beeped. There was a new text message. It was from Richard Holbrooke. It said, "Are you up, can you talk?" When I called, he told me that Barack Obama had asked him to serve as envoy for Afghanistan and Pakistan. He would work out of the State Department, and he wanted me to join his team. "No one knows this yet. Don't tell anyone. Well, maybe your wife." (The Washington Post reported his appointment the next day.)

I first met Holbrooke, the legendary diplomat best known for making peace in the Balkans and breaking plenty of china along the way, at a 2006 conference in Aspen, Colorado. We sat together at one of the dinners and talked about Iran and Pakistan. Holbrooke ignored the keynote speech, the entertainment that followed, and the food that flowed in between to bombard me with questions. We had many more conversations over the next three years, and after I joined him on Hillary Clinton's presidential campaign in 2007, we spoke frequently by phone.
Now, making his sales pitch, Holbrooke told me that government is the sum of its people. "If you want to change things, you have to get involved. If you want your voice to be heard, then get inside." He knew I preferred to work on the Middle East and in particular Iran. But he had different ideas. "This [Afghanistan and Pakistan] matters more. This is what the president is focused on. This is where you want to be."

He was persuasive, and I knew that we were at a fork in the road. Regardless of what promises candidate Obama made on his way to the White House, Afghanistan now held the future -- his and America's -- in the balance. And it would be a huge challenge. When Obama took office, the war in Afghanistan was already in its eighth year. By then, the fighting had morphed into a full-blown insurgency, and the Taliban juggernaut looked unstoppable. They had adopted a flexible, decentralized military structure and even a national political organization, with shadow governors and district leaders for nearly every Afghan province. America was losing, and the enemy knew it. It was a disaster in the making.

But Holbrooke, who would have been secretary of state had Clinton won the presidency but had been vetoed by Obama to be her deputy when she accepted the State Department job instead, now insisted to me that he relished the chance to take on what he dubbed the "AfPak" portfolio. "Nothing is confirmed, but it is pretty much a done deal," he told me. "If you get any other offers, let me know right away." Then he laughed and said, "If you work for anyone else, I will break your knees. This is going to be fun. We are going to do some good. Now get some sleep."

Two months later, I was at my desk at SRAP, as the office of the special representative for Afghanistan and Pakistan quickly became known. Those first few months were a period of creativity and hope. Holbrooke had carved out a little autonomous principality on the State Department's first floor, filling it with young diplomats, civil servants, and outside experts like me, straight to the job from a tenured post at Tufts University. Scholars, journalists, foreign dignitaries, members of Congress, and administration officials walked in daily to get their fill of how AfPak strategy was shaping up. Even Hollywood got in on SRAP. Angelina Jolie lent a hand to help refugees in Pakistan, and the usually low-key State Department cafeteria was abuzz when Holbrooke sat down for coffee with Natalie Portman to talk Afghanistan.

People started early and worked late into the night, and there was a constant flow of new ideas, like how to cut corruption and absenteeism among the Afghan police by using mobile banking and cell phones to pay salaries; how to use text messaging to raise money for refugees; or how to stop the Taliban from shutting down mobile-phone networks by putting cell towers on military bases. SRAP had more of the feel of an Internet start-up than a buttoned-up State Department office.

Holbrooke encouraged the creative chaos. "I want you to learn nothing from government," he told me. "This place is dead intellectually. It does not produce any ideas; it is all about turf battles and checking the box. Your job is to break through all this. Anyone gives you trouble, come to me." On his first visit to SRAP, Gen. David Petraeus, then Centcom commander, mused, "This is the flattest organization I have ever seen. I guess it works for you."

Still, Holbrooke knew that Afghanistan was not going to be easy. There were too many players and too many unknowns, and Obama had not given him enough authority (and would give him almost no support) to get the job done. After he took office, the president never met with Holbrooke outside large meetings and never gave him time and heard him out. The president's White House advisors were dead set against Holbrooke. Some, like Lt. Gen. Douglas Lute, were holdovers from George W. Bush's administration and thought they knew Afghanistan better and did not want to relinquish control to Holbrooke. Others (those closest to the president) wanted to settle scores for Holbrooke's tenacious campaign support of Clinton (who was herself eyed with suspicion by the Obama insiders); still others begrudged Holbrooke's storied past and
wanted to end his run of success then and there. At times it appeared the White House was more interested in bringing Holbrooke down than getting the policy right.

Holbrooke, however, kept attacking the problem from all angles. It was as if he were trying to solve a Rubik's cube -- trying to bring into alignment what Congress, the military, the media, the Afghan government, and America's allies wanted and how politicians, generals, and bureaucrats were likely to react. Just before his sudden death in December 2010, he told his wife, Kati Marton, that he thought he had finally found a way out that might just work. But he wouldn't say what he had come up with, "not until he told the president first" -- the president who did not have time to listen.

**OBAMA HAS EARNED** plaudits for his foreign-policy performance. On his watch, the United States has wound down the wars in Iraq and Afghanistan, and it finally killed Osama bin Laden. In tune with the public mood, he has largely kept America out of costly overseas adventures.

But my time in the Obama administration turned out to be a deeply disillusioning experience. The truth is that his administration made it extremely difficult for its own foreign-policy experts to be heard. Both Clinton and Holbrooke, two incredibly dedicated and talented people, had to fight to have their voices count on major foreign-policy initiatives.

Holbrooke never succeeded. Clinton did -- but it was often a battle. It usually happened only when it finally became clear to a White House that jealously guarded all foreign policymaking -- and then relied heavily on the military and intelligence agencies to guide its decisions -- that these agencies' solutions were no substitute for the type of patient, credible diplomacy that garners the respect and support of allies. Time and again, when things seemed to be falling apart, the administration finally turned to Clinton because it knew she was the only person who could save the situation.

One could argue that in most administrations, an inevitable imbalance exists between the military-intelligence complex, with its offerings of swift, dynamic, camera-ready action, and the foreign-policy establishment, with its seemingly ponderous, deliberative style. But this administration advertised itself as something different. On the campaign trail, Obama repeatedly stressed that he wanted to get things right in the broader Middle East, reversing the damage that had resulted from the previous administration's reliance on faulty intelligence and its willingness to apply military solutions to problems it barely understood.

Not only did that not happen, but the president had a truly disturbing habit of funneling major foreign-policy decisions...
through a small cabal of relatively inexperienced White House advisors whose turf was strictly politics. Their primary concern was how any action in Afghanistan or the Middle East would play on the nightly news, or which talking point it would give the Republicans. The Obama administration’s reputation for competence on foreign policy has less to do with its accomplishments in Afghanistan or the Middle East than with how U.S. actions in that region have been reshaped to accommodate partisan political concerns.

By September 2012, when violent anti-American protests swept the Muslim world, claiming the lives of four members of the U.S. diplomatic mission in Libya and dozens of demonstrators, it became clear that we had gotten the broader Middle East badly wrong.

The American people are tired of war -- rightly so -- and they welcome talk of leaving the region. The president has marketed the U.S. exit from Afghanistan as a foreign-policy coup, one that will not only unburden America from the region’s problems but also give the country the freedom it needs to pursue other, more pressing national security concerns.

This is an illusion. Ending the wars in Iraq and Afghanistan, not to mention the broader, ill-defined "war on terror," is a very good idea, provided it is done properly and without damage to U.S. interests or the region’s stability. But we should not kid ourselves that the rhetoric of departure is anything more than rhetoric; the United States is taking home its troops and winding down diplomatic and economic engagement -- but leaving behind its Predators and Special Forces. We should not expect that the region will look more kindly on drone attacks and secret raids than it did on invasion and occupation.

Yet this is exactly the path that the White House has laid out. What follows is the story of how Barack Obama got it wrong.

THE ADMINISTRATION’S INITIAL reading of the crisis in Afghanistan was to blame it on the spectacular failure of President Hamid Karzai’s government, paired with wrongheaded military strategy, inadequate troop numbers for defeating an insurgency, and the Taliban’s ability to find a haven and military and material support in Pakistan. Of these, Karzai’s failings and the need to straighten out the military strategy dominated the discussion. Above all, the Afghanistan conflict was seen in the context of Iraq. The Taliban were viewed as an insurgency similar to the one that the United States had just helped defeat in Iraq. And what had defeated the insurgency in Iraq was a military strategy known as COIN, a boots-on-the-ground-intensive counterinsurgency.

But deciding what exactly to do soon turned into the Obama administration’s first AfPak disaster: the torturously long 2009 strategic review. To conduct it, the president sat with his national security team through 10 meetings -- 25 hours -- over
three months, and there were many more meetings without the president. At SRAP, we managed the State Department's contribution to the paper deluge, working long hours preparing memos, white papers, maps, and tables. But still more was needed.

Early in the process, Holbrooke came back from a meeting at the White House. "You did a good job," he said. "The secretary [Clinton] was pleased with her material but wants her folders to be as big as [those of Defense Secretary Robert] Gates. She wants color maps, tables, and charts." Clinton, continued Holbrooke, "does not want Gates to dominate the conversation by waving his colorful maps and charts in front of everybody. No one reads this stuff, but they all look at the maps and color charts." Everyone in the office looked at him. "So who does read all this?" I asked, pointing to a huge folder on his desk. "I'll tell you who," he said. "The president reads them. He reads every folder."

The amount of time spent seemed absurd. Every time Holbrooke came back from the White House, he would say, "The president has more questions." Frustration was written all over Holbrooke's and Clinton's faces as the process dragged on. Obama was dithering. He was busybodying the national security apparatus by asking for more answers to the same set of questions, each time posed differently.

Holbrooke thought that Obama was not deciding because he disliked the options before him, and that the National Security Council (NSC) was failing the president by not giving him the right options. What Holbrooke omitted from his assessment was that Obama was failing to press the NSC to give him other options.

The night before Gen. Stanley McChrystal, who in June 2009 was installed as the new U.S. commander in Afghanistan, was to release the report outlining what he needed to fight the war, Holbrooke gathered his team in his office. We asked him what he thought McChrystal would request. He said, "Watch! The military will give the president three choices. There will be a 'high-risk' option" -- Holbrooke held his hand high in the air -- "that is what they always call it, which will call for maybe very few troops. Low troops, high risk. Then there will be a 'low-risk' option" -- Holbrooke lowered his hand -- "which will ask for double the number they are actually looking for. In the middle will be what they want," which was between 30,000 and 40,000 more troops. And that is exactly what happened.

The alternative, which Vice President Joe Biden favored, was a stepped-up counterterrorism effort, dubbed "CT-plus," that would involve drone strikes and Special Forces raids, mostly directed at al Qaeda's sanctuary in Pakistan's wild border region near Afghanistan. But this looked risky -- too much like "cut and run" -- and there was no guarantee that CT-plus could work without COIN. Like Biden, Holbrooke thought COIN was pointless, but he was not sold on CT-plus. He thought you could not have a regional strategy built on "secret war." Drones are no substitute for a political settlement.

During the review, however, there was no discussion at all of diplomacy and a political settlement. Holbrooke wanted the president to consider this option, but the White House was not buying it. The military wanted to stay in charge, and going against the military would make the president look weak.

So Obama chose the politically safe option that he did not like: He gave the military what it asked for. Months of White House hand-wringing ended up with the administration choosing the option that had been offered from day one: fully resourced COIN and 30,000 additional troops. But Obama added a deadline of July 2011 for the larger troop commitment to work; after that the surge would be rolled back. In effect, the president said the new strategy was good for a year.
FROM THE OUTSET, Holbrooke argued for political reconciliation as the path out of Afghanistan. But the military thought talk of reconciliation undermined America’s commitment to fully resourced COIN. On his last trip to Afghanistan, in October 2010, Holbrooke pulled aside Petraeus, who by then had replaced McChrystal as commander in Afghanistan, and said, “David, I want to talk to you about reconciliation.” “That’s a 15-second conversation,” Petraeus replied. “No, not now.”

The commanders’ standard response was that they needed two more fighting seasons to soften up the Taliban. They were hoping to change the president’s mind on his July deadline and after that convince him to accept a "slow and shallow" (long and gradual) departure schedule. Their line was that we should fight first and talk later. Holbrooke thought we could talk and fight. Reconciliation should be the ultimate goal, and fighting the means to facilitate it.

The Taliban were ready for talks as early as April 2009. At that time, Afghanistan scholar Barnett Rubin, shortly before he joined Holbrooke’s team as his senior Afghan-affairs advisor, traveled to Afghanistan and Saudi Arabia. In Kabul Rubin met with former Taliban commander Mullah Abdul Salam Zaeef, who laid out in detail a strategy for talks: where to start, what to discuss, and the shape of the settlement that the United States and the Taliban could agree on. Zaeef said the Taliban needed concessions on prisoners America held at Guantánamo Bay and removal of the names of some Taliban from U.S. and U.N. blacklists sanctioning terrorists. Back in Washington -- on the day he was sworn into government service -- Rubin wrote Holbrooke a memo regarding this trip. That afternoon the two sat next to each other on the U.S. Airways shuttle back to New York. Holbrooke read the memo; then he turned to Rubin and said, "If this thing works, it may be the only way we will get out." That was the beginning of a two-year campaign to sell the idea of talking to the Taliban: first to Clinton and then to the White House and Obama.

The White House, however, did not want to try anything as audacious as diplomacy. It was an art lost on America’s top decision-makers. They had no experience with it and were daunted by the idea of it.

While running for president, Obama had promised a new chapter in U.S. foreign policy: America would move away from Bush’s militarized foreign policy and take engagement seriously. When it came down to brass tacks in Afghanistan and Pakistan, however, Clinton was the lonely voice making the case for diplomacy.

During the 2009 strategic review, Clinton had supported the additional troops but was not on board with the deadline Obama imposed on the surge, nor did she support hasty troop withdrawals. Clinton thought those decisions looked a lot
like cut-and-run and would damage America's standing in the world. Add this to where she came out on a host of other national security issues -- including pushing Obama to go ahead with the Abbottabad operation to kill or capture bin Laden and breaking with the Pentagon to advocate using U.S. air power in Libya -- and it is safe to say she was, and remains, tough on national security issues.

But Clinton shared Holbrooke's belief that the purpose of hard power is to facilitate diplomatic breakthroughs. During many meetings I attended with her, she would ask us to make the case for diplomacy and would then quiz us on our assumptions and plan of action. At the end of these drills she would ask us to put it all in writing for the benefit of the White House.

Holbrooke and Clinton had a tight partnership. They were friends. Clinton trusted Holbrooke's judgment and valued his counsel. They conferred often (not just on Afghanistan and Pakistan), and Clinton protected Holbrooke from an obdurate White House. The White House kept a dossier on Holbrooke's misdeeds, and Clinton kept a folder on churlish attempts by the White House's AfPak office to undermine Holbrooke, which she eventually gave to Tom Donilon, Obama's national security advisor. The White House tried to blame Holbrooke for leaks to the media. Clinton called out the White House on its own leaks. She sharply rebuked the White House after journalist Steve Coll wrote in the New Yorker about a highly secret meeting with the Taliban that he was told about by a senior White House official.

Whenever possible, Clinton went to the president directly, around the so-called Berlin Wall of staffers who shielded Obama from any option or idea they did not want him to consider. Clinton had regular weekly private meetings with the president. She had asked for the "one-on-ones" as a condition for accepting the job in hopes of ensuring that the White House would not conveniently marginalize her and the State Department.

Even then, however, she had a tough time getting the administration to bite. Obama was sympathetic in principle but not keen on showing daylight between the White House and the military. Talking to enemies was a good campaign sound bite, but once in power Obama was too skittish to try it.

On one occasion in the summer of 2010, after the White House had systematically blocked every attempt to include reconciliation talks with the Taliban and serious regional diplomacy (which had to include Iran) on the agenda for national security meetings with the president, Clinton took a paper SRAP had prepared to Obama. She gave him the paper, explained what it laid out, and said, "Mr. President, I would like to get your approval on this." Obama nodded his approval, but that was all. So his White House staff, caught off guard by Clinton, found ample room to kill the paper in Washington's favorite way: condemning it to slow death in committee meetings. A few weeks after Clinton gave Obama the paper, I had to go to an "interagency" meeting organized by the White House that to my surprise was going to review the paper the president had already given the nod to. I remember telling Clinton about the meeting. She shook her head and exclaimed, "Unbelievable!"

Clinton got along well with Obama, but on Afghanistan and Pakistan the State Department had to fight tooth and nail just to have a hearing at the White House. Had it not been for Clinton's tenacity and the respect she commanded, the State Department would have had no influence on policymaking whatsoever. The White House had taken over most policy areas: Iran and the Arab-Israeli issue were for all practical purposes managed from the White House. AfPak was a rare exception, and that was owed to Holbrooke's quick thinking in getting SRAP going in February 2009, before the White House was able to organize itself.
The White House resented losing Afghan-Pakistani (AfPak) to the State Department. It fought hard to close down SRAP and take it back. That was one big reason the White House was on a warpath after Holbrooke. But Holbrooke would not back down, especially not when he thought those who wanted to wrest control of Afghanistan were out of their depth and not up to the job.

Turf battles are a staple of every administration, but the Obama White House has been particularly ravenous. Add to this the campaign hangover: Those in Obama's inner circle, veterans of his election campaign, were suspicious of Clinton. Even after Clinton proved she was a team player, they remained concerned about her popularity and feared that she could overshadow the president.

Adm. Mike Mullen, chairman of the Joint Chiefs of Staff until September 2011, told me Clinton "did a great job pushing her agenda, but it is incredible how little support she got from the White House. They want to control everything." Victories for the State Department were few and hard fought. It was little consolation that its recommendations on reconciliation with the Taliban or regional diplomacy to end the Afghan war eventually became official policy -- after the White House exhausted the alternatives.

The White House campaign against the State Department, and especially Holbrooke, was at times a theater of the absurd. Holbrooke was not included in Obama's videoconferences with Karzai, and he was cut out of the presidential retinue when Obama went to Afghanistan. At times it looked as if White House officials were baiting Karzai to complain about Holbrooke so they could get him fired.

The White House worried that talking to the Taliban would give Holbrooke a greater role. For months, the White House plotted to either block reconciliation with the Taliban or find an alternative to Holbrooke for managing the talks. Lute, who ran AfPak at the White House, floated the idea of the distinguished U.N. diplomat Lakhdar Brahimi leading the talks. Clinton objected to outsourcing American diplomacy to the United Nations. Pakistan, too, was cool to the idea. The "stop Holbrooke" campaign was not only a distraction -- it was influencing policy.

Another example was when Donilon's predecessor as national security advisor, James Jones, traveled to Pakistan for high-level meetings without Holbrooke (not even informing the State Department of his travel plans until he was virtually in the air). Again, the message was "ignore Holbrooke." It was no surprise that our AfPak policy took one step forward and two steps back.

During one trip, Jones went completely off script and promised Gen. Ashfaq Parvez Kayani, Pakistan's top military man, a civilian nuclear deal in exchange for Pakistan's cooperation. Panic struck the White House. It took a good deal of diplomatic tap-dancing to take that offer off the table. In the end, one of Kayani’s advisors told me that the general did not take Jones seriously, anyway; he knew it was a slip-up. The NSC wanted to do the State Department's job but was not up to the task.

Afghans and Pakistanis were not alone in being confused and occasionally amused by the White House's maneuvers. People in Washington were also baffled. The White House encouraged the U.S. ambassadors in Afghanistan and Pakistan to go around the State Department and work with the White House directly, undermining their own agency. Those ambassadors quickly learned how easy it was to manipulate the administration’s animus toward Holbrooke to their own advantage. The U.S. ambassador to Afghanistan, Karl Eikenberry, in particular became a handful for the State Department. In November 2010, Obama and Clinton went to Lisbon for a NATO summit, planning to meet with Karzai there. When Eikenberry asked to go as well, Clinton turned down his request and instructed him to stay in Kabul. He ignored her and
showed up in Lisbon.

**PURSUING RECONCILIATION WAS** difficult against the combined resistance of the Pentagon, the CIA, and the White House. It took a massive toll on Holbrooke. Still, Rubin, his Afghan-affairs advisor, provided the intellectual capital for him, arguing in ever greater detail that the Taliban would come to the table and that Karzai and many Afghans favored talking to them. Holbrooke and Rubin were sure a deal that would sever ties between the Taliban and al Qaeda and bring peace in Afghanistan was within reach.

Holbrooke asked Rubin to put his ideas into a series of memos that Holbrooke then fanned out across the government. After Holbrooke died, Rubin put those memos in one folder for the White House. In early spring of 2012 at a White House meeting, Clinton would push the idea one more time. Donilon replied that he had yet to see the State Department make a case for reconciliation. So Clinton asked Rubin for every memo he had written going back to his first day on the job. The 3-inch-thick folder spoke for itself.

All told, it took more than a year of lobbying inside the administration to get the White House to take the idea seriously. It was close to 18 months after Rubin wrote his first memo that Clinton could finally publicly endorse diplomacy on behalf of the administration, in a February 2011 speech at the Asia Society.

The Obama administration's approach to reconciliation, however, is not exactly what Holbrooke had in mind for a diplomatic end to the war. Holbrooke thought that the United States would enjoy its strongest leverage if it negotiated with the Taliban when the country had the maximum number of troops on the ground in Afghanistan. He had not favored the Afghanistan surge, but once the troops were there, he thought the president should use the show of force to get to a diplomatic solution.

But that did not happen. The president failed to launch diplomacy and then announced the troop withdrawal in a June 2011 speech, in effect snatching away the leverage that would be needed if diplomacy were to have a chance of success. "If you are leaving, why would the Taliban make a deal with you? How would you make the deal stick? The Taliban will talk to you, but just to get you out faster." That comment we heard from an Arab diplomat was repeated across the region.

Yet it was exactly after announcing the U.S. departure that the administration warmed up to the idea of reconciliation. Talks with the Taliban were not about arranging their surrender, but about hastening America's departure. Concerns about human rights, women's rights, and education were shelved. These were not seen as matters of vital U.S. interest, just noble causes that were too costly and difficult to support -- and definitely not worth fighting an insurgency over.

The White House seemed to see an actual benefit in not doing too much. It was happy with its narrative of modest success in Afghanistan and gradual withdrawal -- building Afghan security forces to take over from departing U.S. troops. The goal was to spare the president the risks that necessarily come with playing the leadership role that America claims to play in this region.

**THE TRUE KEY TO** ending the war, Holbrooke often told us, was to change Pakistan. Pakistan was the sanctuary that the Taliban insurgency used as a launching pad and a place to escape U.S. retaliation. But to convince Pakistan that we meant business, we first had to prove that America was going to stay.

But how? Pakistan's double-dealing was in part a symptom of its bitterness over having been abandoned and then treated as a rogue state after a previous Afghan war, against the Soviets, had been won in 1989. Pakistan was also deeply insecure
about India's meteoric rise and growing strategic value to the West. Pakistanis were playing things very close to the vest. We had to get them to open up. Could we convince them that their strategic interests in Afghanistan could be addressed? If so, perhaps in time they might reassess their interests in a way more favorable to ours.

Holbrooke understood that the White House, the Pentagon, and the CIA wanted Pakistan to cut ties with the Taliban and do more to fight terrorism. That would never happen, however, without at least some semblance of a normal relationship between Pakistan and the United States. Already in 2009, half the U.S. diplomatic mission in Pakistan worked on intelligence and counterterrorism rather than diplomacy or development. The U.S. Consulate in Peshawar was basically bricks shielding antennas. And it paid big dividends. The CIA collected critical intelligence in Pakistan that allowed for drone strikes against al Qaeda targets and on more than one occasion prevented a terrorist strike in the West. So the Obama administration began carrying out drone strikes in Pakistan on an industrial scale, decimating al Qaeda's command-and-control structure and crippling the organization.

But hunting terrorists was unpopular in Pakistan, and drone strikes in particular angered Pakistanis. In public the authorities denied making any deal with the United States, but it was obvious to citizens that the drones flew with the authorities' knowledge and even cooperation. The anger would only get worse as the number of drone attacks grew. But drones were a deeply classified topic in the U.S. government. You could not talk about them in public, much less discuss whom they were hitting and with what results. Embassy staffers took to calling drones "Voldemort," after the villain in the Harry Potter series, Lord Voldemort: "he who must not be named."

We knew from early 2009 that the drone problem meant the crucial intelligence relationship with Pakistan was headed for trouble. During my early days working with Holbrooke, when we were crafting a new Pakistan policy, one of Holbrooke's deputies asked him, "If we are going to seriously engage, shouldn't we make some changes to the drone policy, perhaps back off a bit?" Holbrooke replied, "Don't even go there. Nothing is going to change."

To create a new narrative, Holbrooke started by calling together a meeting in Tokyo of the newly created Friends of Democratic Pakistan, an international gathering to help Pakistan rebuild its economy and strengthen democratic politics. He got $5 billion in pledges to assist Pakistan. "That is a respectable IPO," Holbrooke would brag, hoping that the opening would garner even more by way of capital investment in Pakistan's future. But if we wanted to change Pakistan, Holbrooke thought, we had to think even bigger -- in terms of a Marshall Plan. After a journalist asked him whether the $5 billion in aid was too much for Pakistan, Holbrooke answered, "Pakistan needs $50 billion, not $5 billion." The White House did not want to hear that -- it meant a fight with Congress and spending political capital to convince the American people. Above all else, it required an audacious foreign-policy gambit for which the Obama administration was simply not ready.

Yet in reality we were spending much more than that on Afghanistan. For every dollar we gave Pakistan in aid, we gave $20 to Afghanistan. That money did not go very far; it was like pouring water into sand. Even General Petraeus understood this. I recall him saying at a Pakistan meeting: "You get what you pay for. We have not paid much for much of anything in Pakistan." In the end, we settled for far more modest assistance: The 2009 Kerry-Lugar-Berman legislation earmarked $7.5 billion in aid to Pakistan over five years -- the first long-term civilian aid package. It was no Marshall Plan.

Holbrooke also believed we needed more aggressive diplomacy: America had to talk to Pakistan frequently and not just about security issues that concerned the United States, but also about economic and social issues the Pakistanis cared about. So Holbrooke convinced Clinton that America had to offer a strategic partnership to Pakistan, built around a formal "strategic dialogue" -- the kind of forum that America holds with a number of countries, including China and India.
In one of Clinton’s first meetings with Pakistan’s military and intelligence chiefs, she asked them point blank to tell her what their vision for Pakistan was: “Would Pakistan become like North Korea? I am just curious. I would like to hear where you see your country going.” The generals were at a loss for words. So was a group of senior journalists when, during a 2009 interview in Lahore, she pushed back against their incessant criticism of U.S. policy, saying: “I can’t believe that there isn’t anybody in the Pakistani government who knows where bin Laden is.” She was tough. But she was just as serious about engaging Pakistanis on issues that mattered to them.

The White House, however, was not all that taken by the diplomatic effort, and the CIA and the Pentagon decided on America’s goals vis-à-vis Pakistan. These were predictably narrow in scope and all terrorism-focused. They set a pugilistic tone for America’s talks with Pakistan but then bore no responsibility for the outcome. I remember Holbrooke shaking his head and saying, “Watch them [the CIA] ruin this relationship. And when it is ruined, they are going to say, ‘We told you: You can’t work with Pakistan!’ We never learn.”

Holbrooke knew that in these circumstances, anyone advocating diplomacy would have to fight to be heard inside the White House. He tried to reach out to Obama, but his efforts were to no avail. Obama remained above the fray. The president seemed to sense that no one would fault him for taking a tough-guy approach to Pakistan. If the approach failed (as indeed it did), the nefarious, double-dealing Pakistanis would get the blame (as indeed they did).

After the 2011 bin Laden operation in Abbottabad, Washington was in no mood to soft-pedal what it saw as Pakistani duplicity. Pressure started to build on Pakistan. Gone were promises of aid and assistance, strategic partnership, and long-lasting ties. The administration threatened to cut aid and shamed and embarrassed Pakistan through public criticisms and media leaks. Some leaks retold familiar tales of Pakistan’s reluctance to cooperate; others revealed dark truths about how Pakistani intelligence had manipulated public opinion and even gone so far as to silence journalists permanently.

It quickly became common for White House meetings on Pakistan to turn into litigations of complaints as senior officials competed for colorful adjectives to capture how back-stabbing and untrustworthy they thought Pakistani leaders to be. The most frequently stated sentiment was “We have had it with these guys.” But they had also had it with us.

**IN OCTOBER 2010**, during a visit to the White House, General Kayani gave Obama a 13-page white paper he had written to explain his views on the outstanding strategic issues between Pakistan and the United States. Kayani 3.0, as the paper was dubbed (it was the third one Pakistanis had given the White House on the subject), could be summarized as: You are not going to win the war, and you are not going to transform Afghanistan. This place has devoured empires before you; it will defy you as well. Stop your grandiose plans, and let’s get practical, sit down, and discuss how you will leave and what is an end state we can both live with.

Kayani expressed the same doubt time and again in meetings. We would try to convince him that we were committed to the region and had a solution for Afghanistan’s problems: America would first beat the Taliban and then build a security force to hold the place together after it left. He, like many others, thought the idea of an Afghan military was foolish and that the United States was better off negotiating an exit with the Taliban.

In one small meeting around a narrow table, Kayani listened carefully and took notes as we went through our list of issues. I cannot forget Kayani’s reaction when we enthusiastically explained our plan to build up Afghan forces to 400,000 by 2014. His answer was swift and unequivocal: Don’t do it. “You will fail,” he said. “Then you will leave and that half-trained army will break into militias that will be a problem for Pakistan.” We tried to stand our ground, but he would have none of
it. He continued, "I don’t believe that the Congress is going to pay $9 billion a year for this 400,000-man force." He was sure it would eventually collapse and the army’s broken pieces would resort to crime and terrorism to earn their keep.

Kayani’s counsel was that if you want to leave, just leave -- we didn’t believe you were going to stay anyway -- but don’t do any more damage on your way out. This seemed to be a ubiquitous sentiment across the region. No one bought our argument for sending more troops into Afghanistan, and no one was buying our arguments for leaving. It seemed everyone was getting used to a direction-less America.

How painful then to remember that, for Obama, Afghanistan had started out as the "good war." A war of necessity that America had to wage to defeat al Qaeda and ensure that Afghanistan never harbored terrorists again. Obama’s stance was widely understood at home and abroad to mean that America would do all it could in Afghanistan -- commit more money and send more troops -- to finish off the Taliban and build a strong democratic state capable of standing up to terrorism.

Four years later, Obama is no longer making the case for the "good war." Instead, he is fast washing his hands of it. It is a popular position at home, where many Americans, including many who voted for Obama, want nothing more to do with war. They are disillusioned by the ongoing instability in Iraq and Afghanistan and tired of more than 10 years of fighting. They do not believe war was the right solution to terrorism, and they have stopped putting stock in the scaremongering that the Bush administration used to fuel its foreign policy. There is a growing sense that America has no interests in Afghanistan vital enough to justify a major ground presence.

It was to court public opinion that Obama first embraced the war in Afghanistan. And when public opinion changed, he was quick to declare victory and call the troops back home. His actions from start to finish were guided by politics, and they played well at home. Abroad, however, the stories the United States tells to justify its on-again, off-again approach do not ring true to friend or foe. They know the truth: America is leaving Afghanistan to its own fate. America is leaving even as the demons of regional chaos that first beckoned it there are once again rising to threaten its security.

America has not won this war on the battlefield, nor has the country ended it at the negotiating table. America is just washing its hands of this war. We may hope that the Afghan army the United States is building will hold out longer than the one that the Soviet Union built, but even that may not come to pass. Very likely, the Taliban will win Afghanistan again, and this long, costly war will have been for naught.

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When Holbrooke died in December 2010, Clinton kept his office alive, but the White House managed to take over AfPak policy, in part by letting the Pentagon run Afghanistan and the CIA, Pakistan. Clinton wanted John Podesta, an influential Democratic Party stalwart who served as President Bill Clinton’s chief of staff, to succeed Holbrooke. But Podesta was too influential (including with the president) and too high-profile, and that would have made it difficult for the White House to manage him and snatch AfPak policy. The White House vetoed the choice.

Photos courtesy of Vali Nasr
Photo at top: Nasr and Holbrooke seated behind the laptop.
January 22, 2013

The Honorable Dianne Feinstein
Chairman, U.S. Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of John O. Brennan as Director of Central Intelligence Agency

Dear Chairman Feinstein:

As attorneys committed to the rule of law who worked on a range of national security issues while serving in the Obama Administration, we write to express our enthusiastic support for the President’s nomination of John O. Brennan to serve as Director of the Central Intelligence Agency.

Throughout his tenure as Assistant to the President for Homeland Security and Counterterrorism in the Obama Administration, John Brennan has been a persistent and determined leader in support of adherence to the rule of law, a principled commitment to civil liberties and humanitarian protection, and transparency. On a broad range of issues, he has endeavored to ensure that the national security practices of the United States Government are based on sound long-term policy goals and are consistent with our domestic and international legal obligations, as well as with broader principles of democratic accountability. John Brennan has been a steadfast champion of the President’s commitment to closing the detention facility at Guantánamo, and has urged that our Article III courts remain a vital tool in our counterterrorism toolbox. He has stood firmly with the President’s efforts to ensure that interrogations are conducted in accord with the law and our values. And he has worked to ensure that the responsible and effective pursuit of our counterterrorism objectives will not depend simply on the good instincts of officials, but will instead be institutionalized in durable frameworks with a sound legal basis and broad interagency oversight.

As a former CIA official and currently the President’s chief counterterrorism adviser, John Brennan well understands the significant security threats that the United States faces, as well as the institutional needs of the CIA and its dedicated personnel. He is also exceptionally qualified to provide leadership and direction to the Agency, consistent with President Obama’s national security objectives. John Brennan understands that adherence to the Constitution and the rule of law serve, rather than undermine, our national security interests. Time and again, he has demonstrated seasoned wisdom and judgment in responding to our nation’s greatest national security threats, and he has consistently reaffirmed his core commitment to conducting our national security and counterterrorism policy in a fashion that comports with our deepest
values. He is superbly qualified to serve as Director of the CIA, and we urge his swift confirmation.

Sincerely yours,

Sarah H. Cleveland
Louis Henkin Professor of Human and Constitutional Rights*
Columbia Law School
Former Counselor on International Law to the Legal Adviser, U.S. Dept. of State

Gregory B. Craig
Skadden, Arps, Slate, Meagher & Flom LLP
Former Counsel to the President

William S. Dodge
Professor of Law and Associate Dean for Research
University of California, Hastings College of the Law
Former Counselor on International Law to the Legal Adviser, U.S. Dept. of State

Jeh C. Johnson
Former General Counsel
U.S. Dept. of Defense

David S. Kris
General Counsel, Intellectual Ventures
Former Assistant Attorney General for National Security

David A. Martin
Warner-Booker Distinguished Professor of International Law
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Former Principal Deputy General Counsel, U.S. Dept. of Homeland Security

Daniel J. Meltzer
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Congressman Bo Ginn: Mr. Secretary, the Defense Agencies Supplemental Request includes $15 million for additional funding under the Emergency Construction Fund. Has this fund been used yet for fiscal year 1981?

Secretary Perry Fliakas: Yes, sir, it has. In December of 1980, the Secretary approved a project at $3.2 million for what is a highly classified activity. It’s a joint special operations command at Fort Bragg, and we have another project in the pipeline, if you will, of $3.1 million for similar facilities at Dam Neck in Virginia.

—From House Appropriations Subcommittee Hearings, 1981

Secrecy, or at least the show of it, was central to their purpose. It allowed the dreamers and the politicians to have it both ways. They could stay on the high road while the dirty work happened offstage. If some Third World terrorist or Colombian drug lord needed to die, and then suddenly turned up dead, why, what a happy coincidence! The dark soldiers would melt back into shadow. If you asked them how they made it happen, they wouldn’t tell. They didn’t even exist, see?

—Mark Bowden, Black Hawk Down

Notes


Chapter 1

The Tip of the Spear

For the SEALs of Red Squadron, putting two bullets in a primary target wasn’t asking much. The insertion aircraft were a little different, a little more crowded than standard Black Hawks, owing to some bolted-on stealth technology recently tested at Area 51. Destination X, a fair-weathered hill town only thirty miles from the capital of Pakistan and well within that country’s borders, would make for a daring incursion. One blip on a station’s radar would scramble Pakistani jets armed with 30mm cannons, air-to-air missiles, and very possibly free-fire orders. Still, it wasn’t anyone’s first time in Pakistan and wouldn’t be the last. When you’re fighting shadow wars everywhere from Iran to Paraguay, quiet infiltrations with no margin for error are simply the expected way to do business.

Those men of the Naval Special Warfare Development Group (DEVGRU), better known as SEAL Team Six, had spent weeks (and, it later occurred to them, months) training for the mission. That night, the aircrews of the U.S. Army 160th Special Operations Aviation Regiment (Airborne) piloted the one-of-a-kind stealth helicopters through Pakistan’s well-guarded and highly militarized border. Central Intelligence Agency (CIA) paramilitaries acted as spotters on the ground and monitored the situation from afar. A ratlike RQ-170 Sentinel unmanned aerial vehicle operated by the U.S. Air Force 30th Reconnaissance Squadron hovered about fifty thousand feet above Abbottabad, equipped with a special camera designed to penetrate thin layers of cloud and down to a three-story compound below.

The RQ-170 Sentinel drone was designed to monitor nuclear weapons sites in Iran and North Korea. The National Security Council, however, had granted special permission for its use over Pakistan. To mitigate diplomatic fallout in the event the drone were to crash in Pakistan, the U.S. Defense Department disallowed nuclear-sensing devices from the aircraft, in opposition to wishes of the CIA.

Transmitters on this drone’s wing beamed encrypted footage to an
orbiting National Reconnaissance Office satellite, which relayed the signal to a ground station in Germany. Another satellite hop brought the feed to the White House and elsewhere.

The Sentinel had spent months monitoring and mapping the Abbottabad compound. The area would fall into scrutiny after intelligence analysts learned that the high-value target in question communicated by courier. Captured enemy combatants—some subjected to enhanced interrogation techniques—fleshed out details. A name. A description. A satellite first spotted the courier’s van, and the drone circled. Ground crews in Afghanistan attached sophisticated laser devices and multispectral sensors to the drone’s underbelly, allowing the U.S. National Geospatial Intelligence Agency to create a three-dimensional rendering of that little piece of Pakistan. Details were so precise that analysts managed to compute the height of the tall man in question they nicknamed “the Pacer.” When it wasn’t gathering imagery intelligence (IMINT), the drone would sometimes fly from Jalalabad, Afghanistan, to Abbottabad and back, on signals intelligence (SIGINT) operations, listening to the routine chatter of Pakistan’s air defense forces so that U.S. National Security Agency analysts could determine patterns and alert configurations.

There was a scare just three weeks before the Abbottabad raid. While the drone was in transit over a Pakistani airbase, translators listening to the feed picked up Pakistani air controllers alerting crews to an orbiting American reconnaissance plane. Had the Sentinel—designed to evade detection and crucial to the operation—been outed? Moments later, when a Pakistani air controller ordered its fighter pilots to ascend to the altitude of “the EP-3,” Americans could exhale. The Pakistanis were merely practicing for the possible straying of an EP-3E Aries surveillance plane from its permitted flight path from the Indian Ocean into Pakistan.

To the list of units that participated in the Abbottabad mission—otherwise known as Operation Neptune’s Spear—there are others still unknown but whose value was inestimable. Some entity of the U.S. government, for example, figured out how to completely spoof Pakistani air defenses for a while, because at least some of the U.S. aircraft in use that night were not
stealthy. Yet at the core of it all were the shooters and the door-kickers of Red Squadron, SEAL Team Six, and a dog named Cairo. It took just forty minutes from boots-on-dirt to exfiltration, and although they lost one helicopter to the region’s thin air (notoriously inhospitable to rotary-wing aircraft), they expended fewer rounds than would fill a single magazine, snatched bags of evidence, and collected a single dead body.

They detonated the lost Black Hawk and slipped like phantoms back to Jalalabad, where DNA samples were taken from the body. They loaded into MH-47 Chinooks and again passed over now-cleared parts of Pakistan, then landed on the flight deck of the waiting USS *Carl Vinson* aircraft carrier. In accordance with Muslim rites, a short ceremony was held above deck (all crewmembers were confined below), and the body of Osama bin Laden was tossed overboard. The after action report doesn’t go into too much more detail than that, but the story of Abbottabad, of seamless integration between elite special forces and the intelligence community, includes many more layers. Lost in the sparkling details of the raid is the immense logistical challenge of providing reliable communications. There was a contingency plan; military interrogators were in place in the *Vinson*, along with CIA officers, just in case bin Laden was captured alive. The 75th Ranger Regiment played an unknown role in the proceedings. And someone had to later exfiltrate the CIA officers who were on the ground.

The next day, the world changed, but perhaps for no one more so than Red Squadron, SEAL Team Six, and its parent, the U.S. Joint Special Operations Command (JSOC), the president’s secret army. At the end of a ten-year American crucible of terrorist attacks and two wars, and as the psychic burden of its citizenry was made all the heavier by a collapse in the financial markets and a near-total dysfunction in government, Operation Neptune’s Spear offered the tantalizing suggestion that something in government *could* work and *did* work. Here, government agencies worked together in secret, in pursuit of a single goal. No boundaries separated the intelligence community from the military or one military unit from another. In parlance, it was the perfection of a process thirty years in the making—operations by joint military branches (“Purple”) conducted seamlessly with multiple agencies of
the intelligence community ("Gold"). It was the finest example of the apparatuses of state working in concert.

JSOC (JAY-sock) is a special military command established in 1980 by a classified charter. Its purpose is to quietly execute the most challenging tasks of the world’s most powerful nation with exacting precision and with little notice or regard. The Command is clandestine by design. When it makes mistakes, this often means that its singularly lethal techniques were applied to the wrong person, or that the sheer exuberance of being the elite of the elite dulled the razor-sharp moral calculus required of war fighters who have so much autonomy.

Before the terrorist attacks of September 11, 2001, JSOC spent twenty years quietly operating on the periphery of the armed forces, inventing tactics to do the impossible and succeeding in execution. It recruited some of the best soldiers and sailors in the world and put them through the most intense training ever developed by a modern military. The last ten years have witnessed JSOC transform itself and, in so doing, change way the United States and her allies fight wars. This is not an exaggeration or some attempt to burnish the Command’s mythos. Consider these two strategic objectives: suppressing the insurgency in Iraq so that conventional forces could regroup and mount a renewed counteroffensive; and degrading the capabilities of al-Qaeda. Without JSOC’s aggressive fusion of intelligence with operations in real time, and without its warp-speed tempo in tracking high-value targets, the United States would very likely still be slugging it out in the trenches of Iraq, and al-Qaeda would still be a credible threat to U.S. security. Whatever your view of the Iraq campaign or of war itself, and whatever your tolerance for the often nebulous morality of special operations missions, it behooves you to understand how this type of unconventional warfare evolved and what it means as the U.S. military faces significant spending cuts.

The bin Laden assassination bore all of the hallmarks of a modern JSOC operation. It was *joint*, involving military elements both white and black
from different branches of the armed forces. It was *interagency*, coordinated with the CIA and leveraging the assets of much of the U.S. intelligence community, largely without conflict. It was legal *enough*; the razing force was temporarily placed under the control of Leon Panetta, the director of the CIA, because JSOC isn’t strictly authorized to conduct operations in Pakistan. It was also resource-intensive, involving millions of dollars’ worth of secret equipment, significant satellite bandwidth, the attention of national policymakers, and a swath of military personnel belonging to various commands.

The JSOC is the secret army of the president of the United States. But what does “secret” mean when it involves units virtually everyone has heard of? By the numbers, JSOC’s cover has not changed, and its subordinate units must “study special operations requirements and techniques, ensure interoperability and equipment standardization, plan and conduct special operations exercises and training, and develop joint special operations tactics.”

Although that’s not a lie, it is to some degree obfuscation. JSOC does indeed plan and conduct special operations exercises, but it also conducts highly sensitive missions that require particularly specialized units. Many of those units have passed into American cultural legend. In many ways, this mythologizing began with Colonel Charlie Beckwith, the father of Delta Force and its first commanding officer, who wrote a book about his unit. Journalist Mark Bowden later revealed in astonishing detail the operational effectiveness, bravery, and brutal efficiency of Delta operators in sustained combat against overwhelming numbers as exhibited in the Battle of Mogadishu. (Ridley Scott would later commit the operation to celluloid in the film *Black Hawk Down.*)

Eric Haney, a former senior noncommissioned officer of Delta, produced a television show called *The Unit*, based on a book he’d previously written. Years earlier, Charlie Sheen and a camera crew were inexplicably granted access to the actual SEAL Team Six compound in Virginia to film a movie about DEVGRU. And, of course, the beat reporters in Fayetteville, North Carolina, where Delta is headquartered, and Dam Neck, Virginia, where DEVGRU is headquartered, know the names of the colonels and the captains responsible for the
military’s most daring forces.

So it’s not quite right to say that the two principal counterterrorism units of JSOC are secret, per se. A better description might be that they are officially unacknowledged. And though he can’t come out and say it, that’s what Ken McGraw, a spokesman for U.S. Special Operations Command, means when he tells reporters he won’t be talking about the “special missions units” with them.

This secrecy is for operational security, but it’s also to remove layers of accountability. JSOC doesn’t want most of our elected leaders to know what it is up to, especially in cases where things go wrong. And most of our elected leaders would rather not know, for the same reason. The secrecy apparatus of JSOC is prodigious in scope, and the Command camouflages itself with cover names, black budget mechanisms, and bureaucratic parlor tricks to keep it that way. It is heavily compartmentalized; the commanding officer of Delta knew about Neptune’s Spear only days before the operation. To get around Freedom of Information Act inquiries, JSOC security officers advise operators and analysts to “stick to paper and safes,” as one intelligence operative describes, meaning that for sensitive conversations, nonmilitary cell phones are preferable to classified military computer networks where every keystroke is recorded for use by counterintelligence investigators. JSOC currently participates in more than fifty Special Access Programs, each one designating a particular operation or capability. The programs are given randomly selected and always-changing nicknames and are stamped with code words such as Meridian and Principal that are themselves classified.

The Command’s secrecy can intimidate outsiders, but such an operational culture is a necessity. Among its most sensitive tasks in recent years has been to establish contingency plans to secure the Pakistani nuclear arsenal in the event that the civilian government falls in a military coup d’état. Here, policymakers are given a welcome choice—a choice not to know, which allows senior administration officials to reliably and honestly explain to the public and to Pakistani officials that they are confident in Pakistan’s ability to keep its arsenal safe without having to lie. Only a few political appointees
and members of Congress need to know the nature of such contingency plans. Incidentally, JSOC is also a key part of the classified contingency plans to preserve the U.S. civilian government in the event of a coup from the military or anyone else.

It’s clear, however, that the blankets of secrecy are fraying. “If you Google JSOC,” Admiral William McRaven, the commander of the Special Operations Command (SOCOM), a former DEVGRU operator and the previous commander of JSOC, has said, “you can find out pretty much everything you want to know.”

Yet JSOC has done a decent job of keeping to itself. The missions we hear about are but a fraction of the missions it completes. Likewise, JSOC has done a remarkable job of hiding from the public the incredible scope of the missions it is assigned and a fine job of preventing anyone outside the circle of trust from obtaining all but the slightest knowledge of its history, organization, function, and structure.

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“Brian,” the decorated Naval Special Warfare Development Group deputy commander who planned Neptune’s Spear, had expected to read a lot about his unit—some of it even true—and had participated in conversations with colleagues about the future of the cover narrative given to JSOC. Maybe it was time to loosen things up a bit. A big mission such as this would inevitably degrade JSOC’s capacity to some nontrivial degree, as the efficacy of special operations forces is often inversely proportional to the publicity given to the mission. Brian is no longer a DEVGRU commander, but as with all JSOC colonels and captains, his identity is considered a state secret, protected by the Defense Cover Program. (Brian is also not his real name; because Nicholas Schmidle referred to him as Brian in his excellent August 8, 2011, New Yorker article “Getting Bin Laden,” we will, too.)

As Brian worked with SEAL element planners and intelligence analysts in a warren of rooms at CIA headquarters in Langley during the first months of 2011, he was bemused to find that he was worried about success. He feared that in the operation’s aftermath, reporters might harass the Command for
more information about how it worked and what it did. This was, admittedly, a mild concern. There has always been some level of curiosity, and there always would be. A more paramount concern was that someone might leak details of the mission before it happened. The closer to the witching hour, the higher the risk of a compromise. Simply put, JSOC commanders didn’t trust everyone at the White House who would have to be “read in” to the operation. Admiral McRaven did, however, trust Panetta and the director’s decision to brief certain lawmakers on the House and Senate Select Committees on Intelligence. (Though no lawmakers were given operational briefings about the mission until Osama bin Laden was introduced to the Arabian Sea, the chair and ranking committee members were given cryptic notifications by Panetta that the operation would happen about six hours before it did.)

Thankfully, Brian’s initial fears proved unfounded. Yet what he did not expect were the throngs of tourists flocking to Dam Neck, Virginia, hoping to spot members of the team at known SEAL bars and haunts. Or the two motion pictures put almost immediately into production, with filmmakers contacting members of the squadron. Or the History Channel and Discovery Channel specials, with commentators either knowing nothing at all or revealing too much. (Even President Barack Obama participated in one of them.) Or the book by a former SEAL element commander that directly named the serving captain in charge of DEVGRU. If, as it seemed, JSOC were no longer secret, what would it be? How could it be effective when its existence was all but officially acknowledged and its activities openly reported?

When he assumed command of SOCOM, Admiral McRaven sent word to the Command: The story of U.S. special operations forces (SOF) is a good one, and he wanted to talk forthrightly with the American people about it. Americans could, and should, be proud of their SOF. There would by necessity be exceptions: he would protect the identities of those involved in missions, and he would never talk about missions themselves. In keeping with this promise, he declined to talk about Neptune’s Spear or any other mission for this book.
By some estimates, 80 percent of JSOC missions launched before 2000 remain classified. Operators from Delta Force and SEAL Team Six infiltrated China with the CIA and mapped the locations of Chinese satellite transmission facilities in the event that the United States ever needed to disable them. On more than one occasion, they’ve engaged Iranian troops on Iranian soil. They’ve fought in Lebanon, in Peru, in the Palestinian territories, and in Syria. They also spent a lot of time shooting up abandoned buildings in U.S. cities, rehearsing hostage rescue situations of every kind. The Command hoards contingency planners. When the president travels overseas, a JSOC team usually shadows him. Its members are trained to take charge should the mammoth security structure of the U.S. Secret Service break down.

Although the bin Laden mission may have been less complicated than other, less well-known operations, it was in many ways the culmination of decades of work. Since the terrorist attacks on September 11, 2001, no single entity—not even the CIA—has done more to degrade and isolate al-Qaeda, to prevent Hezbollah from funneling drug money to terrorists, or to check Iranian influence. Pick a threat, and there’s a good chance the Command is there “mowing the lawn.” (This metaphor is a favorite of JSOC flag and general officers.) The cost of doing so much—indeed, the necessary cost of success—is that the secret force is no longer impenetrably black. Its operators are tired. The casualty rate has been high. And a perennial, hush-hush debate inside the Pentagon has grown vociferous.

During the last decade, the United States has created the most impressive killing machine in the history of the world. What, exactly, will we do with it?

Notes

Chapter 2

Doers, Not Teachers

Delta Force, the secret U.S. Army counterterrorist unit, was the brainchild of Colonel Charles Beckwith, a U.S. Army Special Forces officer in Vietnam and a liaison there to the Special Air Service, Britain’s premier special operations force. He immediately recognized the U.S. tactical disadvantage in not having such a direct-action force of its own and pushed hard to make up for lost time. In 1977, the army finally acquiesced to the determined colonel and gave him the funds and the latitude to create the 1st Special Forces Operational Detachment-Delta, better known as Delta Force. As its name would indicate and as Colonel Beckwith later wrote, these men were not teachers (as is the formal mission of special forces—to act as force multipliers by training indigent forces in hostile areas), but doers.1

A little more than two years later, Delta’s first major hostage rescue, in Iran, ended in disaster. Operation Eagle Claw was a joint mission of U.S. Army Rangers and Delta Force operators transported by U.S. Air Force MC-130 cargo planes to a secret staging area designated as Desert One, in Iran. Central Intelligence Agency paramilitaries and U.S. Air Force combat air controllers had scouted the area. U.S. Marine helicopters from a U.S. Navy aircraft carrier were set to rendezvous at the base, but when harsh weather and mechanical failures beset the incoming helos, the mission was delayed and ultimately aborted.

The delay, however, created another problem: the idling aircraft at Desert One now required refueling. A miscommunication between an air force combat controller and a marine pilot caused a helicopter to collide with a transport plane. A total of eight airmen and marines died in the explosion. The survivors departed by MC-130 in an emergency evacuation. In addition to the loss of life, the United States suffered a crushing humiliation on the world stage, U.S. special operations forces (already generally held in poor regard by conventional military leadership) appeared second-rate at best, and Iranians gained abandoned helicopters and the intelligence within.
Following the disaster, Colonel Beckwith would immediately press for the formation of a new kind of “joint” command that he’d long proposed, which could train for and execute special operations requiring the best of each branch of the U.S. military. The muddled chains of command, branch rivalries, varied operating procedures, and ad-hoc arrangement that doomed Eagle Claw would be cleared away and reorganized into a unified force—a military within the military.\(^2\) By the end of 1980, the organization would essentially absorb the U.S. Army Delta Force and a new U.S. Navy unit called SEAL Team Six (a number inflated by its founder, SEAL Team Two commander Dick Marcinko, to alarm foreign intelligence services) and train alongside the newly minted 160th Special Operations Aviation Regiment (Airborne), or SOAR, an elite collection of the most highly trained rotary wing aircraft pilots in the U.S. Army.

In 1987, the organization was subordinated to a new U.S. Special Operations Command, though JSOC reported directly to the National Command Authority, meaning that its units could be tasked directly by the president and the secretary of defense. The Command existed on the fringes of military operations. If it worked in the shadows before, secretly deploying hunter-killer teams around the world to do the necessary dirty work of the White House, it would now largely vanish completely, but for occasional glimpses in such places as Bosnia, where it hunted war criminals, or in Panama, where it allegedly pursued Pablo Escobar.

The crucial role of JSOC units in the early phase of the campaign against terrorism (when al-Qaeda was largely concentrated in the Punjab) has been chronicled. Sean Naylor’s *Not a Good Day to Die: The Untold Story of Operation Anaconda* tells it best—so rich in detail, in fact, that Naylor was declared persona non grata by some JSOC commanders for revealing too much about their operations. In brief: Delta sent half of its force to Afghanistan. Major General Dell Dailey, then commander of JSOC, ordered a second task force of the less experienced DEVGRU SEALs to the region, setting off some territorial friction. Delta operated autonomously, while the SEALs operated with experienced and chagrined U.S. Army Rangers. Despite any simmering tensions, the various teams set about pursuing high-
value targets without the benefit of solid intelligence and almost no technical intelligence surveillance assets. Yet many operators on the ground had spent the 1990s on the hunt in Bosnia and Kosovo and leveraged their capabilities to the fullest. In March 2002, the men killed as many as five hundred Taliban and al-Qaeda fighters in the Shahi Kot valley in Afghanistan’s Paktia Province, working alongside Green Berets and U.S. Army infantrymen from the 101st Airborne Division. Early failures (such as losing Osama bin Laden at Tora Bora) were matched with successes (for example, the Delta Force capturing Saddam Hussein).

Details of later successes, such as the direct action mission that killed Abu Musab al-Zarqawi, the leader of al-Qaeda in Iraq, are still coming to light. In this baptism by fire, is easy to imagine the remnants of problems that beset Somalia falling away—no more reliance on nonmilitary operators, no more weak intelligence, no more rivalries. JSOC’s missions in the global war on terror were taxing, but they were normal JSOC missions—reactive, shrouded in secrecy, and peripheral to the larger war effort. In Iraq, several small JSOC teams covertly infiltrated the country before the war officially began. Their goal: find and, if needed, secure chemical and biological weapons Saddam was sure to use against the allied forces. General Stanley McChrystal, the incoming commander of JSOC, would change all of that. He would set the Command on the decisive course that put a controlled pair in Osama bin Laden.

Notes

2. Ibid., 331.
Chapter 3

Interrogations and Intelligence

The insurgency in Iraq caused panic at the Pentagon. The lack of tactical intelligence was a nontrivial problem. In early June 2003, U.S. commanders in Iraq launched Operation Peninsula Strike, the first of the efforts to sweep away the underbrush that allowed the Fedayeen Saddam to survive. The operation was not a success. On September 12, as violence against coalition forces spiked, Secretary of Defense Donald Rumsfeld sent a memo to Stephen Cambone, the undersecretary of defense for intelligence. “I keep reading [intelligence community] intel,” he wrote. “It leaves one with the impression that we know a lot—who the people are, what they are doing, where they are going, when they are meeting, and the like. However, when one pushes on that information it is pretty clear that we don’t have actionable intelligence.” Furthermore, Rumsfeld didn’t “have good data on the people we have been capturing and interrogating” in either Iraq or Afghanistan. “I don’t feel I am getting information from the interrogations that should be enabling us as to answer the questions I’ve posed.”

It is not hard to see how, from this urgent need, a policy of enhanced interrogation techniques might develop, which in the frenzy of war could turn into torture. In 2004, according to a recently declassified memorandum written for Rumsfeld, three years after the start of the war, JSOC now “operated from a reactive rather than a proactive posture and was not structured for the complex, extended-duration operations they currently conduct.” JSOC, he said, “lacked the ‘find and fix’ intelligence fusion capabilities essential” to the war on terrorism. Its intelligence capabilities, “particularly in human intelligence, were very limited.” Rumsfeld, in an interview with one of the authors, would say, “We elevated them and put them on the spear point.”

Such was the situation when Rumsfeld named then Major General Stanley McChrystal as commanding general of JSOC. General McChrystal, the former commander of the 75th Ranger Regiment and a task force
commander in Afghanistan, had just completed a Pentagon tour as vice director of operations on the Joint Staff. He had impressed Rumsfeld, who admired him for defending the Iraq war in public, despite harboring private reservations.²

McChrystal had, with the help of Marshall Billingslea, the Pentagon civilian in charge of special operations, painstakingly drafted the execute order that allowed JSOC to pursue terrorists in a dozen countries outside Afghanistan and Iraq, subject to various rules imposed by the National Security Council. (JSOC could not set foot in Iran; it had to jump through hoops to chase terrorists in Pakistan; Somalia was an open zone.) McChrystal, compact, intense, and stone-faced, was known for his Ranger high-and-tight, his minimal tolerance for bureaucracy, and his talent as a constant innovator. (To wit: Before he put on his first star, he had rewritten the U.S. Army hand-to-hand combat curriculum.) He is at once disarming and intimidating in person. He struck some subordinates as a monk, largely because he was an introvert, and the nickname JSOC personnel give to their boss—the Pope—became synonymous with McChrystal, more so than with any JSOC commander, before or since. (The Pope moniker traces its lineage to Janet Reno, the attorney general under President Bill Clinton, who once complained that getting information out of JSOC was like trying to pry loose the Vatican’s secrets.)

McChrystal slept in tents with his men. Once, General Doug Brown, the commander of the U.S. Special Operations Command and McChrystal’s boss, visited a JSOC team forward deployed in a war zone, expecting that his office would befit his three-star billet. It turned out to be an austere eight-foot by ten-foot prisonlike cell. It wasn’t for show that McChrystal accepted the designation of commander, Joint Special Operations Command Forward—he was always with his men. Indeed, under his command, JSOC’s headquarters back in Fayetteville often had little to do. McChrystal brought everything with him. But, as a decorated Ranger colleague of McChrystal’s recalls of the period, “We were cowboys in 2003 and 2004 . . . we were accountable to no one.”

McChrystal inherited a command that included the military’s brightest
and boldest but also most overburdened. Indeed, his predecessor, Major General Dell Dailey, wanted to scale back JSOC’s missions after Afghanistan in order to give the teams time to regroup. The Rangers, in particular, had just finished Operation Winter Strike, clearing large swaths of territory in Afghanistan at the end of 2003. Task Force 1-21, JSOC’s regional task force, followed. The demands on JSOC were prodigious, and they lacked a strategy or central focus for success. Even though the spigot of money for counterterrorism operations was open, the Command often had to beg to get a fixed-wing aircraft in the air. Simply put, JSOC lacked the resources, the structure, and the strategy to carry out its mission.

McChrystal’s first instinct was true to his infantry roots: he wanted more combined arms training for the units, but he quickly realized he had a much larger problem. As the war in Iraq turned ugly, no one really knew how to solve what in military terms was known as the “OODA problem.”

An OODA loop is a term coined by the late military strategist John Boyd to refer to the way fighting organizations adapt: observe, orient, decide, and act. The challenge of fighting insurgencies is that smaller groups tend to outlast their larger adversaries because small groups have OODA loops measured in nanoseconds when compared with the lumbering decision chains of major world armies. The enemy is thus always a step ahead of even armies with the best technology and hardened soldiers.

Complicating matters was the existence of excess “blinks” between the development of a piece of intelligence and its use on the battlefield. Most of the actionable intelligence the United States received came from foreign sources (the Brits were particularly good in Iraq, as were the Kurds). The National Security Agency had yet to get a full read on Iraq’s rudimentary but highly distributed cell phone network. The U.S. intelligence community bickered over high-tech surveillance resources, and agencies refused to talk to one another. British journalist Mark Urban, writing in Task Force Black, a narrative history about U.S.-UK cooperation in Iraq, quotes a senior British officer as saying that the CIA’s refusal to share information with even its own countrymen was “catastrophic.”

Such confusion and desperation are two reasons harsh interrogations
seemed morally permissible at the time. At the very least, enemy combatants would say something, which would set in motion kinetic operations. This, at least, gave the appearance of movement toward a goal.  

In the early days of the chase for al-Qaeda and the Taliban in Afghanistan, the Central Intelligence Agency and the U.S. Defense Intelligence Agency (DIA) did most of the interrogating. JSOC intelligence gatherers watched but did not participate. By October 2002, an internal JSOC assessment of interrogations at Bagram Airfield, Afghanistan, and Guantanamo Bay, Cuba, found that the resistance techniques of enemy combatants “outmatched” the interrogation techniques of U.S. forces. Higher headquarters was not satisfied with the results, and JSOC picked up the rope. The Command established a task force to determine whether its operators should directly interrogate the “designated unlawful combatants” they captured. One month later, U.S. military Survival, Evasion, Resistance, and Escape (SERE) instructors taught certain members of JSOC the finer points of harsh interrogation. (These operators, like all members of the special operations forces community, had previously attended SERE school as prisoners so as to learn how to effectively resist torture.) Around this time, some JSOC operators were read into a classified program called MATCHBOX that included direct authorization to use certain aggressive interrogation techniques in the field. (For example, the best way to throw a detainee against a wall.)

Who chartered MATCHBOX (also known by the unclassified nickname COPPER GREEN, as revealed by journalist Seymour Hersh) remains a mystery. No one wants to take credit for it. Yet as a result of the program, JSOC adopted a standard operating procedure (SOP) for Afghanistan that included the use of stress positions, barking dogs, and sleep deprivation, among various other physical inducements.

When JSOC Task Force 6-26 set up operations in Iraq, it extended the practice, copying the SOP in its entirety, essentially only changing “Afghanistan” to “Iraq” on its letterhead. The primary mission of 6-26 was
to hunt, kill, or capture high-value targets. At the top of the list: former senior members of the Baathist regime, followed by al-Qaeda and foreign fighters who flocked to the war zone en masse seeking a pound of Uncle Sam’s flesh.

Just after the fall of Saddam Hussein, U.S. Army Rangers claimed a small Iraqi military base near Baghdad International Airport for use by special operations forces. Camp Nama, as it is called, was purposed to hold enemy combatants thought to possess actionable intelligence about the locations of 6-26 targets. The limits of enemy interrogation as defined in a revised, more humane SOP soon fell by the wayside. Personnel from Task Force 6-26 (with the participation of members of the DIA) subjected prisoners to intense physical, psychological, and occasionally lethal interrogation.

The Senate Armed Services Committee investigation into detainee abuse in Iraq includes several harrowing accounts of the interactions between conventional military officers and JSOC commanders. Reportedly, special operations officers acted as though they were above the law, and the Senate review later concluded that JSOC interrogators regularly brutalized their detainees. At the time, members of both the Central Intelligence Agency and the DIA sent word up their respective chains of command that JSOC was possibly breaking the law. An effort by the Defense Department requiring JSOC to adhere to its own set of interrogation standards was ignored. One senior Joint Staff official testified that he would give 6-26 commanders a copy of the new SOP to sign every day. Every day, it would be “lost.” It was never signed.

During numerous visits by outside personnel, higher-ranking non-JSOC officers halted interrogations midway. JSOC personnel seemed to be flouting their harsh techniques with impunity. It got so bad that by late 2003, the DIA, the Federal Bureau of Investigation, and British interrogation teams stopped all cooperation with JSOC.

The lack of accountability was startling to long-term military interrogators such as Lieutenant Colonel Steven Kleinman, who had been dispatched to Iraq to review and modify JSOC detainee operations. One Iraqi was picked up for allegedly knowing a lot about bridges. The bridges in
question would turn out to be of the calcium-and-enamel variety—he was a
dentist. Kleinman later testified that he considered the JSOC facility to be
“uncontrolled.”

McChrystal commanded JSOC for more than a year before the harsh
interrogations finally stopped. People close to McChrystal say that when he
toured Camp Nama facilities, the interrogators would be on their best
behavior and seemed to be following the classified SOP he had approved. By
the end of 2004, however, it became clear that the abuses were habitual and
institutionalized. According to Urban, the British Special Air Service (SAS)
informed McChrystal that it would no longer participate in operations where
detainees were sent to “black” sites, which now included a kennel-like
compound near Balad, Iraq, and another at Bagram Airfield in Afghanistan.
Up until that point, SAS units had been instrumental in helping JSOC
uncover the rudiments of an intelligence railway that allowed al-Qaeda to
penetrate Iraq so easily.

McChrystal ordered deputy commanding general Eric Fiel to quietly
review the practices at Camp Nama. The review, which remains classified
and locked in a vault at Pope Army Airfield, resulted in disciplinary action
against more than forty JSOC personnel. Several promising careers—
including that of the colonel responsible for Nama at the time of the abuses
—were ended. McChrystal has since told associates that he did not fully
appreciate the degree to which interrogators at all levels lacked guidance and
direction.

When the extent of the abuses at Camp Nama was made public,
Undersecretary of Defense Cambone was furious with McChrystal, accusing
the general of abusing the authority given to him. McChrystal, to put it
mildly, did not appreciate being blamed for a program he did not create and
by most accounts knew almost nothing about. A still-classified internal
Pentagon investigation of McChrystal was initiated on Cambone’s
insistence. Its conclusions are not publicly available, but it is known that
they did not undermine confidence in the Pope. (Cambone did not respond to
a request from us to discuss the subject.)

In some ways, the detainee abuse scandals gave McChrystal a platform to
clean house at JSOC, and by most accounts he did. He flew to JSOC operating locations around the world and insisted that the era of harsh interrogations—except in the direst of circumstances—was over.

“My sense is that we just didn’t know much about how to work or handle the detainees,” said a senior military official whose service at JSOC spanned the Afghanistan and Iraq campaigns. “The mistakes that were made during our initial forays into detainee exploitation were more about ignorance and just trying to figure out this art, rather than any malicious attempt to violate any policies or regulations. We also suffered from a lack of trained personnel who didn’t understand what was effective interrogation.” He added, “Then General McChrystal’s leadership drove the need for a fix and professionalizing the force, and then General [Michael] Flynn drove the execution.”

Notes

2. McChrystal’s views on Iraq, from a senior official who discussed it with him contemporaneously.
Chapter 4

Find, Fix, and Finish

General Michael Flynn is the sixth eldest of nine children and grew up in a poorer section of gilded Newport, Rhode Island. He is slender, with fierce, dark eyes. According to his brother Charles, a fellow army general, “You don’t get out of a family like that without learning how to scrap.”

Flynn first worked with Stanley McChrystal in the Afghanistan campaign, when the former was the intelligence officer for the army’s XVIII Airborne Corps and the latter assumed command of Task Force 180. At the start of the Iraq campaign, Flynn became a senior special forces intelligence officer, and McChrystal was called to Washington for Joint Staff duty. Secretary Donald Rumsfeld soon appointed McChrystal to head JSOC, and a year later, McChrystal asked Flynn to be his top intelligence officer.

To the extent that a man such as Flynn has martial fantasies, one has always been to integrate intelligence and fight a war in real time. In Afghanistan, early efforts at fusion teams (called Cross Functional Teams) were modestly successful but “depended on voluntary participation and their authorities were limited,” according to an influential study by National Defense University academics Christopher Lamb and Evan Munsing. At Bagram Airfield, the first formal Joint Interagency Counter-Terrorism Task Force helped several task forces in the early phase of the al-Qaeda conflict. Yet intelligence analysts did not sit in the same meetings as operators. Real-time access to databases was limited. Everyone understood the concept—battlefield forces needed intel—but no one really knew how to execute it. And everyone was obsessed with keeping JSOC’s secrets a secret, even at the cost of collecting and sharing actionable intelligence.

As his intelligence officer (or J-2, or “two”), Flynn operated with General McChrystal’s full authority. He leveraged his friendships with senior members of U.S. intelligence to send more analysts into the field. By force of personality, and during the course of several years, Flynn convinced officials everywhere from the State Department to the Internal Revenue
Service to staff the experimental new interagency fusion teams he was
developing. He crossed Iraq, trying to better integrate JSOC’s mission
(which mostly involved hunting high-value targets) with other special
operation forces and conventional units. (Before Flynn’s efforts began, when
JSOC conducted a combat mission, the battle space would be cleared of
conventional forces lest anyone disturb the secrecy of a black operation.)
Flynn discovered that most intelligence and interrogation reports collected
by JSOC units were stamped ORCON, meaning, “originator controlled,”
which effectively precluded anyone else—even the Central Intelligence
Agency (CIA)—from seeing them. He wondered how often conventional
forces missed an opportunity to capture or kill a bad guy because they
couldn’t gain access to JSOC task force intelligence. Flynn issued an order
that JSOC information should be classified only at the Secret level, bringing
tens of thousands of intelligence analysts around the world into the fold.

McChrystal and Flynn slowly coaxed the Federal Bureau of Investigation
and the Defense Intelligence Agency back into JSOC interrogations and
insisted to the agencies that he would deal with abuse complaints directly.
McChrystal even charmed the CIA, bringing its main special operations
liaison into his secure video conference calls (but he instructed the man to
never, ever tell his superiors at Langley untruths about what JSOC was up
to). McChrystal was famously enthusiastic for video conferencing and used
the technology to “gather” officers, operators, ambassadors, politicians, and
members of the intelligence community around the world in the same room
to resolve issues and design strategy. In fact, his unit spent more than
$100,000 on video teleconferencing bandwidth during the early stages of the
counterinsurgency operation in Iraq. As his counterterrorism efforts in the
Horn of Africa increased, he likewise coordinated regular videoconferences
between CIA station chiefs, U.S. ambassadors, and policymakers in
Washington.²

If it surprises you that it took years for the CIA—which is tasked with
gathering intelligence on terrorists—to establish a regular, senior-level
presence in daily conference calls with the military units tasked with killing
terrorists, you can begin to sense the frustration that fed Flynn’s and
McChrystal’s determination to set things right.

Changing the culture of a mysterious organization such as JSOC is hard, and it took more than three years before Flynn and McChrystal could create the real-time, flattened battlefield that allowed coalition troops to significantly reduce violence in Iraq. General Doug Brown of Special Operations Command eventually pulled in more than a hundred liaison officers from agencies and entities across the government, telling them that they were expected to be part of the team, not just note takers at briefings.

McChrystal and Flynn came to realize around the same time that JSOC’s operational tempo could be rapidly stepped up by introducing radical decentralization and radical transparency into an organization that had always been centralized and extraordinarily discrete. Flynn once told one of McChrystal’s deputies that his “ah-ha” moment came when he saw that the key to actually doing tactical military intelligence right was as simple as making sure that everyone had access to everything.3

At another moment in history, with any other unit, these insights might not have produced even a ripple of change, much less a wave. Yet JSOC was special and feared, and the bureaucracy paid extra attention to it. McChrystal was uniquely suited for the challenge—humble and exacting, capable of incorporating into his inner circle personalities (such as Flynn’s) that were the opposite of his own.

And there was urgency. Nothing but JSOC’s networked warfare was working. Not the CIA’s operations, not whatever the National Counterterrorism Center thought it was, not outsourcing intelligence to liaison organizations. JSOC’s success begat success. Iraq was a horrible place to be as JSOC’s operational strategy gelled. Sometimes, Iraqi police would have to cart fifty dead bodies a day to the morgue in Baghdad alone. Lieutenant General David Petraeus, the commanding general of the Multi-National Force in Iraq at the beginning of the McChrystal era and then, in his second tour, as the usher of President George W. Bush’s surge, had a slightly more measured view of JSOC’s success; he knew how much his conventional forces were contributing to missions that JSOC was supplementing, and he was not above pulling rank to refuse to authorize a
JSOC mission when he felt it would compromise another strategic goal. Yet he deeply respected McChrystal for his strategic vision. Likewise, McChrystal saw in Petraeus the model of a warrior-intellectual that he aspired to be. The two men got along well; had their relationship not developed, it would have been disastrous to the mission. Petraeus, now the director of the CIA, is on better terms with special missions unit commanders than any of his predecessors ever were, because they served under him just prior to his appointment.

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A newly minted real admiral named William McRaven was equally instrumental in their endeavors. The former SEAL Team Six member and SEAL Team Four commander had just spent eighteen months as a director on the National Security Council (NSC). He’d been itching to get back to the combat zone during his tenure at the NSC, but his time at the top of the chain proved useful. He now knew the bureaucracy in ways that McChrystal and Flynn did not, and he knew its trigger points. McRaven was given command of the Combined Joint Special Operations Task Force–Arabian Peninsula, which oversaw all JSOC operations in Iraq. He had a direct line to the White House through his former boss, Michele Malvesti, the senior National Security Council director for combating terrorism. (They shared adjoining desks in the Eisenhower Executive Office Building.)

After mending old wounds and reorganizing the bureaucracy, the three men turned their guns to the doctrine itself. Flynn and McChrystal wanted to operationalize what Flynn calls “network-centered warfare,” a PowerPoint term that conceals as much as it reveals. With Malvesti’s help, they developed a new model of using intelligence to aid combat against terrorists and insurgents. Technology now allowed (at least, in theory) for the reduction of blinks between collecting and exploiting a piece of intelligence. The model went by the initials FFFEAD, or F3EAD—find, fix, finish (that is, the getting of the bad guys), exploit, analyze, and disseminate (that is, using the first get to get other bad guys). The “finish” of F3EAD—the kill—is certainly the most dangerous part of any operation. “But exploitation is
where you truly made your money and enabled you to go after a network, vice a single target, once we all embraced F3EAD, which was relatively quickly,” said a U.S. Army Ranger who served in Iraq. “This was the strength of McChrystal and Flynn. They believed in the process and then set out to resource it.”

As simple and intuitive as it sounds, F3EAD was terrifically difficult to actually do. Most soldiers—even the elite special operations forces—were trained on a much less elegant model that privileged firepower and hardware over thinking and strategizing. For Flynn, the key word in the model is “disseminate.” Information, he told one colleague, “was fucking less than worthless” if it couldn’t be widely distributed. This meant that JSOC’s culture had to change. No longer could it be some secret task force. It had to open the tent. Meanwhile, high-level commanders in Iraq had to learn to be patient.

Notes

3. Based on interviews with firsthand participants.
4. From the author’s brief interview with Richard Holbrooke, the special envoy to Afghanistan and Pakistan, shortly before his death.
Chapter 5

The Tools for the Job

At the National Security Council (NSC), Admiral William McRaven chaired an informal task force that took inventory of the secret aircraft and surveillance platforms of the United States—what the Central Intelligence Agency (CIA) had, what the air force had, what JSOC had, and so on. They also evaluated the specialized and highly classified Pentagon units that designed and fielded such technology. The traditional Pentagon acquisition process is lethargic, but shortly afterward, and in a rare show of intellectual synergy, Congress authorized an enormous buying spree in 2003 and 2004.

Today, drones are a ubiquitous presence in global airspace. Without them, it’s possible that Osama bin Laden would still be alive. Yet when General Stanley McChrystal assumed command of JSOC, the Command didn’t have one to its name. There were, in fact, no intelligence, surveillance, and reconnaissance (ISR) resources whatsoever. General Michael Flynn had to beg for time on specialized collection platforms such as Medium Altitude Reconnaissance System airplanes, with which he could track insurgents on the ground, and RC-12 Guardrails, innocuous jets that contain highly sensitive signals intelligence collection equipment. With the NSC’s assent, Flynn expanded a unit called the Technical Development Activity, which flew secretly developed, manned reconnaissance and surveillance aircraft. He chained it to JSOC for use in Iraq, Pakistan, and, later, Yemen.

Although the CIA was reluctant to provide institutional resources, the National Security Agency (NSA), under the directorship of General Keith Alexander, was quick to see the benefits of giving Flynn the best personnel and manpower. Several joint CIA/NSA Special Collection Service teams rotated through Balad. Alexander personally participated in a secure teleconference with General McChrystal at least once a week. He sent dozens of engineers directly to Flynn’s headquarters in Balad and to other forward deployed sites, where they implemented a TiVo-like system for signals intelligence that allowed analysts to rapidly process and analyze the

[60]
take from the NSA’s near-total tapping of the telecom networks of several Iraqi cities. USSOCOM Technical Surveillance Elements set up cameras and RFID-chip (radio frequency identification chip) tracking sensors. A quiet Pentagon procurement office, the Rapid Response Technology Office, and a classified department called the Special Capabilities Office, provided more than three hundred technological assets to assist intelligence and special military operations in the CENTCOM (U.S. Central Command) theater.\(^1\) About 60 percent of them went operational.\(^2\) The army’s Technical Operations Support Activity figured out how to merge sensor data collected on the ground with experimental drones in the air, providing what commanders call “persistent” surveillance. Commanders could now track the bad guys and see their activities 24/7 and could analyze patterns with incredible efficiency. (One promising project involves sensors attached to balloons—the Persistent Threat Detection System.) Tactical satellites were fielded—by 2009, units could task them to view multiple targets and track as many as ten thousand objects per pass. (The unclassified Pentagon office that works on these projects is called the Operationally Responsive Space Office and is run directly out of the Office of the Secretary of Defense.)

One operational technology that was first attached to drones and later to Artemis geostationary satellites helped JSOC (and then Task Force ODIN in Iraq) figure out where IEDs (improvised explosive devices) might be placed by analyzing how recently the soil had been disturbed. A joint National Geospatial-Intelligence Agency (NGA)–U.S. Strategic Command project called NGA SKOPE allowed JSOC units to merge data collected from virtually any intelligence source and predict, based on patterns of movement, where insurgents were likely to be and what they were likely to do. (To understand how this works, imagine sensors surreptitiously placed on cars belonging to suspected IED planters. Based on the cars’ locations and orientations during an IED attack, the SKOPE cell could predict future attacks based on similar movements.)

Three technologies developed by the NSA during this short burst of time proved pivotal. One, which the government has asked us not to describe in detail, involves the ability to pinpoint cell phone signals to within inches of
their origin. (In their book *Top Secret America*, Dana Priest and Bill Arkin refer to an “electronic divining rod” that allowed operators to hone in on cell phone–using bad guys as though the operators were using metal detectors at a beach.) Another involves the use of RFID chips in what can only be described as an ingenious way. (Again, details are withheld because the technique is highly classified and still in use.) One technique that SOCOM has shared with researchers, originally code-named BLUE GRASS, involves attaching tiny RFID emitters to vehicles and tracking them through a variety of different platforms. In 2005, Project SONOMA helped analyze where cells of insurgents planning IED attacks were clustered. And JSOC was using dyes and perfluorocarbons to track insurgents before the rest of the military was aware that this capability existed.

It also helped when NSA scientists figured out a way to “un-wipe” supposedly cleared cell phones and extract every number ever called by that phone. When a cell phone is captured at a site, the NSA techs download its data using the new technique and feed it to other analysts who are monitoring the data pulled from cell towers across Iraq. If two numbers match, a team is sent to the area to investigate. The NSA, with help from British intelligence, has created a massive database of computer hard drive and thumb drive identification numbers, allowing analysts to trace connections among militants through the technological litter left at sites.

JSOC fusion teams and their augments also benefit from the completion of a comprehensive biometrics database that allows for quick identification of insurgents, as well as a quiet revolution in DOCEX (or document exploitation) techniques. Using technology relying on sophisticated algorithms that assign values to data based on the probability that a faint “I” might indeed have been an “I,” DOCEX specialists can reconstruct documents that have been burned. Meanwhile, the Defense Intelligence Agency (DIA) consolidated its media exploitation center and figured out a way to speed up its analysis. As late as 2003, lumbering military transport planes had to fly into Andrews Air Force Base in Maryland to drop off unsorted pocket litter by the crate, leaving the DIA’s teams with reams of paper and little context.
To the credit of the Department of Defense and SOCOM, most of these technologies were classified only until they were fielded and then were quickly downgraded to allow the people fighting the wars to gain access to them and push their limits. If the intelligence agencies had been stingy—if they’d been unwilling to relax security controls or had set up shielding for special access programs—the fusion cells that beat back the insurgency in Iraq and have been used by U.S. forces ever since would simply not have existed. NGA’s SKOPE cell, for example, was highly classified for about two months. Now it is ubiquitous, and its main architect is permitted to acknowledge its existence in the press.6 “A lot of organizations like this—the Rapid Equipping Force, the Robotics Systems Joint Program Office, the Joint IED Defeat Organization, the Biometrics task force, and probably down at JSOC—were essentially start-ups deploying technologies that were unique to the threats of counterinsurgency,” said Brian Smith, an air force captain who worked on energy projects for the Rapid Equipping Force during the early years of the Iraq war.

In October 2011, Michael Flynn, the former JSOC J-2, was promoted to lieutenant general and appointed a deputy director of national intelligence. He has been outspoken about the need for reform within the military intelligence community. Many of his fellow flag and general officers in the intelligence community consider him to be too outspoken. His nomination took more than eight months to gestate, as forces within the Pentagon—inside the army, in particular—pushed back, whispering into the ears of senators that Flynn’s tactics did not work when he followed McChrystal to Afghanistan in 2009. Some Democratic senators on the Armed Services Committee believe that Flynn’s championing of bulk data analysis provided a brutally efficient way to kill too many innocent Afghans and may not have been as effective as the military suggests. By this, they mean that instead of targeting people, infantry and special forces units targeted telephone numbers—they would target gatherings of people who had been surreptitiously tagged with chemicals or RFID chips, even if they didn’t
precisely know who these targets were.

Officially, the DIA’s Joint Interagency Task Force–Counter Terrorism vetted the targets, with input from the NSC. In reality, the Joint Prioritized Effects List—the target board—had a lot of phone numbers that a computer had associated with the broad periphery of the insurgency, rather than names of specific terrorists. Flynn’s response to this is simple: for one thing, raids weren’t ordered because some Afghan villager happened to call a Taliban commander; commanders had to have a better reason to send Americans into harm’s way than that. One of the hardest tasks that Flynn’s intelligence team faced was figuring out whether contacts between innocent Afghans and those associated with the Taliban were innocent or nefarious. Doing that required a significant amount of collection and analytical time. It required a granular level of knowledge about each village. Plenty of people were collecting all sorts of information—Provisional Reconstruction Teams, Human Terrain Teams, Civil Affairs officers and intelligence gatherers—but it wasn’t being fused or analyzed or appropriately disseminated.

Flynn wanted to create a middle level of what he termed “information brokers,” who could analyze everything and determine patterns that would allow all parts of the Afghanistan effort—especially the mission to rebuild civil society—to succeed. As he described it, “This vast and underappreciated body of information, almost all of which is unclassified, admittedly offers few clues about where to find insurgents, but it does provide elements of even greater importance—a map for leveraging support and for marginalizing the insurgency itself.” He attempted to divine, in villages and provinces, who was good and who was bad and attempted to flesh out (as much as possible) which members of the Taliban were secretly cooperating with the State Department or the CIA and which members were susceptible to U.S. influence. But Washington saw American body counts and ordered that General McChrystal, as the commanding general of the International Security Assistance Force, force Flynn to reprioritize his resources. He had to stop the flow of money and trainers from Iran who were arming insurgents. He had to counter growing Pakistani influence in the region and deal with the nettle of cross-border political complexities. And he
had promised to provide conventional forces in Afghanistan with the same high-grade, high-velocity intelligence that special operations forces received.\textsuperscript{8}

Notes

2. Ibid., 24.
5. Interview with a former Defense Intelligence Agency official.
Chapter 6

A Known Unknown

For those not clued into JSOC operations, the June 2006 mission to capture or kill Abu Musab al-Zarqawi was the first hint that something fairly magical was happening. Flynn would later recall that it took more than six hundred hours of surveillance time between the first tip and the kill. After Zarqawi, the White House began to rely on JSOC for just about everything. Congress was in love. Senator Evan Bayh of Indiana requested and received an unprecedented (and secret) billion-dollar earmark for intelligence, surveillance, and reconnaissance assets on the basis of a battlefield conversation with Generals Stanley McChrystal and Michael Flynn.

“Chris C.” joined the army after reading about the heroics of Americans in Fallujah. A few months out of West Point, he was deployed on a fifteen-month tour of Iraq as a battalion-level intelligence officer. In order to find insurgents, his soldiers worked from scraps of human intelligence—a rumor here, an overheard conversation there. Based in the Salahuddin province north of Baghdad, they had shared access to a single drone for overhead surveillance. There was no National Security Agency presence and thus no real signals intelligence. Sometimes, a JSOC task force would inform Chris’s commander that they were about to raid a part of the city. “We were told: the Task Force is going into our area, and here is the grid they’re going to hit. I would look at the grid and say, ‘Oh, I know who they’re going to hit, because we’d just been there looking for the same person.’”

In Balad, General Flynn had come to appreciate the wealth of information that intelligence collectors with conventional forces could provide. He recognized that such intel could benefit the regular troops, as well as the JSOC task forces. While JSOC soldiers went home every three months, conventional forces were on twelve- to fifteen-month rotations.

McChrystal and Flynn knew that JSOC needed to better understand the populations their task forces worked among—an intelligence capability that only units such as Chris’s could provide. Knowing the sinews of a local
community could help the U.S. military establish degrees of trust with tribal and authority figures. General David Petraeus, for example, would use early successes by conventional commanders such as General H. R. McMaster, the commander of the 3rd Armored Cavalry Regiment in Iraq, to develop his counterinsurgency doctrine. “JSOC, earlier than any other element in the U.S. government, understood the importance of messaging and how actions can influence populations,” said Mike Leiter, the former director of the National Counterterrorism Center.¹

Officers such as Chris C. had an institutional knowledge of tribes, geography, and environment that had eluded JSOC. Flynn was determined to merge the two systems. “Ninety percent of the intelligence we needed was not in JSOC,” he told one observer in 2010.²

Indeed, Chris’s unit provided the tip that led the JSOC task force to Abu Abdul-Rahman al-Iraqi, the spiritual adviser to al-Zarqawi. Chris’s officers had long watched an internecine tribal conflict north of the Tigris River. (One tribe was angry that the United States was targeting the other tribe, which increased the heat on everyone involved.) Just after a firefight, Chris got word that Haj al-Bazari, a high-ranking al-Qaeda in Iraq operative, had been injured and taken to a cousin’s home in the area. A database crosscheck revealed that one of al-Bazari’s cousins had a wife who was an OB/GYN. Chris’s team searched her house and found bloody gauze and a truculent doctor refusing to tell anyone what had happened. She was detained. When her husband arrived at the American detention center, he pleaded for her release. He had little money but was a member of a major facilitation network that included former Baathist elements funded by Syria. He offered the Americans information instead.

Chris’s commander contacted a JSOC task force. They flew in and grabbed the man and interrogated him. That was the last time Chris heard about the guy until, out of the blue, a JSOC shooter team came by to thank him. (This was another early McChrystal-Flynn innovation: let the “black” guys talk to the “white” guys, or allow units that operate in the shadows to work with units that operate in the sunlight.) “They told me that the guy was a high-level financier and that he had led them to Sheik Abdul Rahman,” he
By December 2007, when Chris’s second tour of duty in Iraq began, JSOC task forces were fully integrated with the rest of the effort. Chris’s battalion was assigned to the eastern half of Mosul and was constantly fighting to keep the province from collapsing under the weight of foreign fighters, many from Saudi Arabia. Communicating with the JSOC team in the area, Task Force 9-14 (also known as Task Force North), was much easier than before.

Chris had access to their interrogation reports and worked with a TF 9-14 intelligence officer to devise a strategy for his area of operation: they would target specific mid-level operatives who might lead to the bigger gets. His team produced a steady stream of intelligence reports about local politics and conditions on the ground. Not once was he denied access to JSOC products, and TF 9-14 was literally a phone call away. “Once this started happening, it was just awesome in terms of what we were able to do,” he said.

Here is how a colleague of General Flynn’s described the change in procedures on the ground: “What would normally happen is: the shooters would kick down a door and snatch everyone and drag them to the front room, and then take everything with them, and put it in a trash bag. The bad guys would be taken to a detention facility and the pocket litter would come back to [the intelligence analysts]. Flynn thought this was stupid. Instead, he gave the shooters—think of this—the Delta guys, mini cameras, and schooled them in some basic detective techniques. When you capture someone, take a picture of them exactly where you captured them. Take detailed notes of who was doing what with what. Don’t merge all the pocket litter.”

He continued, “Then, the shooters were supposed to e-mail back an image of the person they captured to Balad [JSOC’s intelligence headquarters], where analysts would run it through every facial recognition database we have, or fingerprints or names, or what have you. We’d get hits immediately. And so our intel guys would radio back to the team in the field, ‘Hey, you’ve got Abu-so-and-so, or someone who looks like them. See if he knows where
And that’s what the shooters would do. They’d tell their captured insurgents that for a price, they could help them. A senior JSOC intelligence commander said, “They’d say, ‘I know you, you’re so-and-so. And if you want us to help you, you need to tell us where this other person is.’ And it would work. And then, when we got a new address, sometimes within twenty minutes of the first boot on the door, we’d have another team of shooters going to another location.” Follow-up interrogations were plotted out like dense crime dramas, with dozens of participants, including some by video teleconference.

Instead of three operations every two weeks, JSOC was able to increase its operations tempo (or “optempo”) significantly, sometimes raiding five or six places a night. This completely bewildered insurgents and al-Qaeda sympathizers, who had no idea what was going on. In April 2004, according to classified unit histories, JSOC participated in fewer than a dozen operations in Iraq. By July 2006, its teams were exceeding 250 a month. McChrystal’s operations center was open for fifteen hours a day, regardless of where he was. There is a strong correlation between the pace of JSOC operations, the death rate of Iraqi insurgents and terrorists, and the overall decline in violence that lasted long enough for U.S. troops to surge into the country and “hold” areas that used to be incredibly dangerous.

In Lamb and Munsing’s thesis-length assessment of intelligence in Iraq, Flynn’s “pivotal” efforts at fusing intelligence and operations, developing real-time reach back to analysts, and the flattening of authority are lauded as “the secret weapon” behind the surge—not some special weapon, as Bob Woodward has hinted. Notably, Flynn is rendered in the piece as “General Brown,” and the authors were not permitted to mention that his team was actually JSOC. Such is the nature of the Defense Cover Program—Flynn himself was (and is) a target for terrorists and many nation-states.

The Bush administration showered attention and resources on JSOC, and as the mission in Iraq wound down and the United States elected a new
president who, it seemed, would take counterterrorism in a different
direction, the Command prepared itself for an uncertain future. There were
whispers of a Justice Department investigation into JSOC’s financial and
operational practices. This appears untrue, although the Senate Armed
Services Committee did conduct some type of JSOC investigation beginning
in 2008—with results no one will discuss.

Barack Obama was a complete unknown—a Democrat with no military
experience and little understanding of its dynamics. A wave of JSOC
operators quietly retired as President George Bush’s second term drew to a
close. Some migrated to become contractors or to the CIA or lower-profile
military units.

The problem with being a secret organization is that when a harsh light is
cast on questionable activities—even activities performed with patriotic
intent or, at least, performed when no better options seemed available at the
time—there’s no opportunity for a rebuttal. “We are in a difficult position,
in that there’s not much we can do to make the case for ourselves,”
McRaven said in 2010. “There are some things we can try and do to respond
to things like Seymour Hersh articles,” referring to the journalist’s
allegations that JSOC fostered a culture that resulted in torture and later
served as Dick Cheney’s personal assassination force, “but we are
constrained.”

For all of McChrystal’s advances and achievements, McRaven still
inherited a work in progress. Even with all of the attention paid to ISR
(Intelligence, Surveillance, and Reconnaissance) assets, JSOC had only
thirty-three planes to its name, and its drones were making only five orbits
per day over Iraq. Fusion cells that worked well in some areas didn’t
necessarily work in others. With a new U.S. president, the rules of
engagement in Iraq were about to change, and attention would soon shift
back to Afghanistan and more decisively toward Africa. The spigots were
still open, but JSOC’s bureaucracy was growing overburdened.

One of the earliest problems McRaven had to deal with was the Status of
Forces Agreement (SOFA), signed with Iraq and which forbade the United
States from conducting most counterterrorism raids without warrants. Warrants? JSOC doesn’t do warrants—that’s a law enforcement thing. Many in the Command wanted to ignore the SOFA entirely. McRaven, however, insisted that his team figure out a way to fulfill the agreement. To do this, he directed JSOC funds to build mini-courthouses, first in Baghdad and then elsewhere in the country. JSOC flew in JAG (Judge Advocate General) officers from the United States, and McRaven personally briefed the Iraqi leadership, describing the constraints under which JSOC often operated. He asked for their help.

As a result, Iraqi judges were empowered by the U.S. military and began issuing warrants based on the testimony of JSOC intelligence analysts, SEALs, or Delta guys themselves. McRaven at first faced internal resistance for bringing in the Iraqis—JSOC was supposed to be a secret organization. Yet as operators saw how well the courthouse system worked, they soon dropped their objections and quickly adapted.

Likewise, they adapted to McRaven’s establishment of an Afghan partner unit within JSOC. It consisted mostly of civilians, many without a shred of military experience, and began to accompany JSOC units on raids. This was a particularly important outreach following a JSOC disaster in April 2010, when a Ranger unit killed five Afghan civilians in Khataba, the result of a bad tip from an unreliable source. McRaven took the extraordinary step of personally apologizing to the family and admitting that the men under his command had made a “terrible terrible mistake.” As reported, McRaven, near tears, told an elder, “You are a family man with many children and many friends. I am a soldier. I have spent most of my career overseas, away from my family. But I have children as well. And my heart grieves for you.” McRaven figured that the Afghan partner units could prevent these kinds of mistakes—the kind that made the job harder for every soldier, conventional or special operations, who was fighting in Afghanistan. McRaven further reached out to conventional units, asking commanders how his units could better assist their missions.

As of yet, JSOC does not seem to have found the kind of successes in Afghanistan that it did in Iraq. The enemy is different, more embedded in
the population. The geography makes intelligence gathering more difficult. And the strategy from the White House is different. Yet as a force multiplier and as a hub of best practices, the Command may have prevented a decisively unwinnable situation from descending into disaster.

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In the early morning of April 12, 2009, Somali pirates held an American merchant marine captain captive, and President Obama had his first encounter with his secret army. On the other end of the telephone was McRaven, who, in turn, had a deputy directly plugged in to a DEVGRU platoon positioned on the deck of the USS Bainbridge off the coast of Somalia. Four Red Squadron SEALs had sighted three of the pirates with their long-barreled M-110 rifles. Obama and McRaven agreed on the rules of engagement. If the pirates seemed to endanger the life of the captain, the SEALs could shoot.

A few hours after the call, the SEAL snipers squeezed their triggers, and the hostage situation was over. Obama was not required to make that particular call to McRaven. A secure teletype sent through the Defense Message Service had already given the element commander authority to use force if necessary. In fact, those present could recall only two other times in recent memory when a president directly discussed firing options with a commander. But Obama was curious about the authority associated with the presidency. The military was curious, too. Did Obama have the mettle?

It would seem he did. The new commander in chief, a young one-term senator who did not strike voters as the type who was predisposed to authorizing force, had endorsed a decisive application of lethal action. From this kill, a relationship flourished. Months later, the White House authorized a large expansion of clandestine military and intelligence operations worldwide, sanctioning activities in more than a dozen countries, rewriting, in effect, the Al Qaeda Network Exord. Obama’s national security adviser, retired marine general James Jones, and his chief lieutenant for Afghanistan and Pakistan, General Douglas Lute, were well aware of JSOC’s capabilities. Obama gave JSOC unprecedented authority to track and kill terrorists.
turn, JSOC would keep al-Qaeda from regrowing the networks and the branches needed to mount large-scale attacks against the United States. That was the implicit understanding Obama and the National Security Council had reached with McRaven. Keep us safe, and you can do what you need to do.

Notes

1. Author’s interview with Michael Leiter.
2. Based on interviews with firsthand participants.
Chapter 7

When You See the Word National, You Know It Is Important

The Command has no published organizational chart—at least, not one that we’ve seen. So here’s a good guess at what it might look like. Like any other military unit, it is divided into staffs. Because it is “joint,” staff designations have a “J” prefix. J-1 is the manpower branch, which recruits, hires, and trains the next generation of JSOC warriors and analysts; J-2 is responsible for intelligence and information operations; J-3 is operations, the central hub of activity; J-4 is logistics and transportation; J-5 is strategic plans and policy; J-6 handles signals and communication; J-7 is JSOC’s training and exercise directorate; J-8 deals with acquisitions and budgeting. The Office of the Commander is a three-star general billet based at Pope Army Airfield, adjacent to Ft. Bragg in Fayetteville, North Carolina.

Lieutenant General Joseph Votel, an army Ranger, is the current commander of JSOC. Beneath him are two assistant commanding generals (ACGs) and two deputy commanding generals (DCGs). The ACGs are responsible for operations and intelligence; the DCGs are dual-hatted as commanders of the numbered Joint Task Forces that operate around the world. The Defense Cover Program protects the identities of the DCGs and the ACGs, although we found open-source references to three of the four. (One is Brigadier General Marshall Webb, whose impassive face was made famous by Pete Souza’s photograph of the White House Situation Room during Neptune’s Spear.) One ACG provides line command to JSOC’s three operating divisions, each of which is managed by a civilian director. One division includes the National Missions Force, a title that was suggested by a Pentagon consultant to give people an unclassified way to refer to the elite special missions units not assigned to geographic areas of operations. (If there is an echo of the fictional Impossible Missions Force, it’s not quite accidental.)
Another division is responsible for Force Mobility—how JSOC moves its personnel from A to B. The third operational division tends to the logistics and the back end of the Command’s combatant-command deployments.

The Tier One forces, as previously noted, consist of the Combat Applications Group (CAG), more widely known as the 1st Special Forces Operational Detachment-Delta, or Delta Force, and the Naval Special Warfare Development Group (DEVGRU), or SEAL Team Six.

Each special missions unit (SMU) has a commander and a deputy commander; two captains for the SEALs and two colonels for Delta. There are now four operational CAG squadrons (A, B, C, and D), four operational DEVGRU squadrons (Blue, Red, Gold, and Silver), and one training squadron per SMU. The squadrons break down into troops and detachments. Each is supported internally by explosive ordnance disposal specialists, intelligence analysts, communications and logistics noncommissioned officers, and other personnel who are not considered to be “operators” (or, more specifically, graduates of the Operators Training Course—what popular culture would consider the “shooters”) but are vital to the mission. There is an unacknowledged CAG squadron and a secret DEVGRU squadron (known as DEVGRU Black), each of which performs exceptionally sensitive reconnaissance missions, such as cross-border, high-value target hunts in Pakistan. These units are smaller than the other squadrons. As of 2011, JSOC has about 4,000 personnel; we don’t know for sure, but we think that about 300 are members of DEVGRU and 450 are Delta operators. The average operator has more than seven years’ worth of experience in his unit, a number diminishing as elite soldiers on near-constant deployments retire in greater numbers.

The 75th Ranger Regiment, headquartered at Ft. Benning, Georgia, belongs to the U.S. Army Special Operations Command but details infantrymen to JSOC on a regular basis. (Both General Votel and General Stanley McChrystal commanded the 75th at some point in their respective careers.) The same goes for the Nightstalkers of 160th Special Operations Aviation Regiment (Airborne), or SOAR, based out of Ft. Campbell, Kentucky. For discrete missions, the U.S. Air Force 427th Special
Operations Squadron provides Short Takeoff and Landing (STOL) assets, as well as nontraditional aircraft. For JSOC, a nontraditional aircraft would be a passenger jet, which, to civilians, is quite traditional. Although it officially belongs to the U.S. Air Force Special Operations Command, the 427th also operates special worldwide crisis response aircraft for the State Department and the CIA.

Other SMUs reporting to the ACG for operations include:

- The Joint Communications Unit, a worldwide, all-weather, transportable communications brigade supporting JSOC operations globally. It often incorporates elements of the Air Force 25th Intelligence Squadron, which conducts offensive cyber attacks and exploitation. The 25th is divided into five squadrons, one of which is stationed in Afghanistan and another in Iraq.
- The 24th Special Tactics Squadron of the U.S. Air Force is a Tier Two SMU. Based at Pope, it provides combat air controllers (essentially, air traffic controllers with commando training) and pararescue airmen (for quick reaction rescue missions) for CAG and DEVGRU operations.
- The Aviation Tactics and Evaluation Group (AVTEG) consists of three battalions that supply all types of aircraft and highly trained pilots for sensitive JSOC missions. Along with SOAR, it moves JSOC forces around the world. AVTEG is a clandestine air force of sorts within JSOC, and its pilots and analysts determine what JSOC and its units might need and, from a strategic level, figure out how to get it to them. (AVTEG pilots tested the stealth helicopters later used in the bin Laden raid, for example.) AVTEG, as well as SOAR, also flies highly sophisticated intelligence, surveillance, and reconnaissance aircraft.
- The Technical Applications Program Office (TAPO), based in Ft. Eustis, Virginia, incorporates the modern-day equivalent of the Central Intelligence Agency’s (CIA’s) SEASPRAY unit, which helped the agency obtain, exploit, and spoof foreign aircraft and technology. TAPO itself is unclassified, but most of its work is budgeted in secret. (In military J-8 speak, TAPO has “streamlined acquisition procedures
to rapidly procure and integrate non-developmental item equipment and systems for Army Special Operations Aviation.”) Quite often, its platforms work so well that they become standardized for entire branches of the military. TAPO is one of several program offices that primarily support JSOC operations. Another is the Ground Applications Program Office, based out of Ft. Belvoir, which manages the most sensitive acquisition and development projects in the Command. (There is a subordinate contracting office to each—the Ground Applications Contracting Office for the Ground Applications Program Office, and Technical Applications Contracting Office for TAPO.) They report directly to the Office of the Commander and support the technology that JSOC uses in the field, which includes aviation platforms such as “Liberty Blue,” an advanced signals collection package bolted onto jet aircraft; “Chainshot,” a specialized navy EP-3 Orion intelligence, surveillance, and collection plane; the Command’s numerous tracking, tagging, and location programs; and other projects that would fill a library of Tom Clancy novels.

- GAPO supports both fixed and temporary JSOC bases around the world. (One is located in a major European airport.) JSOC’s office of congressional affairs also reports directly to the Office of the Commander. Recruitment is handled by the SMUs themselves, as well as by an administrative directorate reporting directly to the assistant commanding general for operations.

Another flying unit at Pope, the 66th Air Operations Squadron, provides cargo and transport planes, such as C-130s for JSOC operations. An air force memorandum from 2000 suggests that AVTEG and the 66th are uniquely permitted to conduct bare base ops and training with forward air refueling, eschewing much of the normal bureaucratic process before doing so. Although much has changed in the decade since, it certainly suggests a legacy of secret operations. (Otherwise reasonable military regulations are often an obstacle to JSOC’s unique mission. As a job posting for AVTEG’s top intelligence coordinator states: “Guidelines such as Executive Orders and DOD, DIA, DCI, USSOCOM, and military service directives exist, but
judgment and ingenuity in interpreting the intent of these guides is required. Incumbent must be fully knowledgeable of highly specialized SOF doctrine, tactics, techniques, and procedures. May be required to make major or novel adaptations to existing guides in order to accomplish the organizational mission.”

The deputy commanding general for the Intelligence and Operational Security Directorate (ISOD) oversees JSOC’s expanding intelligence empire. In late 2008, Admiral William McRaven stood up the JSOC Intelligence Brigade, a six-hundred-person intelligence analysis detachment that serves the entire command. It analyzes all source intelligence from satellites, drones, CIA cables, State Department cables, the National Security Agency, and foreign intelligence services and produces analytical products to support JSOC commanders and field soldiers. It has divisions for interrogations, planning, and intelligence support.

There is a separate information operations division within the IOSD, that plans and executes JSOC’s Military Information Support Operations (MISO, formerly known as psychological operations, or PSYOP). The same office includes a liaison element with the Defense Program Activity Office, which conducts offensive information operations campaigns against terrorists and other sensitive targets. There are five fixed global JSOC command posts—now called Joint Reconnaissance Task Forces—that perform command and control functions for ongoing operations. And then there is the classified Joint Interagency Task Force–National Capital Region, which fuses and disseminates intelligence relating to the external evolution of terrorist networks.

A number of secretive and advanced units have been op-conned (or, assigned) to JSOC since 2003. How they directly interact with the command is unclear, but they spend most of their time helping JSOC with its special missions. These units report directly to the Office of the Commander and his chief of staff. They include a unit known by the abbreviation BI, consisting solely of highly trained female intelligence collectors and interrogators operating undercover; the Army Compartmented Element, a semisecret U.S. Army unit; the new Naval Cyber Warfare Development Group, which works
with the 25th Intelligence Squadron on cyber attacks; and the National Assessment Group (NAG), which evaluates technology and aircraft for SOCOM and JSOC use. An unclassified Department of Defense budget document credits the NAG with “providing low cost, responsive, evaluations of National Level programs belonging to Department of Defense.” (A bit of bureaucratese translation here: any time you see a reference to a “national” program, you’re dealing with one of three subjects: continuity of government, nuclear weapons, or JSOC.)

The Special Operations Program Activity, run by the U.S. Army Intelligence and Security Command, has provided Technical Exploitation Units for assault team use. A large aircraft acquisition program known as the Technical Development Activity has been absorbed by the Command’s Center for Force Mobility.

JSOC’s plans and policy department (J-5) includes a fifty-person Strategic and Operational Plans Division, which is further subdivided into a strategic plans branch, a futures and concepts branch, an operational plans branch, and a special plans division (which formulates JSOC’s nuclear, biological, and chemical response procedures, along with its Hard and Deeply Buried Target breach planning team, which figures out how to penetrate underground nuclear bunkers). This division also runs a secret JSOC WMD (weapons of mass destruction) chemical lab and proving ground. It has a branch at the National Security Test Site in Nevada—Area 51. (That famous site has long been a testing site for cutting-edge technology, including flying vehicles, but none are otherworldly).

More operational planning for JSOC takes place at SOCOM headquarters in Tampa under the J-5 directorate of its Center for Special Operations, which develops plans for JSOC theater campaigns and coordinates JSOC activities with the rest of the military and intelligence community.

Notes

2. See Air Force Instruction 11-235,
Chapter 8

The Activity

The most sensitive special missions unit listed on the base directory of Ft. Belvoir in Northern Virginia is the Mission Support Activity (MSA). It is JSOC’s clandestine intelligence-gathering organization and is considered a Tier Two special missions unit, performing Tier One functions. Until 2009, its code name was INTREPID SPEAR, and its cover changes every two years. In 2010, it was known as the U.S. Army Studies and Analysis Activity. Inside JSOC, it’s known as the Activity, or Task Force Orange. Doctrinally, it is responsible for “operational preparation of the environment.” The MSA has several fixed operating locations around the world, including at least five secret bases inside the United States.

Close readers of Bob Woodward’s books about the Bush administration may recognize the MSA’s code name during the first months of the war in Afghanistan: GREY FOX. GREY FOX operators were on the ground with Central Intelligence Agency paramilitaries and special forces shooters within days of September 11, 2001. They were instrumental in the capture of Saddam Hussein. (In the famous photograph of Saddam crawling out of his spider hole, you can see the boot of an MSA operator.) Included in the MSA’s numbers are elite signals intelligence collectors (their procurement history includes a lot of commercial radio scanners), pilots, and, to a lesser extent, case officers, interrogators, and shooters. They gather intelligence for counterterrorism operations, but some are cross-trained to kill.

In 2001, the MSA, then known, confusingly enough, as the Intelligence Support Activity (ISA), was the bastard child of the U.S. Army. It had survived years of controversy and scrutiny, including several congressional attempts to shut it down, scandals involving extra-legal activities, and financial improprieties. It was underutilized and poorly integrated with the rest of the force’s intelligence services. In 2003, over the strenuous objection of army leadership, Marshall Billingslea transferred the ISA to JSOC. Its new command quickly changed the ISA’s cover name and code
name and put it to work. (The unit’s last known cover name was changed after a reporter used the phrase in an e-mail to a Pentagon official. This constituted an operational breach sufficient to warrant the termination of a dozen security contractors.) Billingslea did not intend for the MSA to engage in direct action missions. Rather, he believed that the Tier One teams could benefit from the battlefield intelligence-gathering skills that the MSA could bring to bear.

After Billingslea left the Pentagon, however, the incessant demands on JSOC would turn the MSA into something resembling a Tier One unit, with members tasked with missions that involved the direct collection of intelligence for the sake of intelligence—something that American law has a problem with or, at least, the laws that civilians are allowed to see. The MSA was never designed to be a tactical unit, per se, but intelligence and military officials confirm that after 9/11, they executed direct action missions in Somalia, Pakistan, and several other countries. Congress was largely kept in the dark, and, to some extent, it still is. In 1982, after the ISA/MSA’s creation, Defense Secretary Frank Carlucci, not shy about flexing the Pentagon’s muscles, worried that “we seem to have created our own CIA, but like Topsy, uncoordinated and uncontrolled.” An organization with such a secret mandate had to have accountability as its essence, Carlucci wrote in a memo, but “we have created an organization that is uncontrolled.”

As the Mission Support Activity expanded under JSOC’s purview, it began to execute missions independently and outside of declared war zones. In countries such as Yemen, Kenya, Somalia, and Ethiopia, Task Force Orange gathered intelligence directly, technically reporting to the CIA, whose operations were ostensibly based on covert action findings but in reality adhered to the Al Qaeda Network Exord, an executive order signed by President George W. Bush after the terrorist attacks on September 11, 2001. Members of the MSA staffed new Military Liaison Elements (MLEs) installed by SOCOM in U.S. embassies around the world, much to the consternation of the State Department. (The use of MLEs was significantly curtailed when Robert Gates replaced Donald Rumsfeld as defense secretary, although a 2010 SOCOM budget document includes a line item for their
funding in Africa.)

The MSA, with a budget of $80 million, trains its personnel to be essentially dropped into denied areas and to operate more or less on their own. Some MSA elements operate highly specialized surveillance and reconnaissance planes, such as the RC-12 Guardrail, used for years to track al-Qaeda operatives as they meander through the deserts of North Africa. Others zip around terrorist training camps in MH-6 Little Birds, small helicopters used extensively by the U.S. Army.

In two countries with which the United States is not at war, according to three former U.S. officials with knowledge of its operations, MSA elements were tasked with tracking and killing specific terrorist targets. Technically, only the CIA can do that—which was why SEAL Team Six was very publicly placed under the titular authority of CIA director Leon Panetta when it conducted the bin Laden raid, even though Admiral William McRaven and a navy captain managed the operation. Under U.S. law, the military’s intelligence activities outside war zones are restricted to Title 10 of the U.S. code. The CIA, meanwhile, operates under Title 50, which permits covert action, including targeted assassinations of terrorists, so long as a covert action finding has been transmitted to Congress. Given the secrecy associated with the MSA missions, it is not clear whether the CIA had full cognizance of what the Defense Department was doing, particularly in the early years of the global campaign against transnational terrorism. In places such as Africa, “the authorities were fucked up and no one knew who was in charge,” a still-serving JSOC officer said in an interview. This would change around 2004, as JSOC and CIA objectives diverged. Seizing the initiative, General Stanley McChrystal increased the Command’s footprint in Nairobi, Kenya; Camp Lemonnier, Djibouti; and Addis Ababa, Ethiopia. JSOC focused its efforts on “intelligence collection and target development.” In 2006, JSOC went kinetic in Somalia, actively hunting for al-Qaeda leader Saleh Ali Saleh Nabhan. He was killed and bagged in 2009.

Shortly after 9/11, one MSA case officer was nearly killed while following a target (much as a CIA case officer might) in Beirut, when he was kidnapped outside his hotel. He escaped, shot his attackers, and wound up
receiving—secretly—a medal for his valor. The number of case officer—
types hired by the MSA ramped up after 9/11 and is slowly spinning back
down. Yet JSOC’s human intelligence—gathering activities continue to
expand—and this is not a secret. A recent official job solicitation reports
that the Command is recruiting: “[a] Human Intelligence Operations Officer,
responsible for planning and executing highly specialized, mission critical
HUMINT requirements for JCS Directed Operations and contingency plans.
Coordinates the de-confliction, registration and management of Title 10 and
Title 50 recruited HUMINT sources.”

The hiring unit is JSOC’s Directorate of Operation, Security, and
Intelligence Support Division at Fort Bragg, which includes all of JSOC’s
intelligence assets, with the exception of the MSA. The effectiveness of the
MSA operations is difficult to determine, but their legality is an easier
question to answer. In Afghanistan and Iraq, the Defense Department ran the
show, using traditional authorities granted to them under Title 10 of the U.S.
code. Outside the war zones, the CIA had primacy. United States law is
fairly explicit about this: covert action to collect intelligence cannot be led
by the military, in part because the oversight mechanisms aren’t set up to
monitor them.

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Under the large umbrella of “preparing the battlefield,” which later
became “preparing the environment” (an environment being a bigger thing
than a battlefield), and based on their successes elsewhere, there was
reluctance in the Bush administration to de-conflict cases where the CIA and
JSOC had different ideas about what they wanted to do in a country where
the president had signed a finding. For example, the CIA objected to a JSOC
Somalia mission at the last moment in 2003; the National Security Council
(NSC) sided with SOCOM. The CIA had legal authority, but SOCOM had,
by presidential fiat, the lead in terms of counterterrorism. When the twain
diverged in thinking, significant interagency conflicts resulted.

When it came to unleashing JSOC in countries with which the United
States was not at war, the NSC was cautious. Terrorists on the target lists
were fair game pretty much anywhere in the world, and the sovereignty of several countries was quietly disregarded as tiny hunter-killer teams invaded. Large-scale military involvement, however, was iffier, and although the White House had embraced the kinetic success of JSOC in Iraq, it would not endorse the same type of resource surge into places such as East Africa, where terrorists were fleeing. This was maddening for JSOC commanders: they were “lawnmowers,” cutting al-Qaeda off at its roots. They had successfully disrupted Iranian attempts to use Hezbollah to destabilize any number of operations—and now Washington was suddenly very cautious? There was a resource crunch, too. General Doug Brown of SOCOM didn’t have the resources he needed for foreign internal defense operations in Africa, “and that vacuum could be, and was, in some cases, filled by Al Qaeda,” he told a historian. 3

JSOC’s role in some of the more legally marginal elements of the war on terrorism had brought unwanted attention and significant friction with the State Department. Secretary of State Condoleezza Rice encouraged ambassadors in countries where JSOC operated with impunity to speak up. One was Peru, where a DEVGRU operator with red hair (his nickname was “Flamer”) got into a physical dispute with some locals. JSOC wanted the CIA to help exfiltrate him from the country. The CIA refused, and JSOC had to scramble its own assets to collect its sailor. Why was JSOC in Peru? It’s not clear. The NSC, not wanting to unleash JSOC’s capacity in areas outside the war zone and cognizant of the publicity that the units were getting, began to pull back on the reins.

The United States believes that in the summer of 2007, as many as three hundred al-Qaeda-trained fighters fled to the Horn of Africa. Though JSOC was on the ground, missions were highly restricted by an overly cautious Washington. “Flynn watched, literally, because they had these guys tracked, as hundreds of al-Qaeda fighters went to Somalia and into Yemen and elsewhere in the Horn and got better trained,” a senior military official said. It would take a new president and a new classified presidential order to unleash JSOC’s global strike capability again.

Notes


Chapter 9

Semper ad Meliora

On a fresh patch of land in the northwest corner of Ft. Bragg, specially cleared construction workers will soon erect a massive 110,000-square-foot building that will serve as the crown jewel in the Command’s empire. The building will headquarter the JSOC Intelligence Brigade (the JIB), which analyzes raw and finished intelligence for the Command’s special missions units. The JIB has quietly existed for more than three years, escaping the notice of congressional intelligence overseers, who have only just begun to scrutinize JSOC’s intelligence activities. Under a program started by Generals Stanley McChrystal and Michael Flynn, JSOC borrowed hundreds of intelligence analysts from the sixteen U.S. intelligence agencies, many of them rotating through quick front-line deployments. These augmentees greatly helped JSOC conduct its operations, but the Command was not able to develop a cadre of analysts who were JSOC’s own, with institutional muscle memory that would make the fusion of intelligence and operations more efficient in the future. The JIB, in essence, sets in stone JSOC’s new way of doing business.

In 2010, Admiral William McRaven attended the quiet ribbon cutting of his newest jewel: the Intelligence Crisis Action Center (ICAC) in Rosslyn, Virginia, funded through a classified line item in the Pentagon’s budget. Until just recently, it operated on two floors of a nondescript office building that also housed a language learning center and a dry cleaner. At the time when McRaven christened the center, its existence was a secret to many U.S intelligence officials, who learned about it by way of an Associated Press newsbreak in early 2011. According to a senior military official, it has about fifty employees and reports directly to the JSOC Directorate of Intelligence and Security. Its primary function is to serve as a command post for JSOC operations around the world. It is informally known as the Targeting Center, and because of operational security concerns it has changed its name twice. Presently, it’s the Joint Reconnaissance Task Force (JRTF), and it operates

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from a new location in the Beltway, a location that we have agreed not to
divulge. (There are four other JRTFs, each responsible for JSOC operations
within certain areas of operations.)

These entities are sensitive subjects at the highest levels of the U.S.
counterterrorism community, because each represents the extraordinary
achievements of the JSOC units and also reveals by its own existence the
inadequacy of the other intelligence fusion centers set up by the government
to do mostly the same thing. JSOC’s successes have brought with it
blowback and envy and more than a bit of criticism from military officials
who think that conventional forces and regular special operations forces
units were just as important as the smaller, secretive standing task forces in
degrading al-Qaeda’s infrastructure.

Though the addition of an intelligence brigade to JSOC is a natural
consequence of its success and growth, when the Associated Press disclosed
the existence of the ICAC to the general public, a spokesman for SOCOM
made a point of telling reporters that its functions would not duplicate those
of the National Counterterrorism Center (NCTC). Mike Leiter, the director
of the NCTC, worked closely with McRaven to make sure the two centers
didn’t overlap. “I spent hours with Admiral McRaven on this,” he said. “We
saw this as a natural evolution in what they were doing. We sent some of our
guys over there, and they sent some of their guys over here.”

Managers at the Central Intelligence Agency (CIA) and the Defense
Intelligence Agency (DIA) regarded JSOC’s growing footprint with alarm.
Some whispered to journalists that JSOC was building a secret intelligence
empire without oversight or scrutiny. More prosaically, they feared that the
Command’s activities, in both the collection and the analysis of intelligence,
would duplicate their own.

Sensing friction, Michael Morrell, the then acting director of the CIA;
Michael Vickers, the civilian intelligence chief at the Pentagon; and General
James Cartwright, the former vice chairman of the Joint Chiefs of Staff,
tried to reduce tension and conflict arising from JSOC’s expansion. In the
field, JSOC units and their counterparts at the CIA and the DIA work well
together. In Yemen, after some early conflicts, the integration is almost
seamless, with JSOC and the CIA alternating Predator missions and borrowing each other’s resources, such as satellite bandwidth. Often, JSOC element commanders will appear on videoconference calls alongside CIA station chiefs—all but unheard of until very recently. Yet some mid-level managers at the intelligence agencies remain resistant to the type of integration envisioned by the National Security Council (NSC).

McRaven, much like JSOC itself, is at cross-purposes. He knows that his intelligence assets will not survive budget purges unless they fit well within the rest of the community. Yet he also wants to preserve the razor-sharp edge of the special missions units at a time when, due to publicity and overtasking, it risks being dulled. A robust intelligence infrastructure multiplies the effect that JSOC has on the battlefield, he believes.

That JSOC no longer operates exclusively in the shadows is a meal uneasily digested by longtime JSOC team members. Once the curtains have been opened, it is hard to draw them shut. Since being promoted to commander of U.S. Special Operations Command, McRaven has spoken openly about the increased need for transparency regarding the nation’s counterterrorism forces. Operational security is still paramount in at least one way: the identities of those who belong to the Tier One units are state secrets, and McRaven, according to people who have spoken with him, would rather JSOC spend less time creating layers of myth around itself and more time thinking about how to protect its core assets at a time when, as one senior administration official who works with McRaven said, “every time there is an explosion in the world, everyone knows about it within minutes.”

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Some of the most vociferous objections to daylight came from legends of the special operations community. Shortly after the capture of Osama bin Laden and detailed information about the tactics, techniques, and procedures used by DEVGRU shooters showed up in the mainstream media, retired colonel Roland Guidry, one of JSOC’s founding members, took the rare step of contacting journalists to complain about the sunlight bathing the SEALs.
“The pre-mission Operational Security was superb, but the postmission OPSEC stinks,” he said. “When all the hullabaloo settles down, JSOC and [the SEALs] will have to get back to business as usual, keeping the troops operationally ready and getting set for the next mission; the visibility the administration has allowed to be focused on JSOC and [the SEALs] will make their job now more difficult.”

Guidry said that the “administration’s bragging” about details such as the existence of the bin Laden courier network and efforts to eavesdrop on cell phones would encourage the enemy to adapt by changing their cell phones, e-mail addresses, websites, safe houses, and couriers. He also thinks the administration should not have disclosed precisely what types of equipment it found in bin Laden’s compound, such as the terrorist’s use of thumb drives to communicate. “Why did the administration not respond like we were trained to do thirty years ago in early JSOC by uttering two simple words: ‘no comment’?” he asked.

To be sure, the administration—construed broadly—did not intend for too many specifics to get out. The NSC wrestled with the dilemma early on, knowing as soon as bin Laden was captured that the demand for information would be intense. Though no strategic communications expert had been read into the op before it was executed, the White House and the Pentagon hastily prepared a strategy. Mike Vickers and deputy CIA director Mike Morrell would brief reporters on a conference call the night of the capture, after President Barack Obama finished speaking. The White House would issue some details about the time line by having John Brennan, the respected deputy national security adviser for counterterrorism, brief the press corps. And then everyone would shut up.

Because the SEALs themselves were not debriefed until after the White House had released its initial time line, bad information got out. Bin Laden had pointed a gun at the SEALs, reporters were told, and used his wife as a human shield. Neither was true—but both were conveyed in good faith. Reporters, sensitive to the way the administration would try to use the bin Laden capture to boost the president’s image, were relentless in their efforts to pinpoint precise details. Intelligence agencies, seeking their share of
credit, offered unsolicited interviews with analysts who had participated in the hunt. Maybe it was simply the pent-up tension caused by keeping the secret so long, but in the days after the raid, “the national security establishment barfed,” is how Denis McDonough, another deputy national security adviser, put it to a colleague.

James Clapper, the director of national intelligence, had four secrets he did not want published at all. One was the stealth technology used on the Black Hawk, but there was nothing he could do once it crashed. Another was the presence on the ground of CIA operatives—it took less than a week for a detailed story to be published in the *Washington Post* about the CIA renting a house near Osama bin Laden’s compound. (It later emerged that the CIA had had a station in Abbottabad for quite a while and had enlisted an unwitting local doctor to run a vaccination campaign to try to get blood samples from the bin Laden compound. The doctor and others suspected of helping the CIA were taken into custody by the Pakistani intelligence service and would later be released only after much begging on the CIA’s behalf.

Secret three was the type of drones that hovered above the raid—RQ-170 Sentinels, operated out of Tenopah Test Range, near Area 51 in Nevada, capable of jamming Pakistani radar with one pod and transmitting real-time video to commanders with another. A message posted to Twitter by one of us on the night of the raid and a subsequent comprehensive *Washington Post* story broke that secret. (In early December 2011, an RQ-170 gathering intelligence on possible insurgent training camps inside of Iran lost contact with ground controllers and subsequently floated down deep inside the country. Briefly, a JSOC recovery operation was considered, but that was before the Iranians discovered it. At that point, a mission would be tantamount to war. The United States had to adapt to the possible compromise of Top Secret cryptographic devices and stealth material.)

Secret four was the identity of the SEAL unit that had taken the mission, and, in particular, the identities of the operatives. The unit name was revealed the night of the raid, but the intelligence community and Special Operations Command were horrified a month later when several reporters asked them to verify a list of names and ranks that had been distributed to
them by sources unknown. Someone had leaked the names of some of the SEALs on the helicopters.

Military officials begged the reporters not to publish the names or even reveal that the list existed. The reporters acquiesced. A Department of Defense agency—most likely, the Air Force Office of Special Investigations—began to work quietly with the Federal Bureau of Investigation to see who might have possibly leaked such protected information. Inside SOCOM, suspicions were directed at the White House, which, some believed, was availing itself of every opportunity to highlight Obama’s decision to launch the raid. (White House officials insist that no one there would be so stupid as to leak the names of Tier One operatives to reporters, and SOCOM’s Ken McGraw said he was not aware of the incident.)

Inside JSOC, the Delta guys blamed the larger SEAL community for inviting the attention. Whoever leaked the names might have taken a lesson from the SEALs themselves: when Obama met with them several days after the raid, he was told not to ask the men who actually killed bin Laden because they wouldn’t tell even the commander in chief. Bill Daley, Obama’s chief of staff, asked anyway and was told by the squadron leader, “Sir, we all did.”

Notes

1. Based on interviews with firsthand participants.
Chapter 10

Widening the Playing Field

With bin Laden dead, al-Qaeda’s capabilities severely diminished, and the United States pulling back in Afghanistan and Iraq, what will President Barack Obama and his successors do with JSOC? A look at what they’ve already been doing outside of war zones gives us some hints.

In 2005, for example, a 7.6-magnitude earthquake killed seventy-five thousand people in Pakistan-administered Kashmir. After four solid years of war in the region, the United States poured relief services into Pakistan as a show of solidarity with the nominal ally in the war on terror.

The U.S. intelligence community took advantage of the chaos to spread resources of its own into the country. Using valid U.S. passports and posing as construction and aid workers, dozens of Central Intelligence Agency (CIA) operatives and contractors flooded in without the requisite background checks from the country’s Inter-Services Intelligence (ISI) agency. Al-Qaeda had reconstituted itself in the country’s tribal areas, largely because of the ISI’s benign neglect. In Afghanistan, the ISI was actively undermining the U.S.-backed government of Hamid Karzai, training and recruiting for the Taliban, which it viewed as the more reliable partner. The political system was in chaos. The Pakistani army was focused on the threat from India and had redeployed away from the Afghanistan border region, the Durand line, making it porous once again. To some extent, the Bush administration had been focused on Iraq for the previous two years, content with the ISI’s cooperation in capturing senior al-Qaeda leaders, while ignoring its support of other groups that would later become recruiting grounds for al-Qaeda.¹

A JSOC intelligence team slipped in alongside the CIA. The team had several goals. One was prosaic: team members were to develop rings of informants to gather targeting information about al-Qaeda terrorists. Other goals were extremely sensitive: JSOC needed better intelligence about how Pakistan transported its nuclear weapons and wanted to penetrate the ISI.

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Under a secret program code-named SCREEN HUNTER, JSOC, augmented by the Defense Intelligence Agency (DIA) and contract personnel, was authorized to shadow and identify members of the ISI suspected of being sympathetic to al-Qaeda. It is not clear whether JSOC units used lethal force against these ISI officers; one official said that the goal of the program was to track terrorists through the ISI by using disinformation and psychological warfare. (The program, by then known under a different name, was curtailed by the Obama administration when Pakistan’s anxiety about a covert U.S. presence inside the country was most intense.)

Meanwhile, rotating teams of SEALs from DEVGRU Black squadron, aided by Rangers and other special operations forces, established a parallel terrorist-hunting capability called VIGILANT HARVEST. They operated in the border areas of Pakistan deemed off limits to Americans, and they targeted courier networks, trainers, and facilitators. (Legally, these units would operate under the authority of the CIA any time they crossed the border.) Some of their missions were coordinated with Pakistan; others were not. As of 2006, teams of Green Berets were regularly crossing the border. Missions involved as few as three or four operators quietly trekking across the line, their movements monitored by U.S. satellites and drones locked onto the cell phones of these soldiers. (The cell phones were encrypted in such a way that made them undetectable to Pakistani intelligence.) Twice in 2008, Pakistani officials caught wind of these missions, and in one instance, Pakistani soldiers operating in the Federally Administered Tribal Areas fired guns into the air to prevent the approach of drones.2

Forward intelligence cells in Pakistan are staffed by JSOC-contracted security personnel from obscure firms with insider names such as Triple Canopy and various offshoots of Blackwater, but it is not clear whether, as Jeremy Scahill of the Nation has argued, the scale of these operations was operationally significant or that the contractors acted as hired guns for the U.S. government.3 Sources say that only U.S. soldiers performed “kinetic” operations; Scahill’s sources suggest otherwise. The security compartments were so small for these operations (one was known as QUIET STORM, a particularly specialized mission targeting the Pakistani Taliban in 2008) that
the Command will probably be insulated from retrospective oversight about its activities. A senior Obama administration official said that by the middle of 2011, after tensions between the United States and the Pakistani government had reached an unhealthy degree of danger, all JSOC personnel except for its declared military trainers were ferreted out of the country. (They were easy to find using that same secret cell phone pinging technology.) Those who remained were called Omegas, a term denoting their temporary designation as members of the reserve force. They then joined any one of a dozen small contracting companies set up by the CIA, which turned these JSOC soldiers into civilians, for the purposes of deniability.

By the end of 2011, SEALs and the CIA Special Activities Division ground branch were crossing the border to target militants whom Pakistan would not. Presently, Task Force Green (also known as TF 3-10) is the active counterterrorist task force in Afghanistan. A veteran infantry officer nicknamed “K-Bar” commands it. Colonel K-Bar is unique among such task force leaders, in that he has never served as a subordinate in a special missions unit. He first attracted the attention of JSOC brass while serving in Iraq, when he was shot in the chest and ordered his medic to stay away so that he could continue shooting until the rest of his attackers were dead.

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Though the bulk of JSOC’s missions took place in CENTCOM’s area of operations, some of its more colorful endeavors were conducted elsewhere since 9/11.

• A Delta Force detachment helped rescue Colombian presidential candidate Ingrid Betancourt and fourteen other hostages, including four Americans, in 2008, even though full credit was given to the Colombians.
• An operation, code-named NOISEMAKER, tracks Islamic Revolutionary Guard Corps agents and narcotraffickers on the Venezuelan border and works with the Colombian military.
A JSOC team slipped into Madagascar and killed Osama bin Laden’s brother-in-law, Mohammed Jamal Khalifa, after INTERPOL got a tip about his whereabouts in 2007.

In 2009, a team from DEVGRU killed Saleh Ali Saleh Nabhan, who led a successful attack on an Israeli-owned hotel in Mombasa, Kenya, in 2002.4

A secret presidential finding on Iran influenced JSOC’s activities to a degree that irritated its commanders. The idea was to co-opt militaries and nonstate actors who could be trained to cause trouble in Iran. That, in turn, would draw members of the Islamic Revolutionary Guard Corps into Iraq to retaliate, so that JSOC could pick them off, one by one. The finding was allowed to quietly expire in 2006. The next year, Generals Stanley McChrystal and Michael Flynn established a task force to counter Iranian influence in the world (its reach would come to include Hezbollah-linked drug lords in South America).

Outside the war zone, in Africa, Mexico, and South America, the CIA and special operations forces have been teaming together efficiently without significant institutional friction on a growing number of missions. In the field, JSOC units and their counterparts at the CIA and the DIA work well together. Yet mid-level managers at the intelligence agencies remain resistant to the type of integration envisioned by the National Security Council.

At the beginning of 2011, the House Permanent Select Committee on Intelligence notified the Special Operations Command that they wanted more briefings about these commingled Title 10 and Title 50 activities. Such increased oversight could prove to be a bane and a blessing. Many of JSOC’s more questionable incursions might well be curtailed. On the other hand, a well-informed Congress is an insurance policy of sorts. When things go wrong, JSOC will be able to very honestly say that it had the full support of the government at the time.

Notes


Chapter 11

Target: Africa

The U.S. military, and primarily SOCOM and JSOC, have actively hunted al-Qaeda in Africa since at least 2003. In the Army Times, Sean Naylor has charted the remarkable growth of America’s presence in the region and has provided the best look at how U.S. special operations forces enter an area with little, establish a beachhead, and eventually stand up with a frightening, lethal presence.¹

President George W. Bush first gave the go-ahead for operations on the continent after captured Libyan terrorist Ali Abdul Aziz al-Fakhri revealed under interrogation that al-Qaeda, disrupted in Afghanistan, planned to regroup in Somalia and Yemen. In November 2003, an underwater “SEAL delivery vehicle” deployed from the submarine USS Dallas (SSN-700) and entered Somali waters. The clandestine SEAL mission was the first of a dozen to install specialized cameras called Cardinals, which would monitor the coastline. Both the Central Intelligence Agency (CIA) station chief and the U.S. ambassador to Kenya objected to the mission as overkill, which threatened to derail the entire operation. Just before the launch of the operation (known as Cobalt Blue), Secretary of Defense Donald Rumsfeld and CIA director George Tenet debated the issue before the president, who sided with Rumsfeld. The SEALs didn’t operate on the periphery and weren’t micromanaged. The devices were installed in heavily trafficked areas determined on the fly.

A cross-section of U.S. special operations forces participated in the operation. The Joint Special Operations Task Force–Horn of Africa (part of the Combined Joint Task Force–Horn of Africa [CJTF-HOA]), which conducted the operation, pulled double-duty as CENTCOM’s crisis response element (CRE) and was tasked with everything from recon to combat search and rescue. The CRE was composed of a U.S. Army Special Forces commander’s in-extremis force, a team of on-alert, highly mobile trigger-pullers; a SEAL platoon; and air force special operations fixed- and rotary-
wing aircraft.

Because the cameras snapped shots only every twelve hours—a battery-saving measure—Cobalt Blue turned up nothing of value. Still, it was an improvement over the day- and weeks-long gaps that occurred in the past, and it was still in the early days of the sweeping movement at JSOC to eliminate such “blinks” in intelligence. The best intelligence is constant surveillance.

Human intelligence (HUMINT) in Africa at the time left much to be desired. Al-Qaeda had a decided footprint on the continent and had launched multiple devastating operations against U.S. embassies and the USS Cole pre-9/11. It wasn’t until the terrorist organization diverted high-profile individuals and sizable dollar figures to the region that Africa’s role in a post-Afghanistan al-Qaeda became clear.

In some ways, the CJTF-HOA was a screen for JSOC. While the Combined Joint Task Force had to work with host nations and engage in diplomatic genuflection in a kind of global CSI, JSOC moved with purpose to build from scratch a serious intelligence apparatus. Just as General Michael Flynn would face in Iraq, high levels of classification and compartmentalization obstructed intelligence analysis. As did the Iraq campaign, for that matter. Resources that might otherwise have proved vital in the Horn of Africa were diverted. Yet while U.S. operations are now drawing to a close in Mesopotamia, and terrorist activities flourish in such places as Somalia, Africa still wants for intelligence assets.

Still, along with the SEAL insertion in 2003, CIA paramilitaries and JSOC Mission Support Activity (or Task Force Orange) launched daring operations to make up for lost time on the intelligence front. At first, the intelligence missions were about gathering and confirming information, but, as Naylor concludes, “They soon expanded to include working with warlords to hunt al-Qaida members, tapping cellphones, purchasing anti-aircraft missiles and, ultimately, developing a deeper understanding of al-Qaida’s East African franchise and how it fit into the wider al-Qaida network.”

Eventually, U.S. operatives persuaded warlords to whack or sack al-Qaeda operatives. Enemies captured by Somalis would be treated to “extraordinary
rendition”—or capture and interrogation not otherwise permitted if captured by U.S. forces. For their part, warlords, who worked only for the highest bidder, were given to believe that betraying the United States would mean missile strikes. Though no such U.S. aircraft were in the region, the ruse worked. Had things gone wrong in a region where just about everyone was hostile to U.S. personnel and interests, the Joint Special Operations Task Force—Horn of Africa, under the code name MYSTIC TALON, secretly stood ready to go in with extreme prejudice and rescue captured Americans.

While image intelligence assets remained tasked in Iraq, Orange used its specialization in signals intelligence to invade the Somali cell phone network, and it paid off in big ways. It wasn’t long before serious counterintelligence operations could be drawn up and executed. Not only were key al-Qaeda figures targeted by cruise missiles, but U.S. intelligence could now see where various terrorist cells intersected and better understand how they might be dismembered.

In 2006, that intelligence (a still-ongoing and effective program) would be applied with a dagger’s edge, as JSOC took advantage of the conflict between Somalia and Ethiopia. Though the Command was inexplicably caught flat-footed at the time, it soon inserted a small number of hunter-killers to work alongside Ethiopian special operations teams. JSOC might have gone larger but for anxieties in Washington.

The Pentagon and the White House decided to focus on key terrorists, eschewing the possibility of large Somali casualties. Naylor quotes an official who said, “If we wanted to kill a couple of thousand guys, we could have done that pretty much any time.”³ A small JSOC footprint prevented jihadists from pointing to the U.S. presence as some kind of holy war against Islam.

Meanwhile, under the aegis of General Stanley McChrystal, JSOC’s command presence spread from a few people in Nairobi to stations throughout Kenya and into the capital of Ethiopia and across the Horn of Africa. This command would soon produce kinetic operations and a fast, deep operations tempo. In the process, it would seem as if Africa would transition from a CIA to a wider Defense Department theater.
With policymakers obsessed with tracking down every last member of al-Qaeda, the Command’s other capabilities have atrophied. We know this because Admiral Eric Olson, the former commander of U.S. Special Operations Command, said as much to Congress in a little-noticed written answer to questions late last year. According to the admiral, special operations forces needed more resources to combat the threat of nuclear proliferation.

Implicitly referring to JSOC, he said that the weapons of mass destruction (WMD)–hunting capacity of the special missions units has been “limited” due to a lack of time and money to sufficiently train for those types of contingency missions. This is the backwash from success in the war on terror. The gravest threat to the world, as stated by President Barack Obama, is nuclear terrorism. The focus of the force best equipped to counter that threat has been otherwise occupied. JSOC is merely one part of SOCOM, which, at one point during the last decade, was deployed in more than fifty-five countries simultaneously. So-called white, or acknowledged, special operations forces, such as the Rangers, the Green Berets, and the SEAL teams—laid the groundwork for many JSOC successes and found themselves competing with JSOC for resources at the same time. Special Forces Command suffered a high casualty rate, too. But JSOC was sexy. Its direct action missions were more easily evaluated in terms of success or failure. The U.S. Army Special Forces colonel who stands up a school in Afghanistan “will get very little attention and almost no impact on a national strategy, and yet he’s making as much of a difference as JSOC,” a special forces general officer with JSOC experience put it, speaking on the condition of anonymity. “I think that those people making decisions on national-level policy need to be very cautious of overdependence on a policy that is impacted by a classified operation or unit,” he said.

While SOCOM’s budget doubled from 2001 to 2011, Admiral William McRaven now faces the task of rebalancing the overall command and rebuilding basic unconventional warfare capabilities, while ensuring that the
special missions can be carried out. He has told senators that he worries that SEAL combat swimming skills and Ranger airfield-securing capabilities are rusty.

Michele Malvesti, a former senior director for combating terrorism during the Bush administration and the daughter of a Delta Force commander who died in a training accident, was more blunt in an article written for the Center for a New American Security:

> Over the past nine years SOF have focused on unconventional warfare, counterinsurgency, and most prominently and extensively, on CT operations. Such time and attention appropriately match the nature of the conflicts in which SOF are engaged today.

> Yet arguably the gravest threat to U.S. national security is WMD terrorism. The proliferation of WMD capabilities to state actors presents a related challenge for the future. While there is some overlap in the counterterrorism and counterproliferation missions, SOCOM must continue to ensure that it has established and regularly reviews the right readiness metrics for WMD counterproliferation, with SOF fully exercising and maintaining a robust ability to locate, capture or destroy, or render safe weapons of mass destruction in a variety of situations and environments. Virtually no other military component or U.S. department or agency has the ability to conduct the full range of counterproliferation missions or address WMD networks under the unique set of conditions in which SOF have been trained to operate and complete such tasks.

Malvesti has several proposed solutions, but one of them is increased transparency and oversight and a rededicated focus by the special missions units on actual special missions, rather than on what amounts to tactical infantry strikes. (See here the disastrous 2011 shoot-down of a U.S. Army Chinook, which took the lives of thirty U.S. service members, including a SEAL team, the helicopter crew, and the pilot, Chief Warrant Officer Bryan Nichols.)
When visitors are given access to JSOC’s sprawling compound at Pope, they must first drive up Malvesti Road, which is named after Michele’s father. Michele, by virtue of her own academic work and because she grew up as one of them, is considered by many in JSOC to be a plank holder in the small community. Her word can open or shut doors, so it’s significant that she’s taken a stand. JSOC has changed the world, and now the world is changing JSOC.

Notes

4.2 The geographical scope of non-international armed conflict

In considering grounds for recognising the existence of armed conflict in Prijedor the Tadić Appeals Chamber held, in accordance with the definition of non-international armed conflict referred to above, that ‘the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities’.\(^{118}\) International humanitarian law thus pertains not only to those areas where actual fighting is taking place: it applies to the entire territory of the state involved in armed conflict. This position clearly strengthens the reach of international humanitarian law. It is expressed consistently in the jurisprudence of the Tribunal.\(^{119}\) The Trial Chamber in the Blaskic case referred to the definition of armed conflict provided by the Tadić Jurisdiction Decision as a ‘criterion’ applicable to all conflicts whether international or internal. It is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole region of which the municipalities are a part.\(^{120}\)

Similarly, in Kordic and Cerkez the Trial Chamber stated that in order for norms of international humanitarian law to apply in relation to a particular location, there need not be actual combat activities in that location. All that is required is a showing that a state of armed conflict existed in the larger territory of which a given location forms a part.\(^{121}\)

In the Kunarac case, the Trial Chamber applied the Tadić definition of non-international armed conflict to determine the existence of armed conflict between Bosnian Serbs and Bosnian Muslims in the municipalities of Foca, Gacko and Kalinovik.\(^{122}\) In doing so it held that a state

\(^{118}\) Tadić Jurisdiction Decision, para. 67.

\(^{119}\) See Delalic et al., Trial Chamber Judgment, para. 185; Prosecutor v. Blaskic, Trial Chamber Judgment, 3 March 2000, ICTY Case No. IT-95-14, para. 64; Kunarac et al., Trial Chamber Judgment, paras. 402 and 567; Naletilic and Martinovic, Trial Chamber Judgment, para. 177; Kordic and Cerkez, Appeals Chamber Judgment, para. 319.

\(^{120}\) Blaskic, Trial Chamber Judgment, para. 64.

\(^{121}\) Kordic and Cerkez, Trial Chamber Judgment, para. 27. The findings of the Trial Chamber on this point were supported in the Judgment of the Appeals Chamber. Kordic and Cerkez, Appeals Chamber Judgment, para. 319.

\(^{122}\) Kunarac et al., Trial Chamber Judgment, paras. 402 and 567. Similar to the Furundzija Trial Chamber’s finding, the finding of the Kunarac Trial Chamber does not elaborate on its application of the Tadić formula.
of armed conflict existed in the region relevant to the indictment and emphasised that international humanitarian law applies continuously to the whole of the territory under the control of one of the parties, whether or not actual combat takes place there.\textsuperscript{123} While the defence conceded the existence of an armed conflict in Foca, this finding was appealed on the grounds that the Trial Chamber had erred, \textit{inter alia}, in establishing the existence of armed conflict in Gacko and Kalinovik.\textsuperscript{124} In responding to this challenge, the Appeals Chamber stated pointedly that:

\begin{quote}
[T]he Prosecutor did not have to prove that there was an armed conflict in each and every square inch of the general area. The state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties. The Appeals Chamber finds that ample evidence was adduced before the Trial Chamber to demonstrate that an armed conflict was taking place in the municipalities of Gacko and Kalinovik at the relevant time.\textsuperscript{125}
\end{quote}

The language used by the Appeals Chamber in this case places emphasis on the broad geographical scope of international humanitarian law. The position originally expressed in the \textit{Tadić} Jurisdiction Decision is reproduced in the \textit{Kunarac} Appeal Chamber's Judgment:

There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.\textsuperscript{126}

\textsuperscript{123} \textit{Kunarac et al.}, Trial Chamber Judgment, para. 568.
\textsuperscript{124} \textit{Kunarac et al.}, Appeals Chamber Judgment, para. 49.
\textsuperscript{125} \textit{Ibid.}, para. 56. \textsuperscript{126} \textit{Ibid.}, para. 57.
The prosecution of war crimes is thus dependent upon: (a) the existence of armed conflict; and (b) a nexus to armed conflict.\textsuperscript{127} The broad interpretation given to the geographical scope of armed conflict is not without significance. In so far as it avoids fragmentation of status, it facilitates a greater degree of clarity and cohesiveness in the application of international humanitarian law to situations of non-international armed conflict. The Trial Chamber in the \textit{Delalic} case states that ‘whether or not the conflict is deemed to be international or internal, there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable.’\textsuperscript{128} The continuity of applicability is preserved by this position preventing interpretations of the law that would arbitrarily deprive victims of the protection it provides.

\section*{4.3 The temporal scope of non-international armed conflict}

The Tribunal’s position concerning the temporal scope of armed conflict confirms the constant applicability of international humanitarian law to situations of protracted armed violence where hostilities are not necessarily to be characterised as continuous.\textsuperscript{129} Indeed, the use of the term ‘protracted’ in the Tribunal’s definition of non-international armed conflict implies that hostilities need not require, unlike Additional Protocol II, the use of ‘sustained and concerted’ military operations.\textsuperscript{130} As interruptions in fighting do not suspend the obligations of the parties under international humanitarian law, the

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\textsuperscript{127} The existence of a nexus to the armed conflict is an important requirement for the prosecution of war crimes. In order to hold a person responsible for such offences, the acts of the accused must be closely related to the hostilities. \textit{Delalic et al.}, Trial Chamber Judgment, para. 185; \textit{Naletilic and Martinovic}, Trial Chamber Judgment, para. 177. While the geographical scope of the armed conflict concept is to be broadly interpreted, the nexus requirement ensures a degree of balance in the applicability of international humanitarian law. As noted by the \textit{Naletilic} Trial Chamber:
\begin{quote}
Once it is established that an armed conflict occurred in a territory, the norms of international humanitarian law apply. It is not necessary to further establish that actual combat activities occurred in a particular part of the territory. The existence of an armed conflict nexus is established if the alleged crimes ‘were closely related to the hostilities’.
\end{quote}
\textit{Naletilic and Martinovic}, Trial Chamber Judgment, para. 177.
\textsuperscript{128} \textit{Delalic et al.}, Trial Chamber Judgment, para. 185.
\textsuperscript{130} See Zimmermann, ‘War crimes’.
\end{flushleft}
Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists

KELISIANA THYNNE

Abstract

Following the terrorist attacks of 11 September 2001, the US declared Al-Qaeda and its associates as ‘the terrorist enemy’. Under the previous and current Administrations, the US’s security strategies have focused on combating this ‘terrorist enemy’ in various ways including the so-called ‘war on terror’ or ‘war with Al-Qaeda’: an armed conflict against transnational terrorists to which international humanitarian law (‘IHL’) supposedly applies. This article considers the notion of targeting transnational terrorists under IHL. The article addresses the issue of whether an armed conflict against terrorists exists and what sort of armed conflict it may be. It then examines whether terrorists are legitimate targets in and outside an armed conflict, drawing on the recent ‘Interpretive Guidance on Direct Participation in Hostilities’ by the International Committee of the Red Cross. The article concludes that terrorist attacks in general do not give rise to armed conflict; that there is no legitimate war against transnational terrorists; and, therefore, that military targeting of such transnational terrorists can only occur in limited circumstances.

Introduction

Following the terrorist attacks of 11 September 2001 (‘September 11’) on the World Trade Center and the Pentagon in the United States of America (‘US’), the US declared Al-Qaeda and its associates1 as ‘the terrorist enemy’2 and launched attacks against them. In so doing, they also launched an attack against Afghanistan, where Al-Qaeda was based with support of the Taliban, the de facto Government of Afghanistan. Since September 11, under the

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1 Legal Adviser, International Committee of the Red Cross (ICRC) Regional Delegation in the Pacific. The views expressed in this article are those of the author and do not necessarily represent those of the ICRC. This article was originally written as part of assessment for the Master of Laws at the University of Sydney. The author is grateful to Dr Ben Saul for comments in its earlier form.

2 There is a debate as to what Al-Qaeda is in terms of an organisation, whether it is really a functioning organisation or a series of splinter groups and whether it is truly responsible for terrorist attacks across the globe. See, eg, Mohammad-Mahmoud Ould Mohamedou, ‘Non-Linearity of Engagement, Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States’ (Policy Brief, Program on Humanitarian Policy and Conflict Research, Harvard University, July 2005) <http://www.hpcr.org/pdfs/Non-Linearity_of_Engagement.pdf>. For ease of reference, this article shall refer to ‘Al-Qaeda’ as the entity against which the US is determined to fight, because it is the organisation that the US has identified as its main ‘enemy’. See also Marco Sassòli, ‘Transnational Armed Groups and International Humanitarian Law’ (Occasional Paper Series, Winter 2006, No 6, Program on Humanitarian Policy and Conflict Research, Harvard University, February 2006) 1, <http://www.hpcr.org/pdfs/OccasionalPaper6.pdf>.

previous Administration, the US’s security strategies have focused on combating this ‘terrorist enemy’ in various ways.\(^3\) While several different approaches were taken, including immigration policies, freezing finances, and mutual assistance and police cooperation,\(^4\) one major approach was the so-called ‘war on terror’;\(^5\) an armed conflict against transnational terrorists to which international humanitarian law (‘IHL’) supposedly applies.

Under the new Administration of President Obama, the approach to terrorism is multifaceted and varied, including improving food security, greater diplomacy, strengthening partnerships and addressing the underlying causes of terrorism.\(^6\) The approach is more nuanced than a ‘war on terror’, and specifically, the Administration has rejected the use of this term and the term ‘global war’.\(^7\) However, the language remains that of conflict, and the need to combat terrorism. The ‘war on terror’ has now become a ‘war with Al-Qaeda’.\(^8\) Indeed, in his inaugural speech, President Obama said: ‘[o]ur nation is at war against a far-reaching network of violence and hatred’.\(^9\)

The Administration also maintains the rhetoric of the ‘terrorist enemy’.\(^10\) The Office of the Coordinator for Counterterrorism under the US Department of State states that the ‘terrorist enemy’ is in the process of creating a ‘global insurgency’, employing ‘subversion, sabotage, open warfare and, of course, terrorism’.\(^11\) The US State Department _Country Report on Terrorism 2008_ notes that ‘Al-Qa’ida and associated networks continued to lose ground, both structurally and in the court of world public opinion, but remained the greatest terrorist threat to the United States … in 2008’.\(^12\) One of the approaches to the ‘terrorist enemy’ threat has been to increase the size of the Army and Marines.\(^13\) Further, while the Administration no longer uses the term ‘unlawful enemy combatant’, it continues to use military commissions to try those accused of committing terrorist offences outside the US and in the wars in Afghanistan and Iraq. Although, on 22 January 2009, President Obama issued an executive order to close the detention facilities at Guantánamo Bay, which, at the time of writing, had not yet happened.

The US has argued that this proposed war or armed conflict against transnational terrorists, and now specifically Al-Qaeda, would give the US the ability to target terrorists

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\(^{7}\) Ibid.

\(^{8}\) Ibid.

\(^{9}\) President Barack Obama, ‘Inaugural Address’ (Speech delivered at US Capitol, Washington DC, 21 January 2009) <http://www.whitehouse.gov/the_press_office/President_Barack_Obamas_Inaugural_Address/>.\(^{10}\)

\(^{10}\) US Department of State, Office of the Coordinator for Counterterrorism <http://www.state.gov/s/ct/>.\(^{11}\)

\(^{11}\) US Department of State, above n 2.

\(^{12}\) US Department of State, Country Reports on Terrorism 2008, Chapter One: Strategic Assessment (30 April 2009) <http://www.state.gov/s/ct/rs/crt/2008/122411.htm>.\(^{13}\)

\(^{13}\) Brennan, above n 6.
with military force when they are planning, or have performed, terrorist attacks against US interests.14

Military targeting can only occur during an armed conflict against a legitimate target. It involves identification of a particular person or military object that is part of an existing armed conflict, and directing military force against that person or object for the purpose of killing or putting out of action that person or object.15 The policy arguments behind targeted killings include that the persons carrying out the targeting are not killed and that there is less risk of 'collateral damage' of persons protected from the conflict. In other words, it generally meets requirements of proportionality and military necessity.16

The war in Afghanistan is such an armed conflict and was entered into on the basis of self-defence, against the September 11 attacks, under the international law on the use of force.17 Beyond any controversy around the legitimacy of the conflict and reasons for the armed conflict, the conflict in Afghanistan now represents an armed conflict to which IHL applies. The US Government under the previous Administration had, however, proposed that the 'war on terror' was an extension of this war in Afghanistan,18 an armed conflict in which they could target Al-Qaeda and associated terrorist organisations under IHL.19

The notion, continued under the current Administration, of a ‘legal armed conflict’ arises out of the fact that the US considers itself engaged in a war against Al-Qaeda since the September 11 attacks, outside of the territorial boundaries of Afghanistan and separate to the war fought against the 'Taliban.20 In other words, there is an armed conflict against the 'global insurgency' that is Al-Qaeda.21 The ‘war’ is fought across borders against transnational terrorists who are non-State actors, for which a State is not legally responsible.

14 See Bob Woodward, 'CIA Told to Do “Whatever Necessary” to Kill bin Laden; Agency and Military Collaborating at “Unprecedented” Level; Cheney Says War Against Terror “May Never End,’” The Washington Post (Washington DC), 21 October 2001.
18 As the US refers to the war in Afghanistan as a starting point for an extension of their armed conflict, this is the example that this article will consider. It is worth noting, however, that Al-Qaeda is also fighting against the US and vice versa in Iraq. See US Department of State, Country Reports on Terrorism 2004 (April 2005), 62 <http://www.state.gov/documents/organization/45313.pdf>.
19 Ulrich, above n 16, 1046.
21 Brennan, above n 6.
Al-Qaeda is considered by the US to be such a terrorist. It is a collection of individuals and groups that operate across national borders inside and outside of Afghanistan. This so-called legal armed conflict would allow the US to use military force against such ‘transnational terrorists’ wherever they are in the world: ‘mountains in Afghanistan, a village ... in Pakistan, the streets of Milan’. However, it is essentially a policy of targeting terrorists with military force in the context of an armed conflict, rather than engaging in an armed conflict involving armed forces on the ground.

The rhetoric surrounding military targeting and the ‘war on terror’ has confused the two areas of law around the use of force – the *jus ad bellum*, which applies to when the use of force is permitted to begin, and the *jus in bello* (or IHL), which determines how the force is to be applied when the initial use of force results in an armed conflict. It has been said that military targeting can be performed under *jus ad bellum* notions of self-defence, but such force can only be used in response to an actual or imminent armed attack. With military targeting under IHL, there does not need to be any initial use of force engaging a right of self-defence, the person who is targeted merely needs to be a legitimate target in the course of an existing armed conflict. The law relevant to military targeting is IHL, not *jus ad bellum*.

At least two examples of where the US has already attempted to use military targeting (albeit through the CIA, not the US military, and increasingly through the use of private military contractors) occurred in 2002, after the attacks of September 11 and while the US was engaged against Al-Qaeda in Afghanistan as an international armed conflict. In February 2002, a CIA unmanned predator drone fired a missile at three suspected Al-Qaeda leaders on the Pakistan-Afghanistan border. In November 2002, a CIA-­operated plane launched a missile into Yemen specifically targeting and killing Abu

24 US Department of State, above n 20.
28 The CIA is a non-military organisation; it engages in subterfuge, using unmanned missile launchers and does not wear military uniforms, suggesting that it could be acting contrary to IHL if it were to target terrorists: see Mary Ellen O’Connell, ‘To Kill or Capture Suspects in the Global War on Terror’ (2003) 35 Case Western Reserve Journal of International Law 325. Additionally, it has been reported that the CIA employs private military contractors to operate the drones, but not to select the targets, raising issues of accountability and direct participation in hostilities: see James Risen and Mark Mazzetti, ‘CIA said to Use Outsiders to Put Bombs on Drones’ *The New York Times* (New York), 20 August 2009.
29 O’Connell, above n 28, 325.
Ali al-Harithi, an Al-Qaeda member, allegedly Osama bin Laden’s body guard and implicated in the 2000 attack on a US destroyer off the coast of Yemen.\(^{30}\) In the second case, Yemeni forces had already tried to arrest Ali al-Harithi and had been killed. He was alleged to be ‘an active combatant engaged in ongoing plans against the United States’.\(^ {31}\) The US has stated that it considered it had the right to target terrorists anywhere in the world under IHL.\(^ {32}\)

This article considers the notion of targeting transnational terrorists, such as Al-Qaeda, under IHL, and, in so doing, rejects the notion that ‘war on terror’, now dubbed ‘the war with Al-Qaeda’, is a real war. It is a rhetorical war, under which there may be elements of armed conflict, but not all aspects of terrorism create an armed conflict, and not all terrorists are legitimate targets. The first section of the article addresses the issue of whether an armed conflict against terrorists exists and what sort of armed conflict it may be. This analysis is necessary to consider what aspects of IHL apply to the armed conflict. The second section examines whether terrorists are legitimate targets in and outside an armed conflict, drawing on the recent ‘Interpretive Guidance on Direct Participation in Hostilities’ by the International Committee of the Red Cross (ICRC).\(^ {33}\) The article concludes that terrorist attacks in general do not give rise to armed conflict; that there is no legitimate war against transnational terrorists; and, therefore, that military targeting of such transnational terrorists can only occur in limited circumstances.

I. **Framing the scope of the ‘transnational’ armed conflict**

In order to determine whether the US can militarily target terrorists, it is important to consider the circumstances under which military force can be used. The use of military force is regulated by IHL\(^ {34}\) and IHL only applies when there is an armed conflict. Thus, to begin to determine whether the use of military force to target terrorists is lawful, it is necessary to ask two questions. First, does an armed conflict exist? Second, if it is an armed conflict, what sort of armed conflict is it? The answers to these questions depend on how terrorist activities generally and the specific contexts of the armed conflict in Afghanistan are framed.

A. **Is there an armed conflict between the US and Al-Qaeda?**

The previous US Administration sought to use an expanded notion of an armed conflict under the ‘war on terror’ to destroy terrorist cells around the world under IHL. The purpose would be to prevent Al-Qaeda from committing further terrorist attacks against

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\(^{31}\) Kenneth Roth in Kenneth Roth and Robert F Turner, ‘Debating the Issues’ in Sparks and Sulmasy (eds), above n 23, 398.

\(^ {32}\) Letter from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights, above n 23.


US interests, but the methods would have to fall under IHL, and therefore be performed in the context of an armed conflict. The ICRC has rejected the notion that a global war exists
against terrorism,\textsuperscript{35} as have many other commentators.\textsuperscript{36} Under IHL, as the International
Criminal Tribunal for the Former Yugoslavia (‘ICTY’) has identified, an armed conflict is a
military conflict where there is armed force between two or more parties (either States or
non-State actors such as rebel groups).\textsuperscript{37} The fighting must reach a certain level of intensity
and be protracted,\textsuperscript{38} and the parties must be organised into a military structure and
represent an identifiable group.\textsuperscript{39} The following subsections consider these issues in
relation to the ‘war with Al-Qaeda’.

(i) Is there a level of intensity in the conflict to make it armed conflict?

For the US to be able to militarily target Al-Qaeda, there must be an armed conflict
between them. The US and some commentators consider that there is such an armed
conflict stemming from attacks in 1996 and thereafter by Al-Qaeda against US interests,
and that the war in Afghanistan is merely another part of that war.\textsuperscript{40} This view ignores the
fact that the continuing existence of an armed conflict is determined by IHL, or \textit{justus in belli},
not the declaration of a war under \textit{just ad bellum}.

Terrorism is prohibited under IHL as ‘acts or threats of violence the primary purpose
of which is to spread terror among the civilian population’.\textsuperscript{41} These could include acts that
terrorist groups are known to perpetrate, such as beheadings killing UN and humanitarian
personnel.\textsuperscript{42} While they are prohibited during armed conflict, the existence of terrorist
attacks does not necessarily demonstrate an armed conflict. Usually, terrorist acts will not
reach the threshold for an armed attack\textsuperscript{43} or to establish the existence of an armed conflict,
and therefore IHL will not apply to the situation of an isolated terrorist attack.

\textsuperscript{35}International Committee of the Red Cross (ICRC), ‘International humanitarian law and the challenges of
contemporary armed conflicts (Document prepared by the International Committee of the Red Cross for the 30th
89(867) International Review of the Red Cross 779, 724.
\textsuperscript{36}See Mary Ellen O’Connell, ‘The Legal Case against the Global War on Terror’ (2004) 36 Case Western Reserve Journal of
International Law 349; Marko Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror:
\textsuperscript{37}Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (ICTY, Appeals Chamber, Case No
IT-94-1-A, 2 October 1995), [70] (‘Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)’).
\textsuperscript{38}Prosecutor v Tadić (ICTY, Trial Chamber, Case No IT-94-1-T, 7 May 1997), [562] (‘Tadić (Trial Chamber)’).
\textsuperscript{39}Prosecutor v Haradinaj (ICTY, Trial Chamber, Case No IT-04-84-T, 3 April 2008), [60] (‘Haradinaj’). See also Rome
Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July
2002), art 8(2)(f) (‘Rome Statute’).
\textsuperscript{40}Hamdan 548 US (2006), 65; Thomas McK Sparks and Glenn M Sulmasy, ‘Preface’ in Sparks and Sulmasy (eds)
above n 23; Mohamedou, above n 1, 2, 12, 17.
\textsuperscript{41}Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed
Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), arts 51(2)
(‘Additional Protocol I’); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of
Non-International Armed Conflicts (‘Additional Protocol II’), opened for signature 8 June 1977, 1125 UNTS 609
\textsuperscript{42}Ben Saul, \textit{Defining Terrorism in International Law} (2006), 298.
27(2) The Fletcher Forum of World Affairs 55, 63.
Common article 3 of the 1949 Geneva Conventions\textsuperscript{44} applies to 'the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties', but does not provide a definition of 'armed conflict'. As stated above, the ICTY, extrapolating from common article 3, has said that an armed conflict exists whenever there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.\textsuperscript{45} Additional Protocol II to the 1949 Geneva Conventions also applies to non-international armed conflicts, but it has a higher threshold. It provides that an armed conflict exists when there are 'sustained and concerted military operations'. It also provides that 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are not armed conflict, and IHL does not apply to them.\textsuperscript{46} This test has been adopted in the Rome Statute of the International Criminal Court to demonstrate lack of an armed conflict.\textsuperscript{47} The ICTY has also said that a conflict under common article 3 should be distinguished from 'banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.\textsuperscript{48} The International Criminal Tribunal for Rwanda (ICTR) has also approved the criteria that armed conflicts must meet a certain level of intensity for common article 3 conflicts.\textsuperscript{49} The ICTY has noted, however, that the test merely provides guidance as to how to determine an existence of an armed conflict and does not provide set requirements.\textsuperscript{50}

On the one hand, the September 11 attacks were called armed attacks by the US and by many other States with the UN Security Council also invoking the right to self-defence against armed attacks.\textsuperscript{51} The war in Afghanistan is certainly proceeding against transnational terrorists such as Al-Qaeda. Similarly in Iraq, insurgent forces conduct suicide attacks and explode improvised explosive devices (IEDs) with such regularity and intensity as to create an armed conflict between the insurgents and the coalition forces.\textsuperscript{52}

If the terrorist attacks by Al-Qaeda outside of these theatres of war were linked and demonstrated a pattern of violence and attacks, or if they reached a certain intensity, it could be possible to demonstrate that the attacks are part of an armed conflict.\textsuperscript{53} Common

\textsuperscript{44} Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 31, 85, 135, 287 (entered into force on 21 October 1950) (collectively, '1949 Geneva Conventions').

\textsuperscript{45} Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [70].

\textsuperscript{46} Additional Protocol II art 1(2).

\textsuperscript{47} Rome Statute art 8(2)(f).

\textsuperscript{48} Tadić (Trial Chamber) [562]; Prosecutor v. Limaj (ICTY, Trial Chamber, Case No IT-03-66-T, 30 November 2005), [84] ('Limaj').

\textsuperscript{49} Prosecutor v. Akayesu (ICTR, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998), [602], [625] ('Akayesu').

\textsuperscript{50} Limaj [86].


\textsuperscript{52} US Department of State, above n 18.

article 3 is supposed to be applied as widely as possible.\textsuperscript{54} Attacks over a period of time that may themselves be relatively minor, if carried out in a systematic way, can result in their being determined part of an armed conflict or establishing an armed conflict.\textsuperscript{55} particularly if the other element of organisation by the armed group perpetrating the attacks exist and the State’s military is required to respond.\textsuperscript{56} Similarly, if terrorist attacks were to be continuous and they were responded to with force by an opposing side, they could be termed protracted and be a sustained military effort that amounts to an armed conflict. It will depend, however, on the circumstances of each attack and how States deal with it.\textsuperscript{57}

On the other hand, terrorist attacks are, by their nature, usually sporadic acts of violence. They are seemingly random attacks of a political or ideological nature and not attacks serious enough to constitute an armed attack leading to an armed conflict.\textsuperscript{58} The terrorist attacks that have occurred around the world in the last 10 years and generally unrelated, although often linked in the public’s mind to the ‘war on terror’. The 2009 attacks in Jakarta were unrelated to the 2005 London bombings, which were unrelated to the 2004 Madrid bombings. The Jakarta bombings were also conducted by a group that has separated itself from the perpetrators of the 2002 Bali bombings. Terrorist attacks are usually specifically excluded from representing armed conflict,\textsuperscript{59} even if they may extend over time. The ICTY has emphasised that the intensity of attacks is of greater weight than the duration in determining the existence of an armed conflict.\textsuperscript{60} Reviewing their previous jurisprudence, in Haradinaj, the ICTY held that factors indicative of a non-international armed conflict include:

- the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.\textsuperscript{61}

The terrorist attacks and involvement in the armed conflict of Al-Qaeda in Afghanistan and Iraq meet these indicators, but aside from the September 11 attacks, no other terrorist attack has since been called an ‘armed attack’, nor has one prompted a war.\textsuperscript{62} Nor has any terrorist attack since — whether in Indonesia, Spain, London, Morocco, Russia, Egypt or


\textsuperscript{55} Tadić (Trial Chamber) [566].

\textsuperscript{56} ICRC, above n 54.

\textsuperscript{57} ICRC, above n 35, 726.

\textsuperscript{58} There is considerable opinion to the effect that armed attacks can only be carried out by, or be attributable to, states: Nicaragua v United States [195]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, [139].

\textsuperscript{59} Tadić (Trial Chamber) [562].

\textsuperscript{60} Haradinaj [49].

\textsuperscript{61} Ibid.

\textsuperscript{62} Sassoli, above n 1, 10.
elsewhere—demonstrated military engagement or weaponry, military-type organisation or intensity required to demonstrate an armed attack. In the current situation, terrorist attacks meet the test of internal disturbance or short-lived acts of violence, but this puts them outside the boundaries of IHL. While serious, they do not meet the required seriousness for armed conflict, nor has there been an escalation of violence; the acts have been sporadic, without any apparent organisation between them.

Usually IHL will not operate in the context of the fight against terrorists, but only where there is an armed conflict. Criminal law will apply to prevent and punish terrorist attacks when the perpetrators are apprehended. The US will have to rely on an existing armed conflict to which the planned terrorist attacks can be linked, where there is a ‘regularity and level of intensity to the violence such that it is fair to characterise the overall campaign as one of war’, to justify targeting of transnational terrorists under IHL.

The international or non-international nature of the conflict is discussed below. The next question to address before that issue is whether there are two or more parties to the conflict, including the main protagonists for the purposes of the US’s military targeting: Al-Qaeda and the US.

(ii) Are there two or more parties to the conflict?

In an armed conflict that would allow the US to target Al-Qaeda with military force transnationally, the two parties would have to include the US and Al-Qaeda because the US wants to use military force and wants Al-Qaeda to be a target of that force. In order for there to be an armed conflict involving a State and a non-State actor, there must be two or more parties and they must both or all be engaged in military action. The parties must exhibit a certain amount of organisation and military structure to be identifiable as a party to the armed conflict. Common article 3 provides no specific guidance as to how the parties must conduct themselves, but the Commentary on this article states that the rebel party should be ‘an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention’.

In Haradinaj, the ICTY held that indicative factors of whether an organisation can be a party to an armed conflict include:

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63 See US Department of State, above n 18.
64 Tadić (Trial Chamber) [562].
65 Iizuka [90].
66 Mohamedou, above n 1, 14.
69 Kenneth Roth in Kenneth Roth and Robert F Turner, ‘Debating the Issues’ in Sparks and Sulmasy (eds), above n 23, 400. See also Haradinaj [49].
70 Tadić (Trial Chamber) [562].
71 Marcinko, above n 67, 379.
72 Tadić (Trial Chamber) [562]; Haradinaj [50]; Sassoli, above n 1, 11.
73 ICRC, above n 54.
the existence of a command structure ...; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, ... recruits and military training; its ability to plan, coordinate and carry out military operations, including ... logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire ... accords.74

These are not all essential criteria. In Limaj, the ICTY held that the Kosovo Liberation Army’s level of organisation was ‘fluid and developing and not all zones had the same level of organisation and development’.75 There was a general command structure, but with few levels, and generally the different commanders took orders from General Staff.76 General Staff made statements about the organisation’s activities and organised weapons.77 They had no consistent place of location78 and regulations were not necessarily enforced.79 Further, they lacked a consistent uniform.80 However, the ICTY looked at the organisation’s ability to attract new members,81 and its provision of military training,82 command structure and ability to engage in negotiations and in intense armed conflict, as representative of their organisation’s status as a party to the conflict.83

The ICRC’s ‘Guidance on Direct Participation’ recognises that while non-State actors involved in armed conflict might often be indistinguishable from the civilian population, they should not necessarily be classified as civilians and can be classified as being a member of a party to the armed conflict.84 Their continuous engagement in conflict is what distinguishes them from the civilian population and demonstrates their membership of an irregular armed forces — it is a functional determination, rather than affiliation or ties to a group.85

The status of the US in the conflict is straightforward. States are presumed to be proper parties to armed conflicts.86 They also generally fall under the recognisable categories of parties to non-international armed conflicts by wearing a distinctive uniform and by carrying arms openly.87 The US has declared that it is at war with Al-Qaeda and has indicated its intention to use military force against Al-Qaeda. Its national armed forces are well-established in a military hierarchy and it is engaged fully in the war in Afghanistan.

Al-Qaeda forces in Afghanistan are engaged in the armed conflict. In the conflict, Al-Qaeda soldiers do not wear uniforms; they use techniques that are in many cases

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74 Harading [60].
75 Limaj [95].
76 Ibid [98].
77 Ibid [100]–[101].
78 Ibid [104].
79 Ibid [116].
80 Ibid [123].
81 Ibid [118].
82 Ibid [119].
83 Ibid [125], [129], [134], [173].
84 ICRC, above n 33, 1002.
85 Ibid 1007.
86 Harading [60].
87 ICRC, above n 33, 1005.
considered underhand; and they do not necessarily abide by IHL. Nonetheless, they could be termed a party to the conflict in Afghanistan as they engage in war-like acts in Afghanistan and appear to be organised into some form of army. They provide training to their forces; they obtain weapons; they have been known to negotiate; they issue orders from a central command within Afghanistan; and the majority of them can be said to be engaged in continuous combat against the US (and Afghanistan). They appear to meet the test to be parties to the conflict in Afghanistan.

On the other hand, internationally, aside from the conflicts in Iraq and Afghanistan, Al-Qaeda as an organisation is loosely held together and does not display a well-established hierarchy. The groupings of Al-Qaeda outside Afghanistan are held together by an ideological belief, but have little contact with each other and appear to have autonomy in making decisions as to attacks and planning those attacks. They do receive training and do have a common goal, but they do not negotiate, they have no central command structure, they do not have a unified military strategy and they do not engage in military acts, as demonstrated above. Al-Qaeda as an organisation might have ideological appeal to such terrorist groups, but each attack has been performed by home-grown terrorists, without any commanding control by Al-Qaeda in Pakistan and Afghanistan for example. Similarly, none of the ‘terrorists’ outside of Afghanistan and Iraq are engaged in continuous combat functions. Within any perceived ‘war on terror’, outside of Afghanistan and Iraq it appears that Al-Qaeda lacks the ability to be recognised as a party to any such conflict.

(iii) Is there an armed conflict between the US and Al-Qaeda?

The above analysis has demonstrated the limited nature of an armed conflict existing between Al-Qaeda and the US. Terrorist attacks of the kind undertaken by Al-Qaeda or other terrorist groups do not amount to armed conflict outside the theatre of war in Afghanistan. Outside Afghanistan, Al-Qaeda does not display the minimum requirements to be a party to an armed conflict. On the other hand, where the armed conflict is occurring within and as a result of the war in Afghanistan, Al-Qaeda and the US are parties to that armed conflict, with the conflict being a non-international armed conflict to which IHL applies.

Without the link to the war in Afghanistan, the terrorist acts the US alleges Al-Qaeda has perpetrated and will perpetrate amount to acts of violence, but not to armed conflict. For an armed conflict to exist between the US and Al-Qaeda, which would potentially allow the US to militarily target Al-Qaeda wherever it may be operating, there must be a link established to the conflict in Afghanistan.

90 Mohamedou, above n 1, 14.
91 Ibid.
B. If there is an armed conflict, what is the nature of the armed conflict?

The US has attempted, in its rhetoric, to establish a new type of armed conflict, spreading across borders and timeframes. However, the conflict envisaged could fit into one of the two already established types of armed conflict: international and non-international armed conflict. An international armed conflict is a conflict between two or more States, or between a State and an armed group that has substantial links to another State. A non-international armed conflict is between a State’s armed forces and one or more armed groups, or between two armed groups on the territory of one State. IHL applies to both these situations in varying degrees and under different treaties.

Having established that an armed conflict against transnational terrorists must maintain substantial links to the conflict in Afghanistan for targeting of terrorists to be legitimate under IHL, it is useful to consider the type of armed conflict constituted by the war in Afghanistan. It is also useful to look at the temporal and geographical aspects of the conflict, so as to determine the extent of an armed conflict against Al-Qaeda as transnational terrorists.

(i) Is the conflict in Afghanistan an international or non-international armed conflict?

It is necessary to consider what type of armed conflict exists in which both parties would be engaged in order to determine what principles of IHL apply to the targeting of Al-Qaeda by the US. The primary treaties regulating international armed conflicts are the 1949 Geneva Conventions and the 1977 Additional Protocols. Non-international armed conflicts are subject to common article 3 and Additional Protocol II. The US has not ratified either Additional Protocol I or Additional Protocol II, so only common article 3 and customary international law apply to the US’s activities in non-international armed conflicts.

Originally, when the US and its allies attacked Afghanistan in 2001, the conflict was an international armed conflict: a number of States (the US and its allies) were attacking another State (Afghanistan). The Government of Afghanistan was not recognised by many of the attacking States. But the existence of the Taliban as a de facto government brought the conflict within common article 2 of the 1949 Geneva Conventions, therefore making it an international armed conflict. Al-Qaeda and associated groups, and the Northern Alliance, were engaged in the armed conflict.

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93 1949 Geneva Conventions common art 2; Tadić (Trial Chamber) [569].
94 1949 Geneva Conventions common art 3; Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [70].
95 An armed conflict against terrorists and insurgents exists in Iraq as well, but for the purposes of this argument and for the reason that this example is the most widely quoted, the example of Afghanistan will continue to be the example analysed here.
96 In the case of Hamdan, the US Supreme Court held that it did not need to determine whether an international or non-international armed conflict existed, but that common article 3 at any rate applied to the conflict in Afghanistan: Hamdan 548 US (2006), 66.
97 1949 Geneva Conventions common art 2.
98 Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [70].
99 Additional Protocol I art 43(1); cf Yoram Dinsein, War, Aggression and Self-defence (4th ed, 2005), 7.
Now that Afghanistan is a US ally and the conflict is going on within the territory of Afghanistan, the war in Afghanistan is, for practical and legal purposes, a non-international armed conflict. The State of Afghanistan is now involved, with the support of the US and others, in a war against several different armed groups within Afghanistan, primarily Al-Qaeda and the Taliban.

Technically, any armed conflict between Al-Qaeda and the US will be a non-international armed conflict as it is between a State and an armed group. As already shown, any military targeting of Al-Qaeda under IHL by the US will have to have a link to the conflict in Afghanistan or to another armed conflict (for example Iraq), otherwise it cannot be considered to be an armed conflict at all and there will not be two recognisable parties to the conflict. The original armed conflict on which the extension of the conflict must be based is now a non-international armed conflict. Therefore, the targeting by the US of Al-Qaeda would appear to be governed by IHL as it relates to a non-international armed conflict, but not to an international armed conflict.

(ii) What is the geographical scope of the armed conflict?

The concept of using military force under IHL against Al-Qaeda, wherever it is operating in the world, moves away from the traditional idea of a non-international armed conflict within the territory of a single State. In this case, the relevant conflict to which all use of military force against Al-Qaeda must be related to be legitimate is a non-international armed conflict. Nonetheless, the US’s plan is not to limit the geographical scope of the armed conflict to the territory of Afghanistan, but to use force wherever Al-Qaeda members exist. The conflict could be going on far away from the source of the original armed conflict, but this might not necessarily prevent an armed conflict against transnational terrorists from being a legitimate armed conflict, provided the other criteria for armed conflict are met.

Common article 3 provides that a non-international armed conflict is one ‘occurring in the territory of one of the High Contracting Parties’. As has been pointed out by the ICRC, since all States are ‘High Contracting Parties’ to the 1949 Geneva Conventions, ‘any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention’. The ICTY has said that the geographical and temporal scope of a conflict is broad; it is not limited to the area in a territory where hostilities are taking place, but applies to the whole of the territory. There still exists, however, some requirement that there be a territorial nexus to a particular geographic State or region for a conflict to exist. Every State in the world may be a party to the 1949 Geneva Conventions and be bound by them, but this does not mean that an armed conflict will exist anywhere where parties to a conflict may be planning or training or even conducting attacks. For example, can an armed conflict extend to small instances of violence well away from the main conflict?

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100 ICRC, above n 35, 725.
102 Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [69].
103 Mareinko, above n 67, 377.
The geographical scope of an armed conflict is of course not limited to the area in which fighting is taking place. International conflicts between two States can be fought in many other places outside those States and in non-international armed conflict, cross-border activities and targeting sites which are in a neighbouring country may be part of that non-international armed conflict when linked to an existing conflict. In an era of technology that extends to use of space satellites, internet and remote-controlled weapons, the person who controls a weapon or engages in fighting could be geographically remote from the territory on which there is an armed conflict. Nonetheless, the actions of that person would still be directed to the territory of the conflict and have a direct causal impact on the conduct of the armed conflict.

The territorial nexus is not that the non-international armed conflict must occur on the territory of one State, but rather that there should be continuity of territory with each act being linked to the next and connected to a particular territory where the armed conflict occurs. If actions occur as part of an armed conflict directly, which are not in the particular vicinity of the armed conflict, IHL will still apply. Conversely, IHL will not apply if the actions outside a territory in which the armed conflict is ongoing do not occur as a direct part of that armed conflict.

The nature of terrorist activities is that they are seemingly random, conducted against various different groups of people and in different States. Al-Qaeda has allegedly conducted attacks in the US, UK, Kenya, Spain, Pakistan, Yemen and elsewhere. They are also operating in Afghanistan as part of an armed conflict, as discussed above. But an armed conflict that is conducted on several different, unrelated territories by both parties (as a hypothetical example: Al-Qaeda attacks in the UK, so the US attacks Al-Qaeda bases in Sudan) moves away from the territorial link to the existing armed conflict. Also, each act has no direct impact on the armed conflict taking place in Afghanistan. Again, each attack becomes an act of sporadic violence, and therefore unrelated to the conflict. In other words, the recent attacks in these different countries unrelated to the actual conflicts had no direct impact on the conduct of hostilities in Afghanistan and, therefore, are not linked to the existing armed conflicts.

(iii) What is the temporal scope of the armed conflict?
As discussed above, relying on common article 3, the ICTY has said that ‘International humanitarian law applies from the initiation of such armed conflicts and extends beyond

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104 Tadil (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [68].
105 For example, World War II was not fought in the territories of the US or Japan for the most part, although these were major parties to the international armed conflict.
107 ICRC, above n 33, 1023.
108 The question of 'acts' is discussed in Part 3.
109 Tadil (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [68].
110 Mohamadou, above n 1, 6.
111 There could be an indirect impact with the withdrawal of troops from Afghanistan by International Security Assistance Force (ISAF) members in response to home grown terrorist attacks, but this does not directly affect the conduct of the armed conflict.
112 Rona, above n 43, 62.
the cessation of hostilities until a general conclusion of peace is reached'.

The requirement of the protracted nature of a conflict generally excludes terrorist acts. If the terrorist attacks are prolonged and intense, as seen above, they could amount to an armed conflict and the armed conflict would endure for the length of the hostilities. However, the concept of the 'war on terror' or a war 'with Al-Qaeda' is indeterminate in time; there was no specified beginning and there can be no specific end. In this case, currently, the attacks by Al-Qaeda members outside of the theatre of war in Afghanistan and Iraq do not amount to armed conflict.

Any military targeting that the US may undertake (provided that it meets the other conditions above) may be legal if it occurs during the conflict in Afghanistan. However, once hostilities have ceased there, the ability to conduct military targeting will cease. There can be no extension of time to encompass a more general war against transnational terrorists unrelated to the war in Afghanistan.

2. Framing the role of transnational terrorists in an armed conflict

The previous section has shown that the US potentially could conduct military targeting of Al-Qaeda, but only in situations linked to an existing conflict — whether created by a series of terrorist attacks or as part of an existing armed conflict (probably only Afghanistan or Iraq in the current situation). Having determined that a limited scope of an armed conflict exists temporally and geographically as a non-international armed conflict, the question of whether such military targeting of Al-Qaeda would be legal depends upon the participants themselves: where they are operating, what they are doing and how closely linked they are to the armed conflict.

The need to distinguish between those who are engaged in military operations and are, therefore, legitimate targets and civilians, and those not engaged in military operations, is called the 'principle of distinction' and is a fundamental tenet of IHL that the US and other States are obliged to respect as customary international law: 'distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, to the effect that the latter be spared as much as possible'. Only persons who are actively engaged in the fighting should be the subject of targeting. All other persons are to be spared as far as military necessity and proportionality dictates (as discussed below).

In an international armed conflict, IHL distinguishes between combatants and civilians. In non-international armed conflict this distinction does not exist, rather the distinction is

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113 Yadi (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [70].
114 Prosecutor v Delalić (ICTY, Trial Chamber, Case No IT-96-21-T, 16 November 1998) ('Češnjać'), [184].
115 Hamdi v Rumsfeld 542 US 507 (2004), 12; Mohamedou, above n 1, 23.

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between combatants and non-combatants, or protected and non-protected persons.\textsuperscript{119} Nonetheless, for the purposes of this discussion, the terms combatant and civilian will be used, in accordance with the ICRC’s ‘Guidance on Direct Participation’.\textsuperscript{120} When targeting persons in an armed conflict, only those persons designated as non-protected persons and, therefore, ‘legitimate targets’ can be militarily targeted.\textsuperscript{121}

Common article 3 provides that in a non-international armed conflict the following people have protection: ‘[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed bors de combat by sickness, wounds, detention, or any other cause’. Conversely, civilians who are taking ‘direct part in the hostilities’ in a non-international armed conflict for a distinct time, such as in the present case, can be subject to military targeting. The ICRC’s ‘Guidance on Direct Participation’ is of great use here in clarifying what is meant by directly participating in hostilities.\textsuperscript{122}

The US is fighting in Afghanistan against Al-Qaeda. It states that Al-Qaeda members are legitimate targets in the conflict against the terrorist enemy wherever they are operating in the world, and have demonstrated this by targeting Al-Qaeda members in Yemen and on the borders of Pakistan.\textsuperscript{123}

The first question in relation to whether the US can target Al-Qaeda members is whether they are protected or non-protected persons. There is also the question of whether their membership of Al-Qaeda renders them legitimate targets. The next question is whether they are directly participating in hostilities and whether they have a continuous combat function. The geographical and temporal scope of the conflict also must be examined again when considering these actors and their roles in hostilities. Finally, the question of whether it is necessary and proportionate to target terrorists in general must be addressed.

The discussion here is solely centred on military targeting of persons directly engaged in hostilities, where they are singled out for targeting due to their involvement in the conflict. It is also possible to target buildings and other property; including any installation that constitutes a military objective and is not protected.\textsuperscript{124} If a person indirectly involved in hostilities, or even supposed to be protected from the conflict, is also hit and injured or killed, depending on the military necessity, this would be collateral damage; it would not constitute direct targeting of the person killed. Issues along these lines are drawn out briefly below.

\textsuperscript{119} ICRC, above n 35, 728.
\textsuperscript{120} ICRC, above n 33, 997.
\textsuperscript{122} ICRC, above n 33.
\textsuperscript{123} Letter from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights, above n 23; US Department of State, above n 4; O’Connell, above n 28; Dworkin, above n 30.
\textsuperscript{124} See Additional Protocol I arts 53, 55, 56.
A. What is the status of Al-Qaeda members under IHL?

As argued above, Al-Qaeda in Afghanistan is a party to the conflict because of its participation in the conflict, but individual members are hard to classify as they are not members of regular armed forces and do not fall easily into the ‘combatant’ category. The US started fighting Al-Qaeda in Afghanistan under an international armed conflict, therefore the distinction between combatants and non-combatants/civilians has been retained in the US’s approach.\(^\text{125}\) However, the US had classified Al-Qaeda members in Afghanistan as ‘unlawful combatants’, being between civilian and combatant, which gives them a particular legal status.\(^\text{126}\) This definition has since been abandoned by the current Administration, but it is worth discussing Al-Qaeda’s status in relation to whether those operating under its network can be targeted. The persons captured in the conflict in Afghanistan (and many captured outside Afghanistan) in the context of the war in Afghanistan were invariably sent to Guantánamo Bay as ‘unlawful combatants’, even if they were not charged with any crimes related to a breach of IHL.\(^\text{127}\) The definition of ‘unlawful combatants’ was applied to prevent the detainees from accessing prisoner of war protections under Geneva Convention (III), but the question of what status Al-Qaeda members have under IHL is also relevant to whether they can be targeted with military force.

The argument for the definition of ‘unlawful combatant’ was that ‘terrorists’ in an armed conflict do not conform to the definitions in IHL for combatants in an international armed conflict. They are not soldiers readily identifiable by their uniforms and military structure; they are not soldiers hors de combat, nor do they constitute a ‘levée en masse’.\(^\text{128}\) They appear to be civilians. However, they are engaged in hostilities.\(^\text{129}\) As noted above, Al-Qaeda members in Afghanistan do not wear uniforms, they engage in subterfuge tactics and they often switch between the appearance of civilian status and combatant status at different points. The argument is that because terrorists do not identify as combatants under IHL, and yet engage in combat, they should not enjoy the protection of IHL in relation to treatment as prisoners of war or as protected from targeting — they are therefore called ‘unlawful combatants’.\(^\text{130}\)

The US Supreme Court in Hamdan v Rumsfeld was asked to agree with the US Government’s contention that the 1949 Geneva Conventions do not apply to Al-Qaeda members as they are not ‘Contracting Parties’ to the Conventions and therefore cannot be,

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\(^\text{128}\) See, eg, Geneva Convention (III) arts 4(2), 4(6). See Celebí [268].

\(^\text{129}\) Marcinko, above n 67, 408, Sassoli, above n 1, 16.

and are not, obliged to abide by its principles — meaning that the US is also not obliged to apply IHL to the treatment of such persons.\textsuperscript{131} While the Court declined to engage on that issue, they held that common article 3 does apply as a minimum standard. There is a non-international armed conflict (even if arguably there was also an international armed conflict going on at the same time) and Al-Qaeda members who are captured are persons who have participated in hostilities. Although they are non-protected persons, they should be subject to minimum guarantees.\textsuperscript{132} The Court implicitly made the distinction between the roles of participants in non-international and international armed conflicts. It identified common article 3 as applying the correct test for identifying what role a person plays in a non-international armed conflict and what protections they derive, but it did not expressly state what role it considered terrorists or Al-Qaeda members to play.\textsuperscript{133}

The Government of Israel has also sought to create this new legal class of ‘unlawful combatant’, but the Israeli Supreme Court was more explicit in rejecting this as a new category of persons under IHL,\textsuperscript{134} although it retained the language of ‘unlawful combatant’ to talk about civilians participating directly in hostilities.\textsuperscript{135} The Israeli Court was dealing with military targeting of terrorists in what it termed an international armed conflict,\textsuperscript{136} but its analysis is useful in the context of combating terrorists. It found that in international armed conflicts there are civilians or combatants; no other legal category exists.\textsuperscript{137} It held that terrorists in Israel are civilians, but they are civilians who are ‘not protected from attack as long as [they are] taking a direct part in hostilities’.\textsuperscript{138}

In essence as outlined above, in an international armed conflict there are only civilians and combatants;\textsuperscript{139} and in non-international armed conflict there are only protected and non-protected persons. The ICTY has explicitly said there is ‘no gap’ between these categories when discussing prisoner-of-war status.\textsuperscript{140} Those who act outside IHL, without identifying themselves, and not necessarily organised into a coherent structure, remain protected persons.\textsuperscript{141} When they engage in armed conflict, however, they are taking a direct part in hostilities, which makes them non-protected persons for the time that they are engaged in the hostilities.\textsuperscript{142} Al-Qaeda can be seen either: as an irregular armed force in which the members are legitimate targets as members of that force; or as civilians who might be directly participating in hostilities. However, often Al-Qaeda members in

\begin{itemize}
\item \textsuperscript{131} Hamdan 548 US (2006), 65.
\item \textsuperscript{132} Ibid 66–9.
\item \textsuperscript{133} Hamdan was later charged as an ‘unlawful enemy combatant’ for crimes related to training as a terrorist and providing material support to Al-Qaeda: 	extit{Charge Sheet against Salmon Ahmed Hamdan} (5 April 2007) <http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf>.
\item \textsuperscript{134} \textit{Israeli Targeted Killing Case} [28].
\item \textsuperscript{135} See, eg, ibid [26].
\item \textsuperscript{136} Ibid [21].
\item \textsuperscript{137} Ibid [28].
\item \textsuperscript{139} Marcinko, above n 67, 409.
\item \textsuperscript{140} Čelebić [271].
\item \textsuperscript{142} ICRC, above n 33, 997.
\end{itemize}
non-international armed conflicts such as Afghanistan more readily fall into the latter category. This leads to the question of to what extent Al-Qaeda members are involved in the armed conflict.

**B. Are Al-Qaeda members combatants by reason of their membership of a terrorist organisation?**

The question whether Al-Qaeda are combatants is particularly difficult when Al-Qaeda members conduct terrorist attacks outside of Afghanistan. The section below will address the acts of Al-Qaeda members when they are directly participating in hostilities, but it is useful to examine whether mere membership of Al-Qaeda, as a terrorist organisation, makes those members legitimate targets.

On the one hand, when a member of a regular armed force attempts to target a person who poses no threat and is outside a situation of open combat, such targeting would be illegal under IHL. On the other hand, as suggested by one expert at the ICRC’s experts meeting on direct participation in hostilities, merely being a member of a group that engaged in hostilities would qualify that person to be directly participating in hostilities. It seems the US would favour this approach in targeting Al-Qaeda members when there is no direct link by individuals to the armed conflict. The argument would be that Al-Qaeda members are engaged in hostilities in Afghanistan, and that other Al-Qaeda members, as members of the group, are supporting the effort in the armed conflict through their membership and are, thus, able to be targeted.

Membership is difficult to determine, particularly with terrorist organisations. They do not meet the general test for membership of an armed group, rarely control territory and have changing structures. Al-Qaeda is a disparate organisation. It has a limited command structure and relies on individual groups to plan and organise terrorist attacks. It would be difficult to determine whether particular groups are members of Al-Qaeda and have equal control over activities within the armed conflict. The ‘membership’ approach does not take into account the need under IHL for an element of directness in any participation. People can be members of a group external to the conflict, such as reservist soldiers or military instructors, but where they are removed from the actual conflict; they are not directly participating in hostilities and are, therefore, not legitimate targets, despite membership of the group that is engaged in hostilities.

The ICRC’s ‘Guidance on Direct Participation’ looks at membership of an irregular armed group for the purposes of whether a person is a civilian or a combatant. It states that membership of an irregular armed group ‘can only be reliably determined on the basis of functional criteria’. In other words, ‘membership must depend on whether the

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144 Ibid 48–9.
146 See ibid 47, 54; Sassóli, above n 1, 17.
147 Mohamedou, above n 1, 14; Shumate, above n 88, 57–8.
148 Melzer, above n 143, 35, 50.
149 ICRC, above n 33, 1005.
continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Civilian or combatant status is not related to mere membership of the group. Under this reasoning, members of Al-Qaeda cannot be targeted for being members of Al-Qaeda, per se. Rather, members of Al-Qaeda might be able to be targeted as members of an irregular armed force only if they are continually engaged in a fighting function or directly participating in hostilities. Only those members continually engaged directly in hostilities will be able to be targeted legitimately under IHL. This leads to the question of direct participation in the next section.

C. Are Al-Qaeda members civilians who are directly participating in the conflict?

The question of whether particular Al-Qaeda members are directly participating in hostilities is central to whether the US can legitimately target them under IHL. How to determine whether a person is taking and ‘active’ or ‘direct part’ in hostilities is a question that is much debated. The ICRC’s ‘Guidance on Direct Participation’, as already mentioned, sought to clarify this issue.

A distinction is sometimes drawn between ‘hostilities’ and ‘direct participation’ for the purposes of analysis. The ICRC Experts Meeting prior to the ICRC’s Guidance being adopted was unanimous in stating that ‘the qualification of an act as direct participation in hostilities required a link to military activities’. The Commentary on Additional Protocol I says that, in the context of an international armed conflict, ‘“hostilities” covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon’. They equate ‘hostile acts’ to ‘direct participation’. The Commentary further states: ‘[h]ostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces’. The ICTR has held that the terms ‘active participation’ and ‘direct participation’ in hostilities mean the same thing.

Drawing these elements together, the ‘Guidance on Direct Participation’ sets out three criteria for direct participation in hostilities:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack ...;

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150 Ibid 1007.
151 Ibid, above n 1, 18.
152 ICRC, above n 33.
153 See Israeli Targeted Killing Case [33].
154 Melzer, above n 143, 9, 21.
156 Ibid 619.
157 Ibid 618.
158 Akayed [629].
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part ...;

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.159

While the direct hostile acts must reach a certain threshold of directly harming the military operations of the other side, direct hostile acts do not necessarily need to include the use of armed force or to cause ‘death, injury or destruction’.160 They can include attacks on computer networks, capturing military personnel, or denying military personnel access to territory.161 The Israeli Supreme Court has said that transporting combatants or weapons from one area of hostilities to another, operating or servicing weapons, or supervising the operation of weapons constitutes direct participation in hostilities.162 The ‘Guidance on Direct Participation’ suggests that ‘[a]dverse effects may also arise from capturing or otherwise establishing control over military personnel, objects and territory’.163 This could include guarding military personnel to stop them escaping, or clearing landmines that the enemy has laid.164 The requirement is that they have an adverse effect on the conduct of operations by the other side. Manipulating computer networks, cutting electricity supply or building road blocks will not be actions amounting to direct participation in hostilities if they do not have an adverse effect on the other side.165

The Commentary to the 1977 Additional Protocols says that '[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort'.166 General support from the population for those participating in hostilities cannot amount to those supporters also being involved in hostilities. A guard or a cook for an armed group is not necessarily engaging directly in hostilities, depending on his or her particular roles in supporting the military operations.167 The Israeli Supreme Court has said that ‘a civilian who sells food or medicine to unlawful combatants is ... taking indirect part in the hostilities’,168 as are people who provide logistical or financial support to the combatants,169 but such persons cannot be targeted because their involvement is indirect, not direct. War sustaining efforts might indirectly harm the other side because they assist the one party to the conflict and prolong hostilities, but they are not directly the cause of adversity to the enemy.170 Under IHL, any acts one step removed from the actual organisation of the operations and participation in the hostilities means that any

159 ICRC, above n 33, 995–6.
160 Melzer, above n 143, 14.
162 Israeli Targeted Killing Case [35].
163 ICRC, above n 33, 1017.
164 Ibid.
165 Ibid 1019.
166 Sandoz, Swinarski and Zimmermann, above n 155, 619.
167 Melzer, above n 143, 16.
168 Israeli Targeted Killing Case [34].
169 Ibid [35].
170 ICRC, above n 33, 1020.
participation is indirect and those persons engaging indirectly remain protected persons and not legitimate targets.

The Israeli Supreme Court has also said that those sending persons into attack and those who plan attacks take a direct part in hostilities,171 significantly broadening the test of 'actual harm'. The Court said that the military should be able to target persons further down the chain of command.172 In his Expert Opinion on the Israeli Targeted Killing Case, Cassese explicitly rejected the notion that persons planning and preparing an attack could be targeted.173 He suggested a different test: that if a person planning an attack was not operating in military premises nor carrying arms openly, the person could not be targeted. Cassese's rejection of planners of attacks as legitimate targets on this basis ignores the realities of acts by Palestinians in this case and by Al-Qaeda in the context of this article.174 A balance should be reached between the positions of the Israeli Supreme Court and of Cassese. As outlined in the 'Guidance on Direct Participation', there should be a causal link between the participation in hostilities by a protected person and the harm (although, not necessarily loss of life) to their adversary for that participation to constitute 'direct participation'.175 Applying this test to those who plan attacks: there will usually not be a direct causal link from the planning to the actual carrying out of the attack because many factors can break the causal link and there will not be a direct threat in planning an attack. Moreover, persons planning an attack may be well out of range of the hostilities and it may not be proportionate to target them. On the other hand, if a person is planning an attack and organising the weapons and training near or in the theatre of war, there will be the element of directness needed in a causal link to the harm.

In Afghanistan, Al-Qaeda members are generally classified as engaging directly in hostilities when they are engaging directly in fighting, bearing arms, planting IEDs, building IEDs, or engaging in sniping tactics. These acts cause a direct threat to the opposing side and are direct acts of aggression. Al-Qaeda members would be able to be legitimately targeted under such circumstances.176 If they engage in night jobs (after their usual work during the day) — such as making bombs, collecting the equipment to make IEDs, guarding premises or keeping a look-out — the question becomes more complicated.

Such tasks as making a bomb might be directly related to the conflict, if the threat that it will be laid is imminent. Guarding facilities will be more difficult to determine. If the purpose of guarding is to protect fighters or bomb equipment that will be directly used in hostilities, the guard will be a legitimate target because his or her actions will have a direct causal link to the projected harm to the other party. A guard might not be a legitimate target if he or she is: guarding premises for a different reason than opposing the enemy; merely providing support to the group; or is guarding goods that might one day be used to prepare a bomb in an unspecified location and timeframe. If the facilities were targeted and the guard was killed, this could be legitimate as a form of collateral damage in the pursuit of the military objective of destroying the factory. In each particular case, the test will be to

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171 Israeli Targeted Killing Case [37].
172 Ibid.
173 Cassese, above n 138, [15].
174 He acknowledges this issue, but does not provide a realistic response to the problem: Ibid [16].
175 ICRC, above n 33, 1021.
determine, in the context of the armed conflict: whether the acts in which Al-Qaeda members are engaged at the particular time are military related; whether they pose a threat; and whether they are causally linked to the armed conflict.

In Afghanistan, many of the acts of Al-Qaeda members will be determined to be directly participating in hostilities, such as making bombs, laying IEDs, and engaging in direct fire. But many other activities, particularly those outside of the armed conflict — such as training, planning separate bomb attacks, and inciting violence — will lack any direct causal relationship to the conflict and to direct harm to the opposing party that is the US.

D. Are Al-Qaeda acting within the geographical scope of the conflict?

The question then remains whether Al-Qaeda members outside of Afghanistan are directly participating in hostilities. It is demonstrated above that there is no armed conflict in relation to the ‘war on terror’ aside from the conflicts in Afghanistan and Iraq. However, the acts that Al-Qaeda members might be preparing and committing beyond these two States could conceivably constitute direct participation in hostilities. The acts would need to be directly related to the hostilities in those States and be more than logistical and financial support. The acts that terrorists outside Afghanistan and Iraq have been accused of range from separate terrorist attacks, killing hundreds of people, to providing financial support, strategic support, weapons and other equipment. The separate terrorist attacks that occur outside of the armed conflict are potentially unrelated to that conflict; they could be terrible acts of violence, but not armed attacks for the purposes of international law.177 With technology, it is possible that Al-Qaeda members outside of Afghanistan could fly an unmanned plane into Afghanistan and launch attacks from outside the region.178 They could also use satellite and other remote and “space” technology to launch weapons179 and to hack into military databases and systems.180 In such cases, the persons controlling the plane could be classed as directly participating in hostilities and, therefore, as legitimate targets. The fact that those persons are geographically separate from the conflict would not prohibit their being directly involved (although the geographical remoteness may raise questions of the proportionality of targeting such persons).

E. Are Al-Qaeda members acting within the temporal scope of the armed conflict?

The purpose of the US’s approach would be to target Al-Qaeda members wherever they are operating to prevent terrorist attacks, as it has attempted to do in instances already mentioned. However, the test for whether a person is a non-protected person and, thus, able to be targeted under customary international law includes the fact that persons are only non-protected persons ‘for such time’ as they take a direct part in hostilities.181 As soon as they stop participating in hostilities, they regain their protection as civilians, although they might be able to be prosecuted for committing war crimes or other

178 See ICRC, above n 35, 735.
179 See Maqgato and Freeland, above n 106, 169.
181 See Additional Protocol I art 51(3), in the context of international armed conflicts.
If protected persons participate in hostilities and then stop, they return to being protected persons at the end of that particular period of hostilities and cannot be targeted for previous acts. Having articulated that test, the Israeli Supreme Court went on to say that ‘a civilian who has joined a terrorist organisation which has become his “home”, and in the framework of his role in that organisation he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts’. Dinstein has said likewise that persons carrying out ‘military raids by night, while purporting to be an innocent civilian by day ... can be lawfully targeted’. This approach appears to contradict the notion that terrorist are generally protected persons and it is only when they are engaged in hostilities that they become targets. The test should be not how far away they are and whether they have ‘gone home’ for a short while; rather, it is whether the person targeted ‘still constituted an immediate “threat” in terms of engagement in hostilities’.

For Al-Qaeda members who engage in seasonal fighting, they fight for one season and then return home for the harvest or for the planting. They are directly engaged in hostilities during the time that they are engaged in fighting. When they return to the base camp, they might be engaged in activities that are directly related to their next attack (such as preparing weapons or training), and constitute legitimate targets. If they are engaged in nothing more than eating and sleeping in the base, if they remain a threat at this point, because they have simply stopped for one night, they will remain legitimate targets. If they rest for a week, without engaging in any preparations, they might not be directly participating in hostilities. The timeframe must be considered in each separate case. The moment they leave their base to return home, having giving up fighting for one season, they are no longer directly participating in hostilities and become protected persons once again. The ICRC’s ‘Guidance on Direct Participation’ states that a ‘revolving door’ of civilian protection applies. If civilians who have directly participated in hostilities no longer constitute a military threat, they cannot be targeted with lethal force: ‘IHL restores the civilian’s protection against direct attack each time his or her engagement in a hostile act ends’.

It is demonstrated above that Al-Qaeda members outside of Afghanistan are not usually legitimate targets because they will not be participating directly in hostilities in Afghanistan. The question of timing also affects their legitimacy as targets. Even if there are moments when they are directly participating in hostilities, they then stop and resume other activities after carrying out that one act. If a person performs one act of hostilities and then stops, they become a protected person once again. Therefore, even if Al-Qaeda members are said to be directly participating in hostilities from outside Afghanistan at a certain point, the issue of time will usually prevent their being legitimate targets.

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182 Cassese, above n 138, [15].
183 Israeli Targeted Killing Case [39].
184 Ibid.
185 Dinstein, above n 116, 29.
186 Cassese, above n 138, para 14.
187 Melzer, above n 143, 65.
188 Israeli Targeted Killing Case [38].
189 Cassese, above n 138, [14].
190 ICRC, above n 33, 1035.
191 Ibid.
F. Is it militarily necessary and proportionate to target Al-Qaeda members?

One of the justifications for military targeting of terrorists is that it saves the lives of soldiers who would otherwise be sent in on the ground to fight the opposing side. It is also expected to save the lives of the protected persons who live in the area used by the terrorists, because the precision of the targeting should ensure that ‘collateral damage is kept to a minimum’. If it works in this way, then military targeting should be proportionate to the aim of preventing further attacks by persons directly engaged in hostilities. The central purpose of IHL is to balance the military necessity of war and the need to protect humans from disproportionate harm. Therefore, one of the principles of IHL is that military force can only be used when it is militarily necessary and will be proportionate to achieving a military objective.

Attacks are only legitimate when directed against military objectives whose total or partial destruction would constitute a definite military advantage. If military targeting of individuals is disproportionate to the military objective, it will be contrary to law. Commanders should ‘do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives’. The ‘Guidance on Direct Participation’ recommends that ‘[I]n case of doubt, the person must be presumed to be protected against direct attack’. A good faith determination as to whether a person has civilian status or is a civilian directly participating in hostilities must be made using all available intelligence to determine whether the person is a legitimate target. Once the determination that the person is a legitimate target has been made, the amount of force used should not exceed that which is necessary to achieve the military objective.

In the case of terrorism, it has been stressed that lethal force against terrorists must be ‘strictly proportionate’ and necessary to achieve the goal of stopping a terrorist attack. The Israeli Supreme Court has set out useful criteria to determine the necessity and proportionality of targeting. First, there should be direct evidence that the person is engaged directly in hostilities; second, if less harmful means can be employed than killing, they should be; third, after a targeting attack, an investigation into the reasons and means should be undertaken; and, fourth, if protected persons are harmed in the attack, this must be proportionate to the military objective.

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192 Ulrich, above n 16, 1054.
193 ICRC, above n 35, 721; ICRC, above n 33, 1041.
195 Pictet, above n 118, 54.
196 Rome Statute art 8(2)(e)(i); Ulrich, above n 16, 1052.
197 Additional Protocol I art 57(2)(a)(i).
198 ICRC, above n 33, 1037.
199 Ibid 1038.
200 Ibid 1040.
202 Israeli Targeted Killing Case [40].
Military targeting involves limited military operations: selecting the person or group of people who are to be killed and bombing them or shooting them. It is premeditated to a great extent and does not usually occur in the heat of battle. One of its purposes is to protect the soldiers of the other side from becoming directly engaged in exchange of fire. In that sense, it could be said that targeting is proportionate to the protection of one side’s forces. However, it must also protect, as far as possible, protected persons under IHL. The method that is used must be proportionate. Indiscriminate attacks, such as shelling a town or sniping at civilians will never be proportionate to the military advantage. Similarly, the purpose for the targeting must be carefully examined. If it is known that a suicide attack is to be committed within the boundaries of the armed conflict, targeting could be militarily necessary to prevent such an attack. If there is training going on that might lead to attacks in the future, but none have yet taken place, it might not be militarily necessary to target the training camp or the trainers. If the threat exists within the territory under the control of the targeting party, it may be possible to arrest the target, rather than using lethal force against him or her. With targeting, there is greater scope, and also greater necessity, to determine whether the military targeting of opponents in an armed conflict — in this case of the US against Al-Qaeda — is militarily necessary and will be proportionate to the military objective. There is a greater need for good intelligence of activities of the terrorists, their identity, the nature of their activities and any danger to civilians, before targeting can be effected.

Each case of targeting will require examination on a case-by-case basis, having taken into account all other requirements of targeting in an armed conflict situation, including the military objective and the proportionality of any military force against the terrorist. This examination must occur on each occasion when terrorists are planned to be targeted, particularly given the difficult nature of the other questions in relation to targeting terrorists which have been addressed above.

Conclusion

The previous US Administration categorically stated that ‘Al-Qaeda terrorists who continue to plot attacks against the US may be lawful subjects of armed attack in appropriate circumstances’. The current US Administration continues to consider itself engaged in a legal war against Al-Qaeda that will not end until the ‘terrorist enemy’ has been destroyed. The US, in putting forward its argument on the military targeting of terrorists, is seeking to manipulate IHL on two bases: first, that the war in Afghanistan is a new form of armed conflict against transnational terrorists extended across geographical borders and

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203 Milanovic, above n 36, 374.
205 ICRC, above n 35, 723.
206 Kreutzner, above n 27, 202.
207 ICRC, above n 33, 1043.
208 See Melzer, above n 143, 61; Cassese, above n 138, [18].
210 Ibid. See also Brennan, above n 6.
timeframes; and second, that the terrorist or Al-Qaeda member is not protected and is, thus, a legitimate target for armed force wherever and however they are acting. However, as argued here, armed conflict and the laws of armed conflict cannot be used to combat all forms of terrorism. Terrorists can only be subject to military targeting, when they are acting in the course of an armed conflict.

This article has considered these two aspects of IHL in relation to whether the military targeting of terrorists is legitimate under IHL in the context of a broad ‘war with Al-Qaeda’. It concludes that this war is a rhetorical war and is not an armed conflict, in this general sense, under which military targeting is permitted. Generally, terrorist attacks do not rise to the level of intensity required for an armed conflict and, certainly in the current context, aside potentially from attacks in the non-international armed conflicts in Iraq and Afghanistan, there have been no terrorist attacks that would create a prolonged and serious situation that legally justifies the title of ‘armed conflict’. The geographical and temporal boundaries of a non-international armed conflict would also prevent the expansion of one of these existing conflicts into other or all areas of the world in which terrorists such as Al-Qaeda may be acting.

In the context of an existing armed conflict, Al-Qaeda members are generally civilians, who may often lose their protection and be targeted if they are directly participating in hostilities. The ICRC’s ‘Guidance on Direct Participation’ can provide assistance in determining what acts constitute directly participating in hostilities and for how long a person is said to be doing so. Al-Qaeda members are generally non-protected civilians, not because of their membership in Al-Qaeda, but because their actions lead to the conclusion that often they are engaged in a continuous combat function or else they directly affect the conduct of hostilities in a causal way. In these circumstances they become legitimate targets as non-protected persons. When planning to target such persons, however, their involvement in the hostilities should be carefully analysed, both to determine the nature of their involvement and how direct it is, and to determine whether it is militarily necessary and proportionate to be using the strategy of military targeting.

The boundaries of an armed conflict against transnational terrorists are narrow. Under the terms of the US Administration, military targeting of terrorists such as Al-Qaeda will only be able to occur legally in limited circumstances, constrained by IHL and the existence of an actual armed conflict in which so-called ‘terrorists’ are directly participating in hostilities. In most cases in the rhetorical ‘war with Al-Qaeda’, the US Government will have to look to other solutions, rather than the military targeting of the ‘terrorist enemy’.
President Caron and Professor Hunter, distinguished scholars and practitioners, members of the American Society of International Law, ladies and gentlemen,

It is great honour for me to have been invited to deliver the 14th Annual Grotius Lecture at the invitation of the American Society of International Law and the International Legal Studies Program of American University Washington College of Law. It is likewise a great pleasure to be speaking before the annual meeting of the American Society of International Law, which has for so many decades been dedicated to enabling open and creative discussions of the outstanding legal issues of the day. It must be admitted, however, that addressing the opening of an ASIL meeting entitled “Confronting Complexity” presents a great challenge, for the general theme seems to aptly encapsulate both the times we live in, which are undoubtedly complex, and calls on me to try to outline how we might deal with complexity.
It should come as no surprise that my remarks will primarily focus on the role of the law in confronting the complexity of violence, and particularly the role of international humanitarian law in confronting the complexity of armed conflict. It is fitting, in this context, to pay tribute to Hugo Grotius. In line with principles established by his Spanish and Italian intellectual counterparts Francisco de Vitoria and Alberico Gentili, he laid the foundations of international law, and in his timeless treatise “On the Law of War and Peace” determined that certain rules govern the conduct of war whatever the justness of its cause. We are far beyond the writings of Grotius today in terms of the elaborateness of the international legal framework, including the one governing armed conflict, yet we remain in his debt. He not only paved the way to our current thinking, but showed us that complexity may - and can only be - addressed with reason, vision and humanity.

What does complexity mean when armed conflict is the reference point for analysis? It means, first of all, that armed conflicts remain a tragic reality in the 21st century and that enormous human suffering continues to be caused by this form of violence. We are all witness to continued violations of international humanitarian law, including deliberate attacks against civilians, the destruction of infrastructure vital to the civilian population, the forcible displacement of entire communities from their habitual places of residence and various forms of sexual violence inflicted against vulnerable individuals and groups. Persons deprived of liberty in armed conflict are likewise frequently subject to appalling behaviour by their captors, including murder, torture and other forms of ill-treatment, deprivation of humane conditions of detention and denial of procedural safeguards and fair trial rights. Medical personnel and humanitarian workers are also an increased target of attacks. The law tries to prevent or put a stop to suffering and to deter future violations, but it cannot, by itself, eradicate abuses or be expected to do so.
Complexity may also be approached by examining the features of current armed conflicts and the political, economic and social backdrop against which they take place, all issues which are beyond the scope of my remarks. Allow me, nevertheless, to note that the International Committee of the Red Cross, which has operations in some 80 contexts around the world, is involved in a range of situations: from those in which the most advanced technology and weapons systems are deployed in asymmetric confrontations, to an assortment of armed conflicts typified by low technology and high fragmentation of the actors involved. Each case must be approached on the particular facts and a humanitarian response devised to meet the specific needs of those most affected, which is by no means a simple endeavour.

Increased complexity is also a feature of contemporary armed conflicts, the nature of which continues to evolve. The predominant form of armed conflict nowadays is non-international, often stemming from state weakness that leaves room for armed groups to take matters into their own hands based on - real or perceived - political, ethnic or religious grievances. Some non-international armed conflicts are predominantly economically driven and revolve around struggles for access to key natural resources. Whatever the case, non-state armed groups tend to live off the civilian population and engage in appalling acts of brutality to ensure control, instil fear and obtain new recruits. They frequently resort to looting and trafficking, extortion and kidnapping, as well as other acts amounting to profitable economic strategies that are sustained by the general lawlessness and by national, regional and international economic and political interests. Thus, the coexistence of violence stemming from armed conflict and that linked to various forms of banditry and the blurring of lines between armed conflict and crime, including transnational, has become a complex reality defying easy practical or legal solutions.

The world is further beset by the combined effects of political, economic and financial crises. Food prices continue to rise, affecting countless people already suffering from the effects of armed conflict. These trends, when compounded with the ravages of natural disasters, including drought and floods, are likely to continue to fuel unrest and armed conflicts in the years ahead.
Some of these characteristics are also present in situations of violence below the threshold of armed conflict, including instances of state repression, inter-communal strife and urban violence. The humanitarian needs in these contexts may be just as grave as in situations of armed conflict. The ICRC relies on its right of humanitarian initiative provided by the Statutes of the International Red Cross and Red Crescent Movement to come to the aid of persons or communities in need when, among other things, its operational involvement is assessed as being of added value.

The very brief outline of current trends in armed conflict and other situations of violence begs the question of whether reality is really becoming increasingly complex or whether, thanks to technology and new means of communication, we have more facts at our disposal? I will not attempt to answer it because the more important question, in my view, is: how do we use international law to address complexity, whether it is indeed increasing or is just perceived to be that. Based on historical observation and on an analysis of events over the past decade, I would submit that states and other actors have given essentially three responses.

When faced with impending or actual crises, domestic and international institutions have sometimes chosen to abstain from action. An obvious and tragic example was the inability of states to finalize a convention on the protection of civilians ahead of the Second World War, which contributed to the unspeakable consequences that we are all familiar with. On other occasions, the real or perceived complexity of a domestic or international crisis has led states to claim that existing law is not suited to the new circumstances at hand, resulting in the wholesale or partial rejection of longstanding and well-established precepts. This approach, when the legal framework in question is IHL, has the effect of depriving of protection the very persons it was designed to apply to. We are also familiar with the consequences of this option. A third approach, fortunately the most common, has been to uphold existing law in the face of new challenges, whether real or perceived, and to analyze that which is possibly new with a view to devising appropriate solutions. Over the course of
the last years this has also been the ICRC’s approach. The organization has tried to understand and assess the reality of contemporary armed conflicts and to propose answers to some of the salient questions without departing from the balance underlying IHL, which is that between military necessity and the imperative of humanity.

Allow me to briefly touch upon another issue affecting the ability to resolve complexity through law, which is the relationship between international and domestic law. To begin with, the universality of a given norm may be hampered by the fact that a state may choose not to become a party to an international treaty. This may happen even if it took part in the negotiating process and obtained concessions from the other participants, with the implicit expectation that such accommodations will facilitate its signature and ratification. A state may also sign a treaty, but eventually not ratify or accede to it for a variety of reasons, including domestic political considerations. While a state in this case may not act contrary to the treaty’s object and purpose, it is nevertheless not bound by it. Even when states do agree on the content of a treaty and agree to be bound by it at the international level, implementation in a domestic legal system oftentimes remains uncertain, particularly if a treaty needs to be previously incorporated by means of domestic law. Thus, a key legal requirement at the national level may be missing.

A further and important cause of complexity is the way in which domestic courts approach and interpret international norms. Some courts ensure that a state complies with its international obligations, while others may choose to disregard international law. Approaches to customary international law and its acceptance by domestic courts also vary widely. This creates particular uncertainty in the area of international humanitarian law, which was initially customary law based, and in which customary law rules still constitute an important source of legal obligations. If customary law is disregarded, then the minimum safeguards provided for in IHL will not be implemented.
I do not, of course, have a solution to the complexity arising from the interplay of international and domestic law. I simply want to note that the uneven application of international law at the domestic level may give rise to the justified perception that international law cannot ensure consistent and equal outcomes when its rules are violated. In the IHL context this means, for example, that, depending on the operation of the variables I have outlined above, persons suspected of war crimes will in some cases be brought to justice, while others will escape it. States and other actors are thus called on to do their utmost to ensure that IHL performs its protective function in any situation in which it is legally binding. Applying it in good faith is always an indispensable starting point.

Ladies and gentlemen,

I would now like to turn to certain practical challenges related to situations of armed conflict and offer some remarks on how international humanitarian law may be used to address them. The topics are by no means exhaustive and include the classification of armed conflicts, the rules on detention related to armed conflict, the need to improve compliance with IHL, and the role of IHL in the face of new technologies of warfare. In some cases, we have the advantage of hindsight. Other challenges are ongoing. Others are developing.

A key legal issue that has been, and is being debated, is whether the current IHL dichotomy - under which armed conflicts are classified either as international or non-international - is sufficient to deal with new factual scenarios, and whether new conflict classifications are needed. The question has arisen mainly because of the undoubted increase in non-international armed conflicts with an extraterritorial element. A typology of such conflicts has been outlined in the ICRC’s recent Report to the 31st International Conference of Red Cross and Red Crescent entitled “IHL and the Challenges of Contemporary Armed Conflicts”.
One example is a non-international armed conflict originating within the territory of a single state between government armed forces and one or more organized armed groups that has "spilled over" into the territory of a neighbouring state. Another example is a non-international armed conflict in which multinational armed forces are fighting alongside the armed forces of a "host" state - in its territory - against one or more organized armed groups. As the armed conflict does not oppose two or more states, i.e. as all the state actors are on the same side, the conflict is classified as non-international, regardless of the international component. An illustration of this type is the non-international armed conflict in Afghanistan. It may also be argued that a "cross border" non-international armed conflict exists, possibly alongside an international armed conflict, when the forces of a state are engaged in hostilities with a non-state party operating from the territory of a neighbouring state without that state's control or support.

Yet another type of non-international armed conflict, believed by some to exist, is the one between Al Qaeda and "associated forces" and the United States, most often called “transnational”. It should be recalled that the ICRC does not share the view that a conflict of such scope, previously known as the “war against terrorism”, is taking place. Since the horrific attacks of September 11th 2001, the ICRC has referred to a multifaceted "fight against terrorism". This effort involves a variety of counter-terrorism measures on a spectrum that starts with non-violent responses - such as intelligence gathering, financial sanctions, judicial cooperation and others - and includes the use of armed force at the other end. When armed force is used, the ICRC has taken a case by case approach to legally analyzing and classifying the various situations of violence that ensue. Some have been classified as international armed conflicts, others as non-international armed conflicts, while various acts of terrorism taking place in the world have been assessed as being outside any armed conflict. IHL rules governing the use of force and detention for security reasons are less restrictive than the rules applicable outside of armed conflicts governed by other bodies of international law, and IHL should thus not be applied to situations that do not amount to armed conflict.
It should be recalled that the key distinction between an international and a non-international armed conflict is the quality of the parties involved: while an international conflict presupposes the use of armed force between two or more states, a non-international conflict involves hostilities between a state and an organized non-state armed group or between such groups themselves. If one surveys armed conflicts going on in the world, there does not appear to be any current situation that would not fall into one of the two existing conflict classifications. Moreover, to the extent that new classifications have been called for, they would invariably result in a dilution of existing IHL protections, an outcome which the ICRC could not support, for obvious reasons.

IHL rules governing detention in armed conflict have also been the subject of much controversy over the past few years. While the relevant rules of the Third and Fourth Geneva Convention may be said to have withstood the test of time in international armed conflicts, recent practice has demonstrated that IHL governing detention in non-international armed conflict needs to be upgraded. Based on its operational activities the ICRC has identified specific humanitarian concerns related to deprivation of liberty in this type of conflict, some of which are not, or are not sufficiently addressed, by international humanitarian law.

The first concern are poor material conditions of detention which may, and often do have, direct and irreversible consequences on the physical and mental health of detainees. Detention conditions for persons under the control of a non-governmental armed group are oftentimes nothing less than dire, owing to lack of resources and organization. Poor material conditions of detention commonly mean lack of adequate food, water and clothing, as well as insufficient medical care. Detention facilities themselves are frequently unsuitable. Detainees often have limited contact with their families and are sometimes prohibited to see them even though family contact is both a legal obligation and constitutes sound detention policy. There is likewise a failure to register detainees, or to separate the different categories one from the other, or to allow detainees to practice their religion. Last but not least, overcrowding is a permanent characteristic of many places of detention. While objective circumstances are in some cases the
cause, in many others inefficient or non-existent legal processes unnecessarily prolong detention or even prevent release.

While IHL contains detailed rules on conditions of detention in international armed conflicts, this is not the case in conflicts not of an international character, especially those governed by Article 3 common to the Geneva Conventions. Additional Protocol II provides an essential set of rules, but they are not sufficiently comprehensive, and the relevant norms of customary IHL are necessarily formulated in general terms.

In addition to the general protection applicable to all persons detained for reasons related to a non-international armed conflict, further provisions are necessary to address the specific needs of certain categories of persons. The situation of women, for instance, requires special attention. Children should also be better protected, and the needs of other categories of persons, such as the elderly and the disabled, should likewise be reflected in IHL governing non-international armed conflicts.

A particular humanitarian concern related to detention in non-international armed conflict is the lack of procedural safeguards for persons subject to internment. As already mentioned, most conflicts nowadays are non-international and internment is widely practised. In the absence of IHL norms, states often resort to policy directives or apply domestic law, neither of which has proven to be satisfactory from a protection standpoint. In practice, internees are not adequately informed of the reasons for their internment and an established process allowing them to challenge the lawfulness of their detention and to obtain release if the reasons do not or no longer exist, is lacking. Regular, six-monthly periodic review is also missing. Uncertainty about one’s legal situation is often compounded by prohibitions or restrictions on contact with the outside world, including families, leading to tensions within detention facilities that could be avoided.
Let me insert a bracket here and note the increasingly widespread use of the term “indefinite detention” as being synonymous with “law of war” detention. This is very unfortunate, as it may serve to create a perception of acceptability where none should exist. With the exception of prisoner of war internment in international armed, the internment of any other person for imperative reasons of security in international armed conflict must end as soon as the reasons justifying it cease to exist. The same rule should be applied by analogy to internment in non-international armed conflicts. Initial and periodic review processes are provided for precisely because there is no assumption that a person will automatically constitute an imperative security threat until the end of an armed conflict. Each case has to be examined initially on the merits, and periodically thereafter, to assess whether the threat level posed remains the same. In view of the rapid progression of events in armed conflict, the assessment may, and in most cases does, change. There is also the outer temporal limit of internment, which is the close of active hostilities. Thus, to somehow imply that IHL allows indefinite detention as such risks misrepresenting the spirit and letter of this body of rules.

The reality and the urgency of the humanitarian problem caused by lack of procedural safeguards for internment in non-international armed conflicts is, to us, evident. Whether internment takes place in a state’s own territory or is undertaken by states engaged abroad as part of a multinational coalition with a "host" state’s consent, the absence of binding IHL rules has allowed divergent approaches to ensuring the procedural rights of internees. Customary IHL prohibits arbitrary deprivation of liberty, but does not provide criteria for determining what is “arbitrary”. Article 3 common to the Geneva Conventions contains no provisions regulating internment, apart from the requirement of humane treatment. Additional Protocol II mentions internment in Articles 5 and 6 respectively, but likewise does not give details on how it is to be organized. In order to provide guidance to its delegations for their operational dialogue with states and non-state armed groups, in 2005 the ICRC adopted an institutional position on procedural safeguards for internment. That position has served as a basis for bilateral discussions in a range of contexts in which internment for
security reasons is being practised, and is believed to present a workable
starting point for examining the key legal issues that arise.

The transfer of persons between states has also emerged as one of the defining
features of armed conflicts over the past several years, particularly in situations
where multinational forces transfer persons to a "host" State, to their country of
origin or to a third State. There is cause for concern from a humanitarian
standpoint whenever there is a risk that a transferred person may be subject to
serious violations, such as arbitrary deprivation of life, torture and
other forms of ill-treatment or persecution upon transfer.

The ICRC's focus on the issue of transfers has arisen as a result of, broadly
speaking, two operational situations. First, when persons it visits express
concern that they will be at risk of violations upon transfer to the receiving
state. Second, as a result of visits to persons who have been transferred, during
which the ICRC observes that transferees have been subjected to prohibited
treatment. The general international law principle prohibiting transfers to
situations of abuse, known as non-refoulement is not, however, explicitly
provided for in IHL governing non-international armed conflicts. The lack of legal
provisions suggests that it would be advisable to provide for a set of workable
substantive and procedural rules that would both guide the action of states and
non-state armed groups and protect the rights of affected persons. Current
practice, in which more and more non-international armed conflicts involve
coalitions of states fighting one or more non-governmental armed groups in a
"host" country, indicates that uncertainty about how to organize a lawful transfer
regime, including with regard to post-transfer responsibilities, is likely to
increase, rather than decrease.

These and other issues - including the need to ensure ICRC access to persons
detained in non-international armed conflicts - were the subject of an internal
ICRC study and then a Report to the 31st International Conference of the Red
Cross and Red Crescent entitled “Strengthening Legal Protection for Victims of
Armed Conflicts”. A Conference resolution of the same name invited the ICRC
to pursue further research, consultation and discussion in cooperation with
states in order to identify and propose a range of options on how to ensure that IHL remains relevant in protecting persons deprived of their liberty in relation to armed conflict.

The other issue that the ICRC was similarly invited to work on by the Conference is enhancing and ensuring the effectiveness of IHL compliance mechanisms. This is a humanitarian imperative that must be addressed, because lack of respect for IHL remains, as I have noted above, the primary reason for enormous human suffering in armed conflicts.

Special emphasis has been placed in the past two decades, in particular, on developing mechanisms to ensure individual criminal responsibility for crimes under international law, including war crimes. States have enacted and implemented domestic legislation enabling them to prosecute perpetrators. The establishment of international criminal tribunals and the International Criminal Court are also invaluable steps in the effort to combat impunity. The Rome Statute provides a list of war crimes, including those that may be committed in non-international armed conflicts. However, although significant, these measures are not, by themselves, sufficient. The punishment of war criminals takes place once atrocities have been committed, which is often years after the events, while victims' needs are immediate and require mechanisms that are available to prevent violations and to halt them during armed conflict.

It has not been possible to meet this need with the machinery provided for in the Geneva Conventions and Additional Protocol I - the system of Protecting Powers, the formal enquiry procedure, and the International Humanitarian Fact-Finding Commission. The Commission, in particular, has never been called upon to act, although it has been ready to do so since 1991. The main reason is that the actual operation of the existing mechanisms requires the consent of the parties concerned.

In practice, it is mainly the ICRC that carries out certain supervisory tasks, such as visits to prisons, protection of the civilian population, confidential representations in the event of violations of humanitarian law, and so on).
However, there are certain limits to the ICRC’s role that are inherent to its mission and working methods. It is not the ICRC’s policy to publicly condemn actors responsible for violations of IHL. Except in strictly defined circumstances, the ICRC focuses on a confidential bilateral dialogue with the parties to a conflict, the purpose of which is gain direct access to affected persons and to persuade the parties responsible for violations to change their behaviour and meet their obligations. Also, the ICRC does not necessarily have the formal authority to act in every case. In non-international armed conflicts, its ability to operate is subject to the consent of the parties involved through the offer of services. Fortunately, the offer is in most cases accepted.

The mechanisms provided for in IHL are, admittedly, not the only ones that may be relied on to protect persons in time of armed conflict. The United Nations system has for many years been involved in monitoring behaviour in armed conflicts, in particular through the General Assembly, the Security Council and the Human Rights Council. Although these mechanisms sometimes include the establishment of independent procedures (commissions of inquiry, special rapporteurs), final decisions are often subject to political negotiation. And while diplomatic channels are a necessary means for implementing international humanitarian law, they also have limits. First, it is not certain that these channels are really an alternative to IHL mechanisms. Indeed, violations persist in many cases despite monitoring by the UN bodies. What is more, given their political dimension, intergovernmental bodies tend to be selective. Their decisions are liable to be perceived as biased by an involved party, which poses a problem from the point of view of international humanitarian law.

Regional mechanisms for protecting human rights have also helped meet the needs of victims of armed conflicts, particularly by ruling on individual complaints. The European and Inter-American human rights court have made significant contributions to establishing justice, truth and reparation, but they cannot compensate for the absence of a monitoring system specific to IHL. Their jurisdiction is limited to certain geographical zones, and their decisions are in principle based on the applicable human rights conventions rather than on IHL, which is a different branch of international. Very importantly, the
jurisdiction of human rights bodies does not cover non-state armed groups because, in contrast to IHL, human rights law does not, as a rule, bind such groups. The practice of regional mechanisms for protecting human rights can therefore not make up for the absence of a fully effective mechanism specific to humanitarian law. It is liable to call into question the primacy of international humanitarian law as the specific legal framework for protecting the victims of armed conflicts, and to weaken its universality and coherence.

Thus, although the contribution of the United Nations and regional bodies must not be overlooked, the reality of contemporary armed conflicts demonstrates that the issue of sufficient and effective monitoring mechanisms has not yet been resolved. The question thus arises as to how the monitoring system established under IHL could be strengthened. Should the existing procedures (Protecting Powers, formal enquiry procedure, International Humanitarian Fact-Finding Commission) be modified with a view to ensuring that they operate effectively in all armed conflicts? Is it preferable to create new mechanisms that are better suited to contemporary realities? If so, what parameters should be taken into account to ensure that these mechanisms are effective?

Many proposals have been put forward on the subject in the course of the normative history of international humanitarian law. When the Geneva Conventions were being drafted, it was proposed, for example, that a "High International Committee" be established, which would be in charge of monitoring the Conventions' application. Some twenty years later, the UN Secretary-General suggested that an "Observer-General" or "Commissioner-General" be appointed who would be in charge of setting up and running a system of asylum or refuge for civilian populations affected by armed conflicts. When the 1977 Additional Protocols were being drafted, the ICRC also put forward several options, pointing to the potential role of existing international or regional organizations or suggesting that an ad hoc commission be set up. More recently, the UN Secretary-General also suggested, in his Millennium Summit report, that a mechanism be established for monitoring the application of the provisions of international humanitarian law by the parties to conflicts. Lastly, in 2003, the ICRC launched a wide-ranging consultation process on the
subject. The experts, including governmental, who were invited to take part mentioned the possibility of setting up one or several mechanisms that could carry out new functions to monitor respect for IHL: among them, a reporting system, an individual complaints mechanism, fact-finding missions, and the quasi-judicial investigation of violations.

These and other ideas related to IHL compliance mechanisms will be the subject of further examination and work that the ICRC intends to conduct with the Government of Switzerland, which has likewise undertaken to explore and identify concrete ways in which the application of IHL may be strengthened.

Ladies and gentlemen,

Before I draw to a close, allow me to briefly draw your attention to a developing issue that is causing some complexity in the legal field. I refer to the legal regulation of cyberspace, and more specifically, to the role of IHL in regulating what has become known as “cyber warfare”, the subject of much discussion nowadays.

In recent years a wide array of new technologies has entered the modern battlefield. Cyberspace has opened up a potentially new war-fighting domain, a man-made theatre of war additional to the natural theatres of land, air, sea and outer space. It provides worldwide interconnectivity regardless of borders, which means that whatever has an interface with the internet can be targeted from anywhere in the world. Interconnectivity also means that the effects of a cyber attack may have repercussions on various other systems given that military networks are in many cases dependent on commercial infrastructure.

The fact that a particular military activity is not specifically regulated does not mean that it can be used without restrictions. Means and methods of warfare which resort to cyber technology are subject to IHL just as any new weapon or delivery system has been so far. If a cyber operation is undertaken against an enemy in an armed conflict in order to cause damage, it can hardly be disputed
that such an attack is in fact a method of warfare and is subject to prohibitions under IHL.

Reconciling the emergence of cyberspace as a new war-fighting domain with the legal framework governing armed conflict is nevertheless a challenging task in several respects and requires careful reflection. A few issues being debated include:

First, the digitalization on which cyberspace is built ensures anonymity and complicates the attribution of conduct. Thus, in most cases, it appears difficult if not impossible to identify the author of an attack. Given that IHL relies on the attribution of responsibility to individuals and parties to conflicts, major difficulties arise. In particular, if the perpetrator of an operation and thus its link to an armed conflict cannot be identified, it is extremely difficult to determine whether IHL is even applicable.

Second, there is no doubt that an armed conflict exists and IHL applies once traditional kinetic weapons are used in combination with cyber operations. However, a particularly difficult situation as regards the applicability of IHL arises when the first, or the only, "hostile" acts are conducted by means of a cyber operation. Can this be qualified as constituting an armed conflict within the meaning of the Geneva Conventions and other IHL treaties? Does it depend on the type of operation, that is, would the manipulation or deletion of data suffice or is physical damage as the result of a manipulation required? It would appear that the answer to these questions will probably be determined in a definite manner only through future state practice.

Third, the definition of the term “attack” is of decisive importance for the application of the various rules giving effect to the IHL principle of distinction. Additional Protocol I and customary IHL contain a specific definition of the term which is not identical to that provided for in other branches of law. Under Additional Protocol I, "attacks" means acts of violence against the adversary, whether in offence or defense. The term "acts of violence" denotes physical force. Based on that interpretation, which the ICRC shares, cyber operations by
means of viruses, worms, etc., that result namely in physical damage to persons, or damage to objects that goes beyond the computer program or data attacked could be qualified as "acts of violence" and therefore an attack in the sense of IHL.

Fourth, when cyber operations constitute an attack, Additional Protocol I imposes: the obligation to direct attacks only against "military objectives", prohibits indiscriminate and disproportionate attacks, and imposes an obligation to take precautions in attack. These rules operate in the same way whether an attack is carried out by means of traditional weapons or by reliance on a computer network. Problems that arise in their application are therefore not necessarily unique to cyber operations, but many questions can be posed:

Based on what is publicly known about cyber operations thus far, ensuring compliance with the prohibition of indiscriminate attacks poses very serious challenges. One issue is whether cyber operations may be accurately aimed at an intended target and, even if so, whether indiscriminate effects upon civilian infrastructure could be prevented due to the interconnectedness of military and civilian computer networks. As regards the prohibition of disproportionate attacks, one of the queries is whether it is in practice possible to fully anticipate all the reverberating consequences/knock-on effects on civilians and civilian objects of an attack otherwise directed at a legitimate military objective.

Respect for the principles of distinction and proportionality means that certain precautions in attack must be taken. Given that, in certain cases, cyber operations might actually cause less incidental harm to civilians or civilian objects than conventional weapons, it may be argued that the precautionary rule would require a commander to consider whether he or she could achieve the same military advantage by using cyber technology if practicable.

I would like to reiterate that despite the newness of the technology and some of the issues just raised, IHL constraints do apply to means and methods of warfare which resort to cyber technology. Cyber warfare, like any other warfare, may only be conducted with respect for existing rules if the humanitarian goal of
sparing civilians from suffering and preventing the destruction of civilian objects is to be preserved.

Ladies and gentlemen,

I would like to end my remarks by recalling something I noted at the beginning. Hugo Grotius’s work shows us that complexity may, and must be, addressed through law by the application of reason, vision and humanity. Reason means, among other things of course, that the validity of existing international norms must be acknowledged and that the relevant rules must be implemented, until changes are agreed to. Any other approach risks unravelling the hard won compromises that constitute international law and would jeopardize the baseline that states have established for resolving issues of common concern. In the area of international humanitarian law in particular, rejection, or misinterpretation of the rules cannot be limited to one side only, as armed conflict, by definition involves at least two parties. If one of them changes the goal posts in the middle of an armed conflict the other may do so as well, with immediate and tragic consequences for those whom IHL was designed to protect. Differently put, it should be borne in mind that hasty legal responses to new challenges often generate more, not less, complexity.

An approach to international law, including IHL, based on vision means that there is a capacity and willingness to recognize and analyze what is new, and a readiness to effect change if necessary. In the area of international law change is possible, and is most easily achieved, where states come together for the common good, and are prepared to accommodate different views in the process of finding solutions. Resolving some of the challenges in the area of international humanitarian law that I have outlined above will undoubtedly require vision. The ICRC stands ready to assist states in this regard, based on the mandate entrusted to it by the parties to the treaties of international humanitarian law and the Statutes of the International Red Cross and Red Crescent Movement.
As for humanity, it is a broad concept that can be applied to many areas of human endeavour, including the law. It is the foundation stone of the entire edifice of IHL, and must continue to permeate both the application of existing rules and the crafting of new ones, if deemed necessary. And, even though the principle defies precise legal definition, its observance in armed conflict always has immediate results: it helps save lives, protect the vulnerable and prevent suffering. It is in fact necessary that the principle of humanity should remain just that, an overarching principle that informs the application, interpretation and development of IHL. It is by its very nature an evolving concept that is given specific content in accordance with the values of the times. Our common challenge is to ensure that this complex notion keeps expanding.

I thank you for your attention.
The Washington Post

Administration debates stretching 9/11 law to go after new al-Qaeda offshoots
By Greg Miller and Karen DeYoung, March 06, 2013

A new generation of al-Qaeda offshoots is forcing the Obama administration to examine whether the legal basis for its targeted killing program can be extended to militant groups with little or no connection to the organization responsible for the attacks on Sept. 11, 2001, U.S. officials said.

The Authorization for Use of Military Force, a joint resolution passed by Congress three days after the strikes on the World Trade Center and the Pentagon, has served as the legal foundation for U.S. counterterrorism operations against al-Qaeda over the past decade, including ongoing drone campaigns in Pakistan and Yemen that have killed thousands of people.

But U.S. officials said administration lawyers are increasingly concerned that the law is being stretched to its legal breaking point, just as new threats are emerging in countries including Syria, Libya and Mali.

“The farther we get away from 9/11 and what this legislation was initially focused upon,” a senior Obama administration official said, “we can see from both a theoretical but also a practical standpoint that groups that have arisen or morphed become more difficult to fit in.”

The waning relevance of the 2001 law, the official said, is “requiring a whole policy and legal look.” The official, like most others interviewed for this article, spoke on the condition of anonymity to discuss internal administration deliberations.

The authorization law has already been expanded by federal courts beyond its original scope to apply to “associated forces” of al-Qaeda. But officials said legal advisers at the White House, the State Department, the Pentagon and intelligence agencies are now weighing whether the law can be stretched to cover what one former official called “associates of associates.”

The debate has been driven by the emergence of groups in North Africa and the Middle East that may embrace aspects of al-Qaeda’s agenda but have no meaningful ties to its crumbling leadership base in Pakistan. Among them are the al-Nusra Front in Syria and Ansar al-Sharia, which was linked to the September attack on a U.S. diplomatic post in Benghazi, Libya. They could be exposed to drone strikes and kill-or-capture missions involving U.S. troops.

Officials said they have not ruled out seeking an updated authorization from Congress or relying on the president’s constitutional powers to protect the country. But they said those are unappealing alternatives.

**AUMF and the war on terror**

The debate comes as the administration seeks to turn counterterrorism policies adopted as emergency measures after the 2001 attacks into more permanent procedures that can sustain the campaign against al-Qaeda and its affiliates, as well as other current and future threats.
The AUMF, as the 2001 measure is known, has been so central to U.S. efforts that counterterrorism officials said deliberations over whom to put on the list for drone strikes routinely start with the question of whether a proposed target is “AUMF-able.”

The outcome of the debate could determine when and how the war on terrorism — at least as defined by Congress after the Sept. 11 attacks — comes to a close.

“You can’t end the war if you keep adding people to the enemy who are not actually part of the original enemy,” said a person who participated in the administration’s deliberations on the issue.

Administration officials acknowledged that they could be forced to seek new legal cover if the president decides that strikes are necessary against nascent groups that don’t have direct al-Qaeda links. Some outside legal experts said that step is all but inevitable because the authorization has already been stretched to the limit of its intended scope.

“The AUMF is becoming increasingly obsolete because the groups that are threatening us are harder and harder to tie to the original A.Q. organization,” said Jack Goldsmith, an expert on national security law at Harvard University and a former senior Justice Department official.

He said extending the AUMF to groups more loosely tied to al-Qaeda would be “a major interpretive leap” that could eliminate the need for a link between the targeted organization and core al-Qaeda.

The United States has not launched strikes against any of the new groups, and U.S. officials have not indicated that there is any immediate plan to do so. In Libya, for example, the United States has sought to work with the new government to apprehend suspects in the Benghazi attack.

Still, the administration has taken recent steps — including building a drone base in the African country of Niger — that have moved the United States closer to being able to launch lethal strikes if regional allies are unable to contain emerging threats. The administration official cited Ansar al-Sharia as an example of the “conundrum” that counterterrorism officials face.

The group has little if any established connection to al-Qaeda’s leadership core in Pakistan. But intercepted communications during and after the attack in Benghazi indicated that some members have ties to al-Qaeda in the Islamic Maghreb, the terrorist network’s main associate in North Africa.

“There are individuals who have an affiliation from a policy, if not legal, perspective,” the official said. “But does that mean the whole group?”

Other groups of concern include the al-Nusra Front, which is backed by al-Qaeda in Iraq and has used suicide bombings to emerge as a potent force in the Syrian civil war, and a splinter group in North Africa that carried out a deadly assault in January on a natural-gas complex in Algeria.

A focus on Sept. 11
The debate centers on a piece of legislation that spans a single page and was drafted in a few days to give President George W. Bush authority to “use all necessary and appropriate force” against al-Qaeda.

The law placed no geographic limits on that power but did not envision a drawn-out conflict that would eventually encompass groups with no ties to the Sept. 11 strikes. Instead, it authorized the president to take action “against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.”

The authorization makes no mention of “associated forces,” a term that emerged only in subsequent interpretations of the text. But even that elastic phrase has become increasingly difficult to employ.

In a speech last year at Yale University, Jeh Johnson, who served as general counsel at the Defense Department during Obama’s first term, outlined the limits of the AUMF. “An ‘associated force’ is not any terrorist group in the world that merely embraces the al-Qaeda ideology,” Johnson said. Instead, it has to be both “an organized, armed group that has entered the fight alongside al-Qaeda” and a “co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners.”

U.S. officials said evaluating whether a proposed target is eligible under the AUMF is only one step. Names aren’t added to kill or capture lists, officials said, unless they also meet more elaborate policy criteria set by Obama.

If a proposed a target doesn’t clear the legal hurdle, the senior administration official said, one option is to collect additional intelligence to try to meet the threshold.

Officials stressed that the stakes of the debate go beyond the drone program. The same authorities are required for capture operations, which have been far less frequent. The AUMF is also the legal basis for the CIA’s drone campaign in Pakistan, although the agency compiles its own kill list in that operation with little involvement from other agencies.

The uncertainty surrounding the AUMF has already shaped the U.S. response to problems in North Africa and the Middle East. Counterterrorism officials concluded last year that Mokhtar Belmokhtar, a militant leader in Algeria and Mali, could not be targeted under the AUMF, in part because he had had a falling out with al-Qaeda’s leadership and was no longer regarded as part of an associated group.

Belmokhtar was later identified as the orchestrator of the gas-plant attack in Algeria in which dozens of workers, including three Americans, were killed.

Obama’s decision to provide limited assistance to French air attacks against Islamist militants in Mali this year was delayed for weeks, officials said, amid questions over whether doing so would require compliance with the AUMF rules.

Some options beyond the 2001 authorization are problematic for Obama. For instance, he has been reluctant to rely on his constitutional authority to use military force to protect the country, which bypasses Congress and might expose him to criticism for abuse of executive power.

Working with Congress to update the AUMF is another option. The Senate Intelligence Committee has already begun considering ways to accomplish that. But
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Repeal the Military Force Law

Three days after the Sept. 11, 2001, terrorist attacks, Congress approved the Authorization for Use of Military Force. It was enacted with good intentions — to give President George W. Bush the authority to invade Afghanistan and go after Al Qaeda and the Taliban rulers who sheltered and aided the terrorists who had attacked the United States.

But over time, that resolution became warped into something else: the basis for a vast overreaching of power by one president, Mr. Bush, and less outrageous but still dangerous policies by another, Barack Obama.

Mr. Bush used the authorization law as an excuse to kidnap hundreds of people — guilty and blameless people alike — and throw them into secret prisons where many were tortured. He used it as a pretext to open the Guantánamo Bay camp and to eavesdrop on Americans without bothering to obtain a warrant. He claimed it as justification for the invasion of Iraq, twisting intelligence to fabricate a connection between Saddam Hussein and the 9/11 attacks.

Unlike Mr. Bush, Mr. Obama does not go as far as to claim that the Constitution gives him the inherent power to do all those things. But he has relied on the 2001 authorization to use drones to kill terrorists far from the Afghan battlefield, and to claim an unconstitutional power to kill American citizens in other countries based only on suspicion that they are or might become terrorist threats, without judicial review.

The concern that many, including this page, expressed about the authorization is coming true: that it could become the basis for a perpetual, ever-expanding war that undermined the traditional constraints on government power. The result is an unintelligible policy without express limits or protective walls.

Last Wednesday, Attorney General Eric Holder said the president would soon shed more light on his “targeted killing” policy. Mr. Obama needs to. In the last few weeks, confusion over these issues has been vividly on display. On one hand, the administration has said it would use lethal force only when capturing a terrorist was impossible, and it did arrest Sulaiman Abu Ghaith, a son-in-law of Osama bin Laden who once served as a spokesman for Al Qaeda and arraigned him on Friday in federal court in Manhattan. The Washington Post reported last week that counterterrorism officials considered using the authorization law as the government’s authority to kill Mokhtar Belmokhtar, a militant leader in Algeria.
but decided it did not apply because he was not part of Al Qaeda or an associate

But the administration still has not fully disclosed to Congress the legal documents on which the targeted killing program is based. And in that same article, The Post said the administration was debating whether it could stretch the law to make it apply to groups that had no connection, or only slight ones, to Al Qaeda and the 9/11 attacks.

A big part of the problem is that the authorization to use military force is too vague. It gives the president the power to attack “nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on Sept. 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

Making the law more specific, however, would only further enshrine the notion of a war without end. And, as Jeh Johnson, then counsel to the defense secretary, said in a speech last November, “War must be regarded as a finite, extraordinary and unnatural state of affairs.”

The right solution is for Congress to repeal the 2001 authorization. It could wait to do that until American soldiers have left Afghanistan, which is scheduled, too slowly, for the end of 2014. Better yet, Congress could repeal it now, effective upon withdrawal.
Since September 18, 2001, a joint resolution of Congress known as the Authorization for Use of Military Force (AUMF) has served as the primary legal foundation for the “war on terror.” In this essay we explain why the AUMF is increasingly obsolete, why the nation will probably need a new legal foundation for next-generation terrorist threats, what the options are for this new legal foundation, and which option we think is best.

The AUMF 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, or harbored such organizations or persons, . . .” The authorization of “force” in the AUMF is the main legal basis for the president’s power to detain and target members of al Qaeda and the Taliban. In addition, in the years since the resolution took effect, Congress, two presidential administrations, and the lower federal courts have interpreted the “force” authorized by the AUMF to extend to members or substantial supporters of the Taliban and al Qaeda, and associated forces.

The main reason the AUMF is becoming obsolete is that the conflict it describes—which on its face is one against the perpetrators of the September 11 attacks and those who harbor them—is growing less salient as U.S. and allied actions degrade the core of al Qaeda and the U.S. military draws down its forces fighting the Taliban in Afghanistan. At the same time that the original objects of the AUMF are dying off, newer terrorist
groups that threaten the United States and its interests are emerging around the globe. Some of the terrorist groups have substantial ties to al Qaeda and thus can be brought within the AUMF by interpretation. For example, the president has been able to use force against al Qaeda in the Arabian Peninsula, a terrorist organization in Yemen, because it is a supporter or associated force of al Qaeda. But this interpretive move is increasingly difficult as newer threatening groups emerge with dimmer ties, if any, to al Qaeda. As a result, we are reaching the end point of statutory authority for the president to meet terrorist threats.\textsuperscript{3}

We should emphasize at the outset that we do not claim that the increasingly obsolete AUMF demands immediate amendment or alteration. We do not make this claim because we lack access to classified information that would indicate the full nature of the terrorist threats the nation faces, or their connection to al Qaeda, or the nation's ability to meet the threat given current legal authorities. We also recognize that any new force authorizations carry significant strategic and political consequences beyond their immediate operational consequences. We nonetheless believe strongly—based on public materials and conversations with government officials—that the AUMF’s usefulness is running out, and that this trend will continue and will demand attention in the medium term if not in the short term. Our aim is to contribute to the conversation the nation will one day have about a renewed AUMF by explaining why we think one will be necessary and the possible shape it might take.

Part I of this paper explains in more detail why the AUMF is becoming obsolete and argues that the nation needs a new legal foundation for next-generation terrorist threats. Part II then describes the basic options for this new legal foundation, ranging from the president’s Article II powers alone to a variety of statutory approaches, and discusses the pros and cons of each option, and the one we prefer. Part III analyzes additional factors Congress should consider in any such framework.

I. \textbf{The Growing Problem of Extra-AUMF Threats and the Need for a New Statutory Framework}

In this Part we explain why the AUMF is growing obsolete and why a combination of law enforcement and Article II authorities, standing alone, is not an adequate substitute.
1. The Growing Obsolescence of the AUMF

The September 2001 AUMF provides for the use of force against the entity responsible for the 9/11 attacks, as well as those harboring that entity. It has been clear from the beginning that the AUMF encompasses al Qaeda and the Afghan Taliban, respectively. This was the right focus in late 2001, and for a considerable period thereafter. But for three reasons, this focus is increasingly mismatched to the threat environment facing the United States.\(^4\)

First, the original al Qaeda network has been substantially degraded by the success of the United States and its allies in killing or capturing the network’s leaders and key personnel. That is not to say that al Qaeda no longer poses a significant threat to the United States, of course. The information available in the public record suggests that it does, and thus nothing we say below should be read to suggest that force is no longer needed to address the threat al Qaeda poses. Our point is simply that the original al Qaeda network is no longer the preeminent operational threat to the homeland that it once was.

Second, the Afghan Taliban are growing increasingly marginal to the AUMF. As noted above, the AUMF extended to the Taliban because of the safe harbor they provided to al Qaeda. That rationale makes far less sense a dozen years later, with the remnants of al Qaeda long-since relocated to Pakistan’s FATA region. This issue has gone largely unremarked in the interim because U.S. and coalition forces all along have been locked in hostilities with the Afghan Taliban, and thus no occasion to reassess the AUMF nexus has ever arisen. Such an occasion may well loom on the horizon, however, as the United States draws down in Afghanistan with increasing rapidity. To be sure, the United States no doubt will continue to support the Afghan government in its efforts to tamp down insurgency, and it also will likely continue to mount counterterrorism operations within Afghanistan. It may even be the case that at some future point, the Taliban will again provide safe harbor to what remains of al Qaeda, thereby at least arguably reviving their AUMF nexus. But for the time being, the days of direct combat engagement with the Afghan Taliban appear to be numbered.

If the decline of the original al Qaeda network and the decline of U.S. interest in the Afghan Taliban were the only considerations, one might applaud rather than fret over the declining relevance of the AUMF. There is, however, a third consideration: significant new threats are emerging, ones that are not easily shoehorned into the current AUMF framework.
To a considerable extent, the new threats stem from the fragmentation of al Qaeda itself. In this sense, the problem with the original AUMF is not so much that its primary focus is on al Qaeda, but rather that it is increasingly difficult to determine with clarity which groups and individuals in al Qaeda's orbit are sufficiently tied to the core so as to fall within the AUMF. And given the gravity of the threat that some of these groups and individuals may pose on an independent basis, it also is increasingly odd to premise the legal framework for using force against them on a chain of reasoning that requires a detour through the original, core al Qaeda organization.

The fragmentation process has several elements. First, entities that at least arguably originated as mere regional cells of the core network have established a substantial degree of organizational and operational independence, even while maintaining some degree of correspondence with al Qaeda's leaders. Al Qaeda in the Arabian Peninsula is a good example. Al Qaeda in Iraq arguably fits this description as well, though in that case one might point to a substantial degree of strategic independence as well. Second, entities that originated as independent, indigenous organizations have to varying degrees established formal ties to al Qaeda, often rebranding themselves in the process. Al Qaeda in the Islamic Maghreb, formerly known as the Salafist Group for Call and Combat, illustrates this path. Al Shabaab in Somalia arguably does as well. And then there are circumstances (such as the ones currently unfolding in Mali, Libya, and Syria) in which it is not entirely clear where the organizational lines lie among (i) armed groups that work in concert with or even at the direction of one of the aforementioned al Qaeda affiliates; (ii) armed groups that are sympathetic and in communication with al Qaeda; and (iii) armed groups that are wholly independent of al Qaeda yet also stem from the same larger milieu of Salafist extremists.

This situation—which one of us has described as the emergence of “extra-AUMF” threats—poses a significant problem insofar as counterterrorism policy rests on the AUMF for its legal justification. In some circumstances it remains easy to make the case for a nexus to the original al Qaeda network and hence to the AUMF. But in a growing number of circumstances, drawing the requisite connection to the AUMF requires an increasingly complex daisy chain of associations—a task that is likely to be very difficult (and hence subject to debate) in some cases, and downright impossible in others.
The emergence of this problem should come as no surprise. It has been nearly a dozen years since the AUMF’s passage, and circumstances have evolved considerably since then. It was inevitable that threats would emerge that might not fit easily or at all within its scope. The question is whether Congress should do anything about this situation, and if so precisely what.

2. The Inadequacy of Law Enforcement and Article II
Consider first the option of Congress doing nothing. This is, at bottom, a choice to address extra-AUMF threats through a combination of increasingly strained executive branch interpretations of the AUMF, law enforcement and intelligence measures, and whatever supplemental military force the president can and will assert based on his Article II authorities. It is our contention that at some point even strained interpretations of the AUMF will not be possible, and that even before we reach that point, the strained interpretations will call into question the legitimacy of congressional and democratic backing for the president’s uses of force. That leaves law enforcement measures and Article II powers, which in combination are far from ideal.

To be very clear, we do not claim that all terrorism-related threats can or should be dealt with militarily. Law enforcement and intelligence tools can have tremendous effect, and we strongly endorse the view that the president’s authority to use them should not be unduly constrained out of a misguided sense that most or all terrorism scenarios require a military solution. But law enforcement and intelligence tools are not a panacea. In some circumstances—such as the late 1990s in Afghanistan and today in certain areas of Pakistan, Yemen, Somalia, and the Sahel region—these options simply do not provide sufficient capacity to capture individuals or to otherwise disrupt their activities. And in some circumstances, these tools are equally inadequate to the task of long-term incapacitation. Meanwhile, local governments are sometimes either incapable of addressing or unwilling to address terrorism threats; in some cases, for various reasons, we would not want to entrust them with these responsibilities. Whether this is the case with respect to any given extra-AUMF threat at any given point in time is exceedingly difficult to say, particularly for those (including us) who are outside government and lack access to the relevant intelligence. We proceed on the assumption, however, that some such circumstances do exist or will arise.
Bearing this in mind, the next issue is whether the president’s inherent powers under Article II are adequate to address any gap that may emerge between what defense of the nation demands and what law enforcement and intelligence options can provide in extra-AUMF scenarios. We are skeptical, for three reasons.

First, it is worth bearing in mind that some administrations are more comfortable resorting to claims of Article II authority than others. The Obama administration, for example, has consciously distanced itself from the Bush administration on this dimension, at least in the counterterrorism setting (as opposed to the operation in support of the revolution in Libya, which relied on a surprisingly bold stand-alone Article II argument). In a situation where a military response is appropriate but officials are reluctant to act without statutory cover, a serious problem arises unless there is time to seek and receive legislative support.

Second, presidential action based on statutory authority has more political and legal legitimacy than action based on Article II alone. Article II actions leave the president without overt political support of Congress, which can later snipe at his decisions, or take actions to undermine them. We saw this happen, for example, in response to many of the Bush administration’s unilateral assertions of authority, and also to some degree in response to President Obama’s unilateral assertion of authority in Libya. This is a problem that grows with reliance on Article II over time. Also, of course, any subsequent judicial review of the president’s use of force is more likely to be upheld if supported by Congress.

Third, the president faces significant legal hurdles to detaining dangerous terrorism suspects over the longer term under Article II, and at a minimum would encounter substantial political and legal opposition if he attempted it. The Obama administration has shown no proclivity to detain terrorism suspects (outside the criminal justice system or in a combat zone like Afghanistan) other than those captured and detained under the previous administration. But a future administration might regard such detention as necessary in some circumstances, and would have a harder time doing so beyond short periods without statutory authorization. Relatedly, an exclusive reliance on Article II would make targeted killing politically and legally safer than detention, an outcome that would run contrary both to the security interests of the United States (by eliminating the possibility of
useful intelligence through lawful interrogation) and to the interests of the individual in question (for obvious reasons).

3. The General Drawbacks of a New AUMF

While we believe there will be a need for a new AUMF, and while we discuss options for such a new statute in Parts II and III, we first pause to note the general downsides of a new AUMF. As the discussion of inherent presidential power implies, a new statutory framework for presidential uses of force against newly developing terrorist threats might diminish presidential flexibility and discretion at the margins. At the same time, of course, it enhances the legitimacy of presidential action in domestic courts and with domestic public opinion. This constraint-legitimacy tradeoff is commonplace. And to the extent that the constraint achieves legitimacy it promotes sustainable counterterrorism policy, politically and legally, over the long term. A strong statutory basis makes it less likely that Congress or courts will intervene later with constraints that dangerously hamper the president’s agility to respond to threats.

Some will also view a new AUMF as very costly to the degree that it extends, and makes indefinite, presidential military powers against terrorist threats. We have already explained why we believe that police authorities will not suffice against the threat, and we think that a realistic assessment of our national security needs likely makes the powers outlined here necessary and not optional. A related potential cost is a version of the hammer-nail problem. Giving the president new tools might lead him to use them even if they are strategically unwise. This is a fair concern and should inform both the timing of the statute (i.e. the statute should not be enacted until truly necessary) and especially its content (which we discuss in the next Parts).

Third are the international costs of a renewed AUMF. This is a complex issue. As a general matter a renewed and clarified AUMF—especially one that (as we propose below) articulates the U.S. view of international law—would contribute to the development of opinio juris under customary international law. So too would the reaction to the new AUMF. That reaction depends on the details of the legislation. To the extent that the legislation is seen as constraining the president in meaningful ways and in hewing to accepted international law, it would be viewed in a positive light internationally. To the extent that it is seen as making permanent an indefinite and geographically limitless war or in stretching international law, it would be viewed in a negative light internationally.
among allied governments and NGOs. And of course both reactions are likely to some degree.

The attempt to mitigate a negative reception abroad (and, in some quarters, at home), is one reason why we recommend below that any statutory reform in this area should emphasize compliance with *jus in bello* and *jus ad bellum* as well as the limited rather than unlimited nature of the authorization (conceptually and temporally). We recognize that the United States’ interpretation of some international self-defense law and law-of-war authorities is broader than our allies’ interpretations; legislating such limitations thus will not end debate. Nevertheless, acknowledging clearly that U.S. operations are to be conducted within, rather than beyond, traditional legal frameworks is an important step in mitigating friction with our allies, and prudent use of these legal authorities will be important in persuading allies that the U.S. position is a reasonable one.

II. Statutory Options to Address Extra-AUMF Threats

We believe that a better and more stable alternative to reliance on the current combination of an aging AUMF, law enforcement authorities, and Article II is a new congressional authorization for emerging threats. As suggested in the Introduction, we do not maintain that the statute need be enacted immediately. But we do think that current trends likely point to the eventual need for a new statute.

A central challenge in designing such a statute is to provide sufficient flexibility to meet the changing threat environment while at the same time cabining discretion to use force and subjecting it to the sort of serious constraints that confer legitimacy and ensure sound strategic deliberation. There are many possible approaches, and they can be combined in various ways. We here outline three basic options and offer a preliminary recommendation.

1. **Tie the Authorization to Article II or International Law**

Congress could authorize the president to use force that is consistent with his extant powers under Article II of the Constitution to protect the nation. That is, Congress could by legislation authorize the president to use force that he would otherwise possess pursuant to his inherent constitutional authority.

It might seem that a mere legislative reaffirmation of the president’s Article II powers against terrorist threats would have little significance. Recall, however,
that the Bush administration sought from Congress and was denied similar authorization in September 2001. A congressional authorization of force that is co-extensive with the president’s Article II powers of self-defense would shift the exercise of those powers from Justice Jackson’s Category 2 to his Category 1, with all of the political and legal support entailed by that shift. When the president acts with Congress’s backing as opposed to on the basis of Article II alone, “his authority is at its maximum” and “the burden of persuasion would rest heavily upon any who might attack it.” In short, a self-defense regime is politically and legally more stable when backed by Congress.

There are several major problems with this approach, however. First, it would be entirely unclear against whom Congress was authorizing force, and thus Congress would be adding its political and legal weight to open-ended war of the sort that it was unwilling to support even in the early days after 9/11. Additionally, because members of Congress and the president often disagree about the precise scope of Article II powers, such a statute would be especially susceptible to later inter-branch disagreements. It is also not clear whether the president’s Article II authority includes detention powers. That problem could be fixed in the statute if Congress expressly authorized some powers of detention beyond existing criminal and civil authorities, but this would then reopen questions of against whom these authorities could be used.

A variant on the “authorized self-defense” approach would be to tie the president’s authority not to his Article II powers but to international law. That is, Congress could authorize the president to use force that is consistent with the international law of self-defense. The substantive scope of these alternatives would be similar in practice, and they share many of the same benefits and costs just mentioned.

2. Specify Terrorist Groups or Geographies

Congress could instead authorize the president to use force against specified terrorist groups and/or in specified countries or geographic areas. This would resemble the more traditional approach by which Congress authorizes force against state adversaries or for particular operations within foreign countries. Recent news reports have suggested that some in the administration and the military are deliberating about whether to ask Congress for just such a statute to address Islamist terrorist threats in some North African countries. This “retail” approach—in contrast to the “wholesale” approach laid out in the previous
section—is the one that, among our three options, most restricts presidential discretion.

In theory, the retail approach is advantageous because Congress would specifically define the enemy (recognizing, however, the difficulties associated with the AUMF in drawing clear boundaries around transnational terrorism groups). Congress must under this approach stay engaged politically and legally as threats evolve and emerge; it must debate and approve any significant expansions of the conflict.

A downside of the retail approach is that Congress probably cannot or will not, on a continuing basis, authorize force quickly or robustly enough to meet the threat, which is ever-morphing in terms of group identity and in terms of geographic locale. The emerging array of terrorist groups across North Africa, with varying types and degrees of links, and posing potentially different (and again, changing) threats to the United States, illustrates the difficulties of crafting force authorizations that are neither too narrow nor too broad.

3. General Criteria Plus Listing
Based on current trends and the lessons from the past decade, we recommend a third approach: Congress sets forth general statutory criteria for presidential uses of force against new terrorist threats but requires the executive branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force. One model to draw on, with modifications, is the State Department’s Foreign Terrorist Organization designation process. Under this process, the Secretary of State—pursuant to specific statutory standards, in consultation with other departments, and following a notification period to Congress—designates particular groups as terrorist organizations and thereby triggers statutory consequences for those groups and their members.

We believe that a listing system modeled on this approach best cabins presidential power while at the same time giving the president the flexibility he needs to address emerging threats. Such a listing scheme will also render more transparent and regularized the now very murky process by which organizations and their members are deemed to fall within the September 2001 AUMF.

The listing approach is not without significant challenges, however. Some will claim that such a delegation to the president to identify the entities against whom force can be deployed would be unconstitutional. However, Congress has
often authorized the president to use force in ways that leave the president significant discretion in determining the precise enemy. In light of this history, the waning of the non-delegation doctrine in other contexts, the congressional specification of the general criteria for the use of force, and the administrative, reporting, and timing limitations on the listing process described below, the constitutional objections can be overcome.

A more serious challenge is that the listing approach will appear to codify permanent war, and to diminish the degree of congressional involvement and inter-branch deliberation compared to the second approach. These concerns can be mitigated in several ways. First, the substantive statutory criteria governing this listing process should be as specific as possible. For example, a new AUMF might authorize force against “an organization with sufficient capability and planning that it presents an imminent threat to the United States.” Or it might authorize force against “any group or person that has committed a belligerent act against the U.S. or imminently threatens to do so.” In setting out such criteria, Congress could make clear precisely what it means by key terms such as “imminent” and “belligerent act.” The criteria should, moreover, be expressly linked to international self-defense law. Compliance with that law is an obligation of the United States. And from a diplomatic and international legal-policy standpoint it is important that the United States government as a whole make clear that this is not an open-ended “global war on terror” but a cabined application of traditional self-defense to the new realities of non-state threats.

Second, at the front end of the listing process, the administrative, consultative, and notification procedures should be sufficiently robust to ensure careful deliberation and strong accountability. At the same time, the statute should provide for emergency exercises of Article II power (which the Constitution arguably compels in any event), followed by a process for retroactive listing, to deal with rapidly moving crises while providing strong incentive for the president to fold his actions into the statutory scheme.

Finally, a listing scheme should include thorough ex post reporting and auditing as well. At a minimum the president should have a duty to report to Congress in detail on the intelligence and other factual bases that led to the inclusion of particular groups on the list. The president should also have a duty to file detailed reports with Congress—in a more robust form than the usually
conclusory War Powers Resolution reports—about how the statutory authorization of force is being implemented. As has become typical in the exercise of its oversight of modern national security delegations, Congress would also likely deploy inspectors general to perform audits on elements of the listing process. Finally, once a group is listed, there will be tremendous political incentive not to de-list it. So to ensure continual reassessment of the need for authorized force against particular groups, all listing should be subject to a review and renewal process (say, every two years) with an automatic sunset if not affirmatively renewed. (We discuss the role of sunset provisions as a general feature of all three proposed authorizations in the next Part.)

III. Additional Issues

No matter which of the three broad statutory approaches Congress chooses, members will have to address several additional issues that arise almost inevitably in any authorization of modern asymmetric conflict against a shifting set of enemy non-state actors over time.

1. Special Targeted Killing Criteria

Congress might consider statutory targeting guidance beyond mere authorization of force. The United States does not and will not conduct strikes against everyone whom it deems “part of” enemy forces. Rather, as administration officials have explained publicly, it uses far narrower criteria that take into account a target’s potential threat and importance within an enemy group. Particularly outside of hot battlefield zones, it may be worthwhile to write some of these judgments into law to mitigate anxiety that the United States claims an unrestricted right to wage war worldwide. Congress might also state clearly as part of this legislation that the authorization for force applies only overseas. Moreover, the administration has stated that it applies heightened screening criteria for the targeting of U.S. nationals, and both in a major speech and in a leaked Justice Department White Paper, it has laid out circumstances in which it regards the targeting of an American overseas as consistent with due process. Congress could write such standards into law—or, to the extent it disagrees, write different ones.

The general point here is that a use of force authorization does not need to be unqualified, especially with respect to locations in the world in which U.S. troops are not in a day-to-day sense deployed and confronting the enemy. Congress
could, rather, authorize force but calibrate the authorization for a variety of anticipated specialized circumstances that call for heightened review.

2. Detention vs. Targeting

Congress might also consider distinguishing detention and targeting. Broadly speaking, it appears that the two take place under similar standards, namely, whether the individual or individuals are “part of” or “substantially supporting” enemy forces. Yet there is a reasonable argument, in the context of this sort of micro-targeted conflict off the hot battlefields, for treating targeting and detention as legally distinct. More specifically, one can argue that detention authority should sweep more broadly than targeting authority. Outside of regular zones of armed conflict, after all, the United States is highly unlikely to target mere supporters of enemy forces, so narrower criteria might be workable for lethal military force. Having a somewhat broader criteria (though no broader than the current member/supporter test), at least for short-term detentions, would permit the holding of incidental captures until they can be identified and processed and, if need be, transferred to law enforcement or some foreign authority with a legal basis for longer-term action.

3. Accountability and Review Processes

In overseas counterterrorism operations that are inherently secretive by their nature, accountability is critical to ensuring that executive conduct is lawful and prudent and thus to maintaining the legitimacy of the conflict over time. In any future authorization, Congress should build accountability into the authorization itself. It should require public reporting of matters that can be discussed openly, such as the number of strikes and operations, their geographic sweep, and estimates of civilian casualties. It should demand maximum feasible openness about the procedural elements of listing groups as covered entities and about the legal opinions that underlie the American legal framework. And it should require detailed classified reporting and auditing from relevant department and agency inspectors general as to both the vitality of internal processes and the integrity of the intelligence underlying the listings and claims about civilian and enemy deaths. Consideration might also be given to robust internal administrative processes for certain non-battlefield target selection, and for the creation of formal compensation mechanisms for victims of errors in non-battlefield settings. All of these restrictions may sound like a significant erosion of traditional presidential authority to conduct war. But the conflict Congress is authorizing here is a novel hybrid conflict, and the regime
itself—including the accountability mechanisms for that regime—need to reflect that reality.

4. Sunset
Finally, to head off the possibility—or the perception—that Congress is authorizing a perpetual war against an undefined series of groups, the entire regime should sunset after a statutorily defined period of years. Once force is authorized, there is tremendous political incentive not to revoke that authorization—a step that has implications for ongoing operations, as well as for the nation’s sense of itself as at war. To ensure continual reassessment of the need for authorized force, the authorization should be subject to legislative review and renewal (say, every two years), with a default sunset if Congress does not affirmatively renew the granted authority. In the event of a sunset, the legal basis for detentions pursuant to the conflict might evaporate, so the statute would have to address whether and how existing detentions could be extended following a sunset.

IV. Conclusion
As the AUMF becomes obsolete, we are approaching the end point of statutory authority for the president to meet emergent terrorist threats. There are significant downside risks to any successor legal regime to the AUMF and to the option of doing nothing. We have argued that the approach of statutory criteria and listing described above is the least bad option for the country to meet emerging terrorist threats. But at a broader level what is most important is that any legal reform should take account of lessons from the past twelve years’ experience operating under the AUMF. Our broadest aim has been to provide a menu of options for incorporating those lessons into any new legislation that emerges.

Notes
1 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF was approved by both houses of Congress on September 14, 2001, and signed by the president on September 18, 2001. We recognize that the president’s Article II powers are implicated as well, and discuss the significance of this below.

3 See John B. Bellinger III, *A Counterterrorism Law in Need of Updating*, *Washington Post*, Nov. 26, 2010 (arguing that the executive branch should work with Congress to update the AUMF).


5 The Bush administration initially requested from Congress the authority to “deter and pre-empt any future acts of terrorism or aggression against the United States.” David Abramowitz, “The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism,” 43 Harv. Int’l L.J. 71, 73 (2002). After negotiations with the White House, however, Congress declined to authorize this use of military force, though it did in the AUMF recognize that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”


7 Id.

8 See Julian Barnes & Evan Perez, “Terror Fight Shifts to Africa: U.S. Considers Seeking Congressional Backing for Operations Against Extremists,” *Wall Street Journal*, Dec. 6, 2012. At the present time, most assessments suggest that these groups pose threats to U.S. and allied interests but not direct threats to targets inside the United States.


12 Such restrictions have been commonplace in U.S. history. See Bradley & Goldsmith, supra. However, to receive presidential approval and cooperation, and possibly to preserve constitutionality, these restrictions would need some sort of emergency opt-out for the exercise of Article II powers for circumstances in which an imminent threat against the United States falls outside the authorization.

13 Note that the National Defense Authorization Act for Fiscal Year 2012 (NDAA) contains language confirming this measure of detention authority under the AUMF. See Pub. L. 112-81, § 1021. The NDAA does not, however, speak to the question of targeting authority.
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Jean Perkins Task Force on National Security and Law

The National Security and Law Task Force examines the rule of law, the laws of war, and American constitutional law with a view to making proposals that strike an optimal balance between individual freedom and the vigorous defense of the nation against terrorists both abroad and at home. The task force’s focus is the rule of law and its role in Western civilization, as well as the roles of international law and organizations, the laws of war, and U.S. criminal law. Those goals will be accomplished by systematically studying the constellation of issues—social, economic, and political—on which striking a balance depends.

The core membership of this task force includes Kenneth Anderson, Peter Berkowitz (chair), Philip Bobbitt, Jack Goldsmith, Stephen D. Krasner, Jessica Stern, Matthew C. Waxman, Ruth Wedgwood, Benjamin Wittes, and Amy B. Zegart.

For more information about this Hoover Institution Task Force please visit us online at www.hoover.org/taskforces/national-security.
Visions of Drones Swarming U.S. Skies Hit Bipartisan Nerve

By SCOTT SHANE and MICHAEL D. SHEAR

WASHINGTON — The debate goes to the heart of a deeply rooted American suspicion about the government, the military and the surveillance state: the specter of drones streaking through the skies above American cities and towns, controlled by faceless bureaucrats and equipped to spy or kill.

That Big Brother imagery — conjured up by Senator Rand Paul of Kentucky during a more than 12-hour filibuster this week — has animated a surprisingly diverse swath of political interests that includes mainstream civil liberties groups, Republican and Democratic lawmakers, conservative research groups, liberal activists and right-wing conspiracy theorists.

They agree on little else. But Mr. Paul’s soliloquy has tapped into a common anxiety on the left and the right about the dangers of unchecked government. And it has exposed fears about ultra-advanced technologies that are fueled by the increasingly fine line between science fiction and real life.

Drones have become the subject of urgent policy debates in Washington as lawmakers from both parties wrangle with President Obama over their use to prosecute the fight against terrorism from the skies above countries like Pakistan and Yemen.

But they are also a part of the popular culture — toys sold by Amazon; central plot points in “Homeland” and a dozen other television shows and movies; the subject of endless macabre humor, notably by The Onion; and even the subject of poetry. (“Ode to the MQ-9 Reaper,” a serious work by the Brooklyn poet Joe Pan that was just published in the journal Epiphany, describes the drone as “ultra-cool & promo slick, a predatory dart” that is “as self-aware as silverware.”)

Benjamin Wittes, a national security scholar at the Brookings Institution who has written extensively about drones, said he thought Mr. Paul’s marathon was a “dumb publicity stunt.” But he said it had touched a national nerve because the technology, with its myriad implications, had already deeply penetrated the culture.

“Over the last year or so, this thing that was the province of a small number of technologists
and national security people has exploded into the larger public consciousness,” Mr. Wittes said.

On the right, Mr. Paul has become an overnight hero since his filibuster. Self-proclaimed defenders of the Constitution have shouted their approval on Twitter, using the hashtag #StandWithRand and declaring him to be a welcomed member of their less-is-better-government club.

“The day that Rand Paul ignited Liberty’s Torch inside the beltway!” one Tea Party activist wrote on Twitter. “May it never be extinguished!”

But even as the right swooned, the left did, too. Senator Ron Wyden of Oregon — the only Democrat to join Mr. Paul’s filibuster — said the unexpected array of political forces was just the beginning, especially as Congress and the public face the new technologies of 21st-century warfare.

“I believe there is a new political movement emerging in this country that’s shaking free of party moorings,” Mr. Wyden said. “Americans want a better balance between protecting our security and protecting our liberty.”

P. W. Singer, whose 2009 book “Wired for War: The Robotics Revolution and Conflict in the 21st Century” anticipated the broad impact of drones, said he believed they had shaken up politics because they were “a revolutionary technology, like the steam engine or the computer.”

“The discussion doesn’t fall along the usual partisan lines,” he said. The dozen states that have passed laws restricting drones do not fall into conventional red-blue divisions, nor do the score of states competing to be the site of the Federal Aviation Administration’s test sites for drones.

The serious issues raised by the government’s lethal drones seem inextricably mixed with the ubiquitous appearance of the technology in art, commerce and satire.

A four-minute video by the Air Force Research Laboratory on “micro aerial vehicles” shows a futuristic bee-size drone flying in an open window and taking out an enemy sniper with a miniature explosive payload. Since it was posted in 2009, it has been viewed hundreds of thousands of times and reposted all over the Web.

When Amazon advertised a six-inch model of the Predator, made by Maisto, in its toy section, people wrote politically charged mock reviews that became Internet hits: “This goes well,” one reviewer wrote, “with the Maisto Extraordinary Rendition playset, by the way — which gives
you all the tools you need to kidnap the family pet and take him for interrogation at a neighbor's house, where the rules of the Geneva Convention may not apply. Loads of fun!

Senator John McCain, Republican of Arizona, was not laughing Thursday when he took to the Senate floor to chastise Mr. Paul and defend the use of drones. In an interview with The Huffington Post, Mr. McCain dismissed Mr. Paul and the other critics of drones as “the wacko birds on right and left that get the media megaphone.”

But the issue is larger than Mr. Paul, whose ambitions may include a run for the presidency in 2016. For many, Mr. Paul gave voice to the dangers they whisper about to anyone who will listen: that the government is too powerful to be left unchecked.

“It’s not merely the black helicopter crowd of the folks on the far right,” said Mark Potok, a senior fellow at the Southern Poverty Law Center, which tracks extremist groups. “What Rand Paul had to say about drones absolutely fired up conspiracy theorists on the left as well as the right.”

Human Rights Watch plans to join other groups next month in starting an effort called the Campaign to Stop Killer Robots. The technology, fully autonomous weapons that are still at the drawing-board stage, would find and fire at their programmed targets without requiring a human being to pull the trigger.

Some national security experts find the campaign overwrought, but Mary Wareham, the advocacy director for the arms division of Human Rights Watch, noted that the Defense Department in November issued a policy directive on autonomous weapons that recognized the challenges they pose.

At the same time, there are people like Everett Wilkinson, a Tea Party organizer and self-proclaimed conspiracy theorist in Florida, who is hailing Mr. Paul as a “rock star for the Constitution.” On Mr. Wilkinson’s Web site, Liberty.com, he warns that the United States government is building “internment camps” for political dissidents. He is wary of what comes next.

“First they said we are just going to use drones to observe stuff, and then they put Hellfire missiles on them,” Mr. Wilkinson said. “How soon are we going to have drones overhead with Tasers on them?”

In Washington, Code Pink, a leftist group of antiwar activists, showed up with flowers and chocolates at Mr. Paul’s Senate offices on Thursday to thank him for standing up against abuses of power. Known around Capitol Hill mainly for disrupting Congressional hearings, the
group had found a new champion.

“People say: ‘Oh, my God, Code Pink is praising Rand Paul. Hell has frozen over!’” said Medea Benjamin, a co-founder of the group. “But we were glued to C-Span to the bitter end of the filibuster. We were amazed to see the education of the public that was taking place, and that has never occurred before.”
Media Coverage of the Drone Program

By Tara McKelvey
Fellow, Shorenstein Center, Fall 2012
Correspondent, Newsweek and The Daily Beast

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In 2009 and 2010, the media fell short in its coverage of the Obama administration’s drone program, a campaign of lethal strikes focused on terrorists in Pakistan. Once the drone program expanded its range of potential targets to include American citizens and its geographic scope to countries such as Yemen, Libya, and Somalia, however, news organizations increased the breadth and depth of their coverage.

INTRODUCTION

President Barack Obama authorized his first drone strike three days after his inauguration. Since then, he has approved more than three hundred drone strikes against Al Qaeda and other terrorist groups in Pakistan, six times the number of attacks that were carried out during President George W. Bush’s two terms in the White House. In addition, strikes have been carried out against terrorism suspects in Afghanistan, Yemen, Somalia, Sudan, and the Philippines. The drone program represents a shift in strategy for the United States, turning the nation away from large-scale deployment of troops and instead focusing on drones and small bands of special operators who carry out lethal operations. Under the Obama administration, the targeted-killing program has become the centerpiece of U.S. counterterrorism strategy. The Obama White House program of targeted killing is unprecedented in its mission and scope; moreover, the administration’s approach to fighting terrorists is likely to be adopted by presidents in the future, whether Democratic or Republican. For these reasons, it makes sense to examine the role of media in the public debate about the program and moreover to see how journalists have fared in their efforts to cover the story of the targeted-killing program.

Ever since the Al Qaeda attack on the United States in September 2001, executives at media organizations have devoted considerable resources to the coverage of national security. Indeed, scholarly research shows that overall the coverage of terrorism has remained relatively strong for much of the past decade, despite widespread layoffs in
the media industry. More recently, journalists and editors have shown a special interest in the subject of the drone program and its role in national security, and the reporting on this subject increased steadily during President Obama’s first term. For this paper, an informal survey of news articles about drone strikes was conducted, looking at pieces that appeared in five major U.S. publications: The Christian Science Monitor, The New York Times, Time magazine, The Wall Street Journal, and The Washington Post. The media coverage of strikes in these publications nearly doubled during the Obama administration, from 326 articles in 2009 to 625 articles in 2012 (as of November).

Three of these newspapers, The New York Times, The Washington Post, and The Wall Street Journal, have teams of reporters devoted to national security, reflecting the commitment that publishing executives have shown toward the coverage of this subject. Each newspaper devotes at least four full-time reporters to national-security issues, ranging from drone strikes to cyberwarfare, and has editors who specialize in the field and help to shape their newspapers’ coverage of the subject. In addition, dozens of blogs and websites such as Wired’s Danger Room and Lawfare are devoted to national security and cover the drone program.

Social media has also expanded the possibilities for media coverage of the subject: Journalists such as Time’s Bobby Ghosh, ProPublica’s Dafna Linzer, and Pir Zubair Shah, formerly with The New York Times and now the Edward R. Murrow Press Fellow at the Council on Foreign Relations, tweet on the subject. News about CIA- and military-run operations, including the raid on Osama bin Laden’s compound in Pakistan in May 2011, were reported first on Twitter, and an application known as Drone+ has been created in order to follow the strikes in Pakistan.³

The development of citizen reporting on Twitter and Facebook, as well as software that provides information about the targeted-killing program show the fascination Americans have in the subject as well as opportunities for them to deepen their
knowledge of the program. Moreover, this type of reporting shows that the targeted killings, while officially classified, are widely documented and allow journalists to report on the subject using a variety of tools. As the coverage in social media shows, drone strikes raise a host of questions about their legal foundation, as well as their ethical and moral implications, and this paper looks at the manner in which the news media has addressed these issues. For that reason, articles about drone strikes in *The Christian Science Monitor, The New York Times, Time magazine, The Wall Street Journal,* and *The Washington Post* were examined not only in terms of quantity (see Appendix, Figures One and Two), but also in terms of content (see Appendix, Article Database).

For the content analysis, a database of articles was compiled in order to examine the level of complexity and sophistication in the coverage of the drone program from July 1, 2009, to June 30, 2012. This database includes only articles that looked at the legal aspects of the drone program, since those articles tended to be more nuanced in their efforts to understand the program and served as a measure of the quality of coverage. The same five publications, *The Christian Science Monitor, The New York Times, Time, The Wall Street Journal,* and *The Washington Post,* were studied for the content analysis part of the study. However, *Time* published so few articles that looked at the legal aspects of the drone coverage that the work from their reporters was not included in the database.

Reporters and editors at *The New York Times* pursued the story of the targeted-killing program more aggressively than reporters at the other publications, both in terms of the quantity of articles and also in the quality of content. In 2009, the year Obama was sworn in as president, *The New York Times* published 142 articles. Three years later, *The New York Times* published 245 articles on the subject, many of which focused on the international angle of the story. *The Washington Post* published 72 articles in 2009, reflecting in part the newspaper’s interest in the business of Washington, federal agencies such as the Department of Defense and the Central Intelligence Agency, which were managing the drone program.

*The Christian Science Monitor* ran a significant number of stories, fifty, in 2009, which reflected their interest in international affairs, and it published 58 articles on the subject in 2012. *Time* ran a relatively substantial number of stories, thirty-seven, in the first year of the Obama administration. In 2012, though, their coverage dropped to 27 stories.

*The Wall Street Journal* ran twenty-six articles on the subject in 2009. As drone manufacturers increased their profits, *The Wall Street Journal* increased its coverage, and by 2012 it published 86 stories on the subject and had begun to examine how the industry was being regulated in Washington.


At *The Christian Science Monitor*, reporters were more likely than those at other leading publications to look at moral and ethical aspects of drones and targeted killings, a
sensibility that is shown in “Al Qaeda drone attacks on US?”, published in September 2011, that described the use of drones as an “ethical minefield.” In another example, reporter Scott Baldauf wrote in an October 2011 article; “Imagine a war without coffins draped with American flags, without yellow ribbons, without post-traumatic stress disorder. But drone wars are not bloodless, and for every ‘successful’ strike against a ‘legitimate’ target like Anwar al-Awlaki [an American-born radical cleric killed on September 30, 2011], there are several others that go astray, hitting a civilian hospital, a school, or someone who bore an unfortunate resemblance to the target.”

In Wall Street Journal articles that looked at legal aspects of the drone program, reporters focused not on ethical aspects of the program, but on lawsuits filed against the government. A May 2012 piece, “U.S. Rethinks Secrecy About Drones,” showed how government programs were being examined in the courts and presumably how legal findings could affect businesses that are investing in the industry. In contrast, reporters for The New York Times placed more of an emphasis on a political angle, a sensibility that was reflected in articles such as a January 2010 piece, “Obama’s War Over Terror,” which described how the president rejected harsh interrogation methods used on detainees under the Bush administration since these techniques had “fallen out of favor.” Instead, Obama White House officials ramped up the use of drones, an approach that was supported by individuals such as Rahm Emanuel, Obama’s then–chief of staff, and others who had worked on his presidential campaign and were sensitive to “the politics of these decisions.” In addition, two other articles, “Obama Team Split on Tactics Against Terror” (March 2010) and “Renewing a Debate Over Secrecy, and Its Costs” (June 2012), looked at disagreements over the drone program within the White House, describing a politically savvy president and his advisers as they grappled with a national-security strategy.
Of the 11 articles that looked at legal aspects of the drone campaign appearing in *The Washington Post* between July 2010 to June 2011, five focused on the CIA, reflecting the interest that *Washington Post* reporters have in federal agencies.

Of the 12 articles that *The New York Times* published between July 2010 to June 2011 that looked at legal aspects of the drone campaign, a substantial number, five, looked at contentious issues regarding the drone program, such as a U.N. adviser’s criticism about the strikes and the level of secrecy surrounding the strikes. As pieces in *The New York Times* and *The Wall Street Journal* demonstrated, human-rights advocates criticized the drone program, while analysts presented an ethical argument in support of the program. “Never before in the history of air warfare have we been able to distinguish as well between combatants and civilians as we can with drones,” according to the author of a January 2010 piece in *The Wall Street Journal*, describing “a more moral campaign.”

Several months later, another *Wall Street Journal* piece explained, “Drones represent the most discerning — and therefore most moral — form of aerial warfare in human history,” adding that the operators, software engineers, and lawyers have set up procedures for the strikes that “protect innocent civilian life.”

As these articles show, the issue of the drone program and targeted killings is complex, with human-rights advocates, philosophers, and military strategists arguing over the merits of the program. However, few journalists considered the range of complexities of the issue during the early years of the Obama administration. They began to examine the issue in a more sophisticated manner only in the later years of Obama’s first term in office, a shift in coverage that was caused less by the passage of time than by two important events in the evolution of the drone program, the killing of an American citizen, Anwar al-Awlaki, in Yemen in the fall of 2011, and a speech given by counterterrorism adviser John Brennan several months later in which he spoke about “moral questions” regarding the drone program — and coincided with an expansion of the program. These events caused a change in both the volume of coverage, which
increased dramatically, and also in the tone and depth of coverage. After both of these events, journalists at *The New York Times*, *The Washington Post*, and other media organizations began to write more analytical and investigative articles about the targeted-killing program, despite a reporting environment that was marked by secrecy and paranoia and by a crackdown on leaks.

**REPORTING ON A SECRET PROGRAM**

National security is one of the toughest subjects for a reporter. “No beat is more humbling,” wrote journalist Ted Gup in a Shorenstein Center paper, *Covering the CIA in Times of Crisis.*\(^\text{12}\) The remotely piloted drone is one of the most significant military developments of the past decade, allowing American forces to kill terrorists abroad in record time, and it is also one of the most challenging stories for journalists. The drone program has been expanded over the years, a trend that has been fueled both by the counterterrorism strategy of President Obama, which emphasizes unilateral action against militants in Pakistan to a greater extent than President Bush did, as well as by a spike in the number of drones available and by the technology that has made them into increasingly efficient machines.\(^\text{13}\)

Decades ago, wrote Robert A. Pape in *Foreign Affairs*, “U.S. bombers flattened factories and other buildings in Germany and Japan and electric-power plants in North Korea and Vietnam with large numbers of ‘dumb’ bombs.” He explained that roughly seventy-five percent of guided munitions now hit their targets or land within ten feet of them, adding that “this is a remarkable improvement compared to World War II, when only about 18 percent of U.S. bombs fell within 1,000 feet of their targets, and only 20 percent of British bombs dropped at night fell within five miles of theirs.”\(^\text{14}\)
The improved technology led in part to the increased use of drones under the Obama administration, following a pattern of U.S. air campaigns over the past several decades. Military planners began to rely more heavily on air power in Vietnam when they found that attack helicopters such as the Huey AH-1B could be sent out over dangerous terrain and attack the enemy from a distance. The helicopters ramped up the kill rate. The drone strikes against Al Qaeda are part of a long-standing tradition for American forces, which relies heavily on air power, and previous bombing campaigns, such as B-52 strikes in Vietnam and aerial campaigns in Bosnia and Serbia, provoked similar controversies. In all of these conflicts, however, Americans favored the use of surgical air strikes over the deployment of ground troops.

In Vietnam, Americans dropped bombs on North Vietnamese targets, flying more than 750,000 sorties from 1965 to 1972. Many of the aircraft were B-52’s, which, as journalist Ron Moreau wrote in Newsweek, “inflicted heavy losses during the long and bloody siege at Khe Sanh in 1968,” explaining that “Vietnamese airfield, SAM and antiaircraft sites were also hit hard in the north.” One military specialist, Maj. Gen. Tran Cong Man, the former editor of the Vietnamese Army daily, Quan Doi Nhan Dan, said later that the B-52s’ biggest impact was as “an instrument of terror.”

Decades later, American forces used air power when they bombed military targets in Bosnia. “U.S. air strikes delivered 1,026 bombs against fifty-six military targets in western Bosnia and near Sarajevo,” wrote Pape in Foreign Affairs, “enough to debilitate the far smaller and less heavily armed Bosnian Serb army.” The air strikes were supported by the majority of Americans, with sixty percent of the public saying they were in favor of the strikes, according to an article, “Arms and the People,” that was written by Andrew Kohut and Robert C. Toth for Foreign Affairs. “U.S. air strikes, which some have termed the ‘American way of war,’ were clearly favored over committing U.S. ground troops to Bosnia.”
An improved version of the drone was used for surveillance in the Balkans, and military planners were impressed with its ability to provide images of enemy forces, and soon they began to contemplate its potential as a weapon. Airmen at a Nevada test range fired anti-armor missiles from a Predator and found that the experiment worked: They destroyed their target, a rusty tank, with a drone that was operated remotely. Before the creation of the weapon-ized drone, the kill chain, or the amount of time it takes to identify an enemy and then “neutralize” him, could take three days, but drones can do that in five minutes. The drone, which a former top aide to Gen. David H. Petraeus describes as “near-perfect,” comes equipped with five-hundred-pound, laser-guided bombs. It has accelerated the speed of killing as well as the ease with which strikes can be carried out, and in turn American forces have relied increasingly on the Predator in the battle against Al Qaeda.

The growth of the drone industry has been impressive: The American army’s inventory of drones went from fifty-four in October 2001, the month the Afghanistan war began, to today’s store of more than 4,000 unmanned aerial vehicles. President Obama said in a speech at the Pentagon in January 2012 that the new military would be “agile” and “flexible;” and as a result America’s forces will have more Predators. As journalists Scott Shane and Thom Shanker wrote in an October 2011 article for The New York Times, the nation’s reliance on drones has been driven both by “shrinking budgets, which will no longer accommodate the deployment of large forces overseas at a rough annual cost of $1 million per soldier, and by improvements in the technical capabilities of remotely piloted aircraft.”

The nation’s economic downturn hit the defense industry hard, but the drone program remains relatively unscathed. “The services are all so intrigued by their capacities that they are buying more of them then they anticipated,” defense analyst Gordon Adams, a professor at American University, explained. “What you are finding is every year the projected size of the UAV capabilities is getting larger.” Over the next ten years, military
officials will spend $17.9 billion on unmanned aerial vehicles, and they plan to build nine thousand new aircraft. General Atomics is the creator of the Predator, and it has a commercial-style flight schedule with at least forty of the remote-controlled jets flying somewhere in the world every second of the day.

During battles in the 1990s and today, many Americans believed that the use of air force is more efficient that the deployment of ground troops — though critics of the drone program say that remotely controlled aircraft make warfare too distant. “Assassination and targeted killings have always been in the repertoires of military planners, but never in the history of warfare have they been so cheap and easy,” wrote philosophers John Kaag and Sarah Kreps in The New York Times. The drone strikes make killing appear simple, they wrote, and consequently journalists have overlooked the “slow accretion of foreign casualties.”

Distance obscures detail: In Graham Greene’s screenplay for the 1949 film The Third Man, Harry Lime (Orson Welles), who is accused of stealing penicillin from hospitals, rides a Ferris wheel and then looks down at people on the ground below him. “Would you really feel any pity if one of those dots stopped moving forever?” he says. Lime finds it possible to commit crimes once he has dehumanized the victims.

In targeted killings, according to critics of the drone program, the Predator accelerates the process of dehumanization and allows journalists to characterize combat as a form of “pest control,” a phrase that philosopher Uwe Steinhoff used in an essay. In that vein, journalists describe the activities of Al Qaeda and Taliban fighters in words that are commonly used to describe vermin: Militants “snaked” and “crept.” From 2009 to 2011, the drone program was perceived in this country as an efficient way to exterminate terrorists, and the coverage of the strikes during that time was relatively positive, with only sporadic reporting on collateral damage or on the program’s legal and moral ramifications. Most of the drone strikes take place in an area of Pakistan known as the Federally Administered Tribal Area, a region that is roughly the size of Maryland and is
one of the poorest places in the world, a terrain that has added to the difficulties that American journalists have faced in their coverage of the program. The Pakistani military has banned Western journalists from this region except when accompanied by the military, and so Westerners rely on local journalists to visit the sites where strikes have occurred, an extraordinarily dangerous assignment that has led to some of their deaths.

The Predator and its chunkier cousin, the Reaper, are both known as unmanned aircraft, but in reality each one is a team of human beings, including many who work at Creech Air Force Base in Nevada, the hub for America’s drone program. Government officials who worked on the drone program were relatively open to journalists during the Bush administration and allowed them to come to interview drone operators. Yet access to the base was denied after a *Washington Post* article about encryption of drone feeds appeared in 2009. Military officials thought the journalist had “gone too far” in revealing information about the drone program, and they cut off access to Creech. For the next three and a half years, requests from journalists to visit the air base were postponed, indefinitely.

Journalists who cover the drone program say that the biggest obstacles to their work has come not from Air Force officers, however, but from officials in Washington, a pattern that goes back decades. During the Vietnam War, it was “not the military that imposed restrictions on the journalists; when there were restrictions, it was the civilian leadership in the White House,” said Daniel C. Hallin, author of *The ‘Uncensored War’ — The Media and Vietnam*. Today the situation is similar. Since the drone program is classified, officials are not allowed to talk about it. Yet it is an uneven policy of silence. President Obama discussed the drone strikes on Google’s social network, Google+, and White House officials have spoken with some journalists about the strikes, largely in an attempt to foster a positive image of the drone campaign. At the same time, officials have guarded against leaks of classified information, particularly about counterterrorism efforts that could cast the government in a bad light.
Government officials have reason to be cautious. Disclosing information about covert operations “puts American lives at risk, makes it more difficult to recruit assets, strains the trust of our partners and threatens imminent and irreparable damage to our national security,” according to a joint statement that was issued by Republican and Democratic leaders of the House and Senate intelligence committees. As one former CIA official explained, “Revealing the identification of sources and their deeds at some subsequent time could subject them and their families to personal danger, ridicule, or persecution in their homeland for generations to come, hardly an incentive for cooperating with us.”

Government officials believe that secrecy surrounding military programs is crucial to their success. After the NATO strikes about the Serbian military in 1999, members of the media pressed Pentagon officials for information about the attacks — to no avail. “Even to disclose the number of bombing sorties or their targets after the fact — when the Serbs already knew what had been done — would provide the enemy with too much information,” Kenneth Bacon, who was at the time the assistant secretary of defense for public affairs, told a reporter. “You could extrapolate from what we were doing one night what we would do the next.”

Under the Obama administration, many government officials also believe that providing information about the drone strikes would be dangerous. CIA officials have “argued that the release of any information about the program, particularly on how targets are chosen and strikes approved, would aid the enemy. Among other variables, according to one source briefed on the program, those selecting targets calculate how much potential collateral damage is acceptable relative to the value of the target,” wrote Karen DeYoung in an article, “U.S. sticks to secrecy as drone strikes surge,” in The Washington Post in December 2011. “An insurgent leader aware of such logic, they said, could avoid an attack simply by positioning himself in the midst of enough civilians to make the strike too costly.”
In an effort to keep government secrets under wraps, President Obama has prosecuted six cases of leaks (the investigations were not focused on the drone program) during his four years in office, more than any president before him. Many lawmakers applaud his aggressive approach towards leaks as a way to ensure that government secrets will remain hidden from view. However, journalists say the crackdown on leaks has been excessive, and moreover has had a chilling effect on their efforts to cover government activities such as the drone program. Government officials are reluctant to talk to reporters, since they are routinely asked in polygraph examinations about contacts with reporters, and the coverage of the drone program has been largely shaped by the officials who control the media’s access to the air base and to information about the program.

PUBLIC RELATIONS FOR DRONES

Obama White House officials have attempted to foster positive coverage of the drone program by disclosing information about successful operations. When a CIA-directed drone strike killed Taliban leader Baitullah Mehsud in Pakistan in 2009, for example, administration officials revealed details about the attack in off-the-record interviews and in this way journalists were able to include graphic accounts of the strike in their articles. “I’m shocked. There’s gambling in the casinos,” said Newsweek’s Daniel Klaidman, the author of a critically acclaimed book entitled Kill or Capture, during a panel discussion at the Council on Foreign Relations in June 2012. “Of course the White House wants to do that.” Philip Alston, the former special rapporteur on extrajudicial, summary, or arbitrary executions for the United Nations, wrote in an article for Harvard Law School National Security Journal that the leaks from administration officials “played a powerful role in legitimizing the targeted killings program by trumpeting the killing of senior militants and disseminating the CIA’s entirely unsubstantiated accounts of the number of civilian casualties.”
“Instead of challenging these assumptions and probing beneath the surface, too many of those writing about targeted killings lamely accept that there is insufficient information in the public domain to enable existing polices and practices to be meaningfully assessed against rule of law standards,” wrote Alston. “But the default approach of presuming probity good faith, constant self-discipline and deference to formally accepted legal limits on the part of officials acting in secrecy undermines basic democratic principles, defies experience, and mocks the notion of human rights accountability.” As Alston pointed out, officials have spoken about the strikes under controlled circumstances, but they have been unwilling to discuss the majority of the attacks. Nor will administration officials explain who may be targeted. “I think there’s a post-9/11 legacy in which the ‘trust us’ mindset lingers,” says journalist Ted Gup. “They’re saying, ‘Trust us — we have the goods on these individuals.’” Josh Rogin, who covers national security for Foreign Policy, says, “It’s an ad hoc approach to how they respond to the press.”

Many of the articles about the drone program during the early years of the Obama administration provided accounts of the successful strikes, yet offered little information about the controversial ones. After the raid on bin Laden’s compound in Pakistan in the spring of 2011, the largest spike in coverage occurred, with a total of eighty-seventy articles in The New York Times, The Washington Post, Time, The Christian Science Monitor, and The Wall Street Journal (see Appendix, Figure Two). Many of these articles about the drone program were positive, with only a few mentioning legal or moral issues. Yet from 2009 to 2011, the number of civilian casualties from strikes had begun to rise, and meanwhile people living in Pakistan were becoming more vocal in their opposition to the targeted-killing program.

During a speech in Washington in June 2011, the president’s counterterrorism adviser, John O. Brennan, said, “There hasn’t been a single collateral death because of the exceptional proficiency, precision of the capabilities we’ve been able to develop.” The CIA had directed fifty-two drone strikes in Pakistan during that period of time and
killed dozens of people. Nevertheless, journalists at the Los Angeles Times, The Washington Post, National Journal, Reuters, and other media organizations expressed little skepticism in their accounts. “John Brennan gave a speech and said there were no civilian casualties, and we did a story about what he said,” Warren Strobel, the U.S. foreign policy editor at Reuters, told me. “What we didn’t do was a truth squad on his claims.”

One reporter did. In August 2011, Scott Shane of The New York Times published a piece, “C.I.A. Is Disputed on Civilian Toll in Drone Strike,” that examined the claims of Brennan and other administration officials and also those from unofficial sources. “A closer look at the competing claims, including interviews with American officials and their critics, discloses new details about how the C.I.A. tracks the results of the drone strikes,” he wrote. “It also suggests reasons to doubt the precision and certainty of the agency’s civilian death count.”

The tone of the media coverage shifted in 2011, with a drone strike that killed the American-born cleric Anwar al-Awlaki. This led to the largest spike in media coverage, with ninety-six articles about the targeted killing program in October, the month after his death, in The New York Times, The Washington Post, Time, The Christian Science Monitor, and The Wall Street Journal (see Appendix, Figure Two). The death of an American raised questions about who might be targeted in a strike, and journalists became more circumspect. “The killing of Awlaki was sort of watershed because it was an American citizen who was not convicted of any crime,” Reuters’ Warren Strobel told me. “It was a pretty big step for the U.S. government to take.”

the program. Ten mentioned moral issues surrounding the targeted killings. During the following twelve-month period, a comparable period from July 2011 to July 2012, The New York Times, The Washington Post, and The Christian Science Monitor published roughly 120 articles, or more than four times the number of articles from a comparable period in the previous twelve months, that looked at legal aspects of the drone program. In addition, these newspapers published thirty-three articles that looked at moral aspects of the program, more than three times the number of articles during the previous twelve-month-long period of time.

Some of these articles were groundbreaking: Reuters published a piece, “Secret panel can put Americans on ‘kill list,’” by Mark Hosenball, revealing details about the targeting of terrorism suspects. He wrote that administration critics had accused President Obama of “hypocrisy” and noted that White House officials “insisted on publishing Bush-era administration legal memos justifying the use of interrogation techniques many equate with torture, but refused to make public its rationale for killing a citizen without due process.” Putting together the story about the “kill list,” says Strobel, was an arduous task: “You get bits and pieces of the puzzle, and it took a while before we were confident that we had enough detail.”

For both editors and reporters, the process of doing a story about the drone program is time-consuming and delicate. Ideally, says one female journalist who works on stories about drone strikes for a prominent publication, “You talk to the hunter and to the people who are being hunted. Both sides are human.” (She asked not to be identified because of the sensitive nature of her work). In Washington, she arranges to meet her sources at Starbucks and other coffeehouses. She arrives early, and she brings out a thick reporter’s notebook. “I ask if I can take notes,” she says. “I never record.” Once, she was interviewing an official about the Arab spring, and a friend of hers walked by their table. As it turned out, it was Singles Night, and her friend thought that the journalist and her source were on a date. “I thought, ‘What an interesting cover,’” the journalist recalls.
In the spring of 2012, counterterrorism adviser John Brennan gave another speech in Washington because, he said, “President Obama has instructed us to be more open.” The speech was a milestone, both in terms of candor about the program and also in the media coverage. Brennan spoke openly about the program, using the word “drone” for the first time, and he expressed his personal concerns. “The issue of targeted strikes raised profound moral questions,” he said. “It forces us to confront deeply held personal beliefs and our values as a nation. If anyone in government who works in this area tells you they haven’t struggled with this, then they haven’t spent much time thinking about it. I know I have, and I will continue to struggle with it as long as I remain involved in counterterrorism.” The month after Brennan’s speech, reporters at The New York Times, The Washington Post, Time, The Christian Science Monitor, and The Wall Street Journal published ninety-six articles, one of the biggest spikes in coverage of the drone program (see Appendix, Figure Two). It was not only Brennan’s speech that marked a change in how White House officials were administering the drone program: By then, President Obama had expanded the program dramatically. Terrorism suspects were being killed not only in Pakistan, Iraq, and Afghanistan, but also in Libya, Yemen, and Somalia. “Drone strikes in six countries,” says Reuters’ Warren Strobel. “That statistic kind of jolted me a little bit, and we started to do analytical pieces.”

“I think that people didn’t understand how central this was to a counterterrorism strategy until it migrated from one place, the Afghanistan-Pakistan border, to a bunch of different places,” says James Traub, a former contributing writer for The New York Times Magazine who now writes for Foreign Policy. “Before, I thought, ‘Well, maybe it’s bad, but not as bad as the other options. I was probably wrong about that nonchalant attitude. But now that it’s part of the broad policy, it needs to be brought to light.’”

Throughout the summer and fall, journalists began to write more about the various aspects of targeted killing — in one case, by doing a profile of a Notre Dame professor who examined moral and legal issues about the program. “I think the way we grapple
with it is not to write about the moral and ethical implications, but to make sure we’re reporting on this program because it has moral and ethical implications,” Reuters’ Warren Strobel says. “It’s incumbent upon us to report on this stuff and let the American people know what is being done in their name.”

“The most agonizing issue in the drone program is figuring out who is an enemy combatant, who is not, and how one knows,” wrote Georgetown Law’s David Luban in an essay for Boston Review. “So much turns on the details: the expected collateral damage, how much care has been taken to verify the target and the danger he poses, whether the target was trying to surrender, whether the foreign state is truly unwilling or unable to suppress the target, what the non-lethal alternatives were the wrong answer on any of these issues means the decision to kill from the air flunks the test of morality.”

The quantity and quality of the coverage of the drone program has improved since President Obama’s inauguration, leading to important pieces such as Scott Shane’s “C.I.A. Is Disputed on Civilian Toll in Drone Strike” in The New York Times and Mark Hosenball’s article about Obama’s “kill list” for Reuters. Overall, though, it took two important events, the killing of Al-Awlaki in the fall of 2011 and counterterrorism chief John Brennan’s speech about “moral questions” in the following spring, to elevate the coverage of the subject, alerting journalists to the legal and ethical complexity of a targeted-killing program and ultimately to a higher quality of journalism. Yet four years later important aspects about “things that go boom in Pakistan,” as a CIA spokeswoman described the drone strikes, are still unclear. Who is targeted? Are these individuals a threat to Americans? Why has only one high-level terrorist been taken prisoner since 2009, yet thousands have been killed? The opacity about the program makes it all the more important for journalists to continue to press administration officials for more transparency and also to write investigative and critical pieces about the targeted killings.
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Appendix. Coverage of Drone Strikes, 2009 to 2012

Figure One.

![Annual Coverage by 5 Major Outlets](image)

Figure Two.

![Monthly Coverage by 5 Major Outlets (2009-2012)](image)
Data from *The New York Times*, *The Washington Post*, *Time*, and *The Christian Science Monitor* were compiled from Lexis-Nexis using a search for articles with “drone” and “strike,” commonly used terms that describe the drone program. Data from *The Wall Street Journal* were gathered from a ProQuest database search, and data from *Time* were collected from the magazine’s internal search function using identical search terms. During President Obama’s first term, coverage of strikes in these newspapers nearly doubled, from 327 to 650 articles in 2012, as of November 29, 2012 (see Appendix, Figure One, “Annual Coverage by Five Major Outlets”).

**Article Database, Coverage of Legal Aspects of Drone Strikes, 2009 to 2012.**


**JULY 2009 TO JUNE 2010**
**THE CHRISTIAN SCIENCE MONITOR**  

**THE NEW YORK TIMES**  

**THE WALL STREET JOURNAL**  

**THE WASHINGTON POST**  

**JULY 2010 TO JUNE 2011**
**THE CHRISTIAN SCIENCE MONITOR**  

THE NEW YORK TIMES
Shane, “Rights Groups Sue U.S. On Effort to Kill Cleric,” August 31, 2010.

THE WALL STREET JOURNAL

THE WASHINGTON POST
Finn, “U.S. urged to stop CIA drone hits in Pakistan,” June 3, 2010.
Greg Miller, “At CIA, Obama hails agency’s work in bin Laden killing,” May 21, 2011.
Miller, “CIA will direct Yemen drones,” June 14, 2011.
JULY 2011 TO JUNE 2012
THE CHRISTIAN SCIENCE MONITOR

THE NEW YORK TIMES
Shane and Thom Shanker, “Yemen Strike Reflects U.S. Shift To Drones as Cheaper War Tool,” October 2, 2011.
Mark Landler, “Civilian Deaths Due to Drones Are Not Many, Obama Says,” January 31, 2012.

THE WALL STREET JOURNAL

THE WASHINGTON POST
DeYoung, “Terror suspect detained on ship,” July 6, 2011.
DeYoung, “U.S. air attacks in Yemen intensify,” September 17, 2011.
Finn, “In secret memo, Justice Department sanctioned strike,” October 1, 2011.
Scott Wilson, “No safe haven anywhere in the world,” October 1, 2011.
DeYoung, “U.S. sticks to secrecy as drone strikes surge,” December 20, 2011.
DeYoung, “Questions on Obama’s ‘drone’ remarks rejected,” February 1, 2012.
DeYoung, “ACLU sues to force release of drone attack records,” February 2, 2012.
Finn, Sari Horwitz, “Holder says U.S. has right to kill terrorist citizens abroad,” March 6, 2012.
Miller, “Intelligence panels seek new laws on classified data,” June 7, 2012.
ENDNOTES

6 As journalist Michael Kinsley, writing in an article, “Cut This Story!” in the January / February 2010 issue The Atlantic explained, reporters for The New York Times tend to see national-security and other stories through the prism of domestic politics: “There’s an old joke about the provincial newspaper that reports a nuclear attack on the nation’s largest city under the headline ‘Local Man Dies in NY Nuclear Holocaust,’” Kinsley wrote. “Something similar happens at the national level where everything is filtered through politics. (In what was widely seen as a setback for Democrats just a year before the midterm elections nuclear bombs yesterday obliterated seven states, five of which voted for President Obama in the last election...).”


25 Interview by author with military officer who asked to speak off the record because he was not authorized to talk about the subject, Washington, D.C., March 15, 2012.


36 Author interview with Gup, Cambridge, Massachusetts, November 1, 2012.

37 Author interview with Josh Rogen (on phone), October 31, 2012.


41 Author interview with Warren Strobel (on phone), November 4, 2012.


43 Author interview with Strobel (on phone), November 4, 2012.


45 Author interview with Strobel (on phone), November 4, 2012.


47 Author interview with Strobel (on phone), November 4, 2012.

48 Author interview with James Traub (on phone), October 31, 2012.

49 Dilanian, “In legal battle against drone strikes, she’s on the front lines,” Los Angeles Times, October 9, 2012.

October 13, 2012

Questions on Drones, Unanswered Still

By MARGARET SULLIVAN

UNDERSTANDING American drone strikes is like a deadly version of the old telephone game: I whisper to you and you whisper to someone else, and eventually all meaning is lost.

You start with uncertain information from dubious sources. Pass it along, run it through the media blender, add pundits, and you’ve got something that may or may not be close to the truth.

How many people have been killed by these unmanned aircraft in the Central Intelligence Agency’s strikes in Yemen and Pakistan? How many of the dead identified as “militants” are really civilians? How many are children?

The Bureau of Investigative Journalism in Britain has estimated that, in the first three years after President Obama took office, between 282 and 535 civilians were credibly reported killed by drone strikes — including more than 60 children. The United States government says the number of civilians killed has been far lower.

Accurate information is hard to come by. The Obama administration and the C.I.A. are secretive about the fast-growing drone program. The strikes in Pakistan are taking place in areas where reporters can’t go, or would be in extreme danger if they did. And it is all happening at a time when the American public seems tired of hearing about this part of the world anyway.

How does The New York Times fit into this hazy picture?

Some of the most important reporting on drone strikes has been done at The Times, particularly the “kill list” article by Scott Shane and Jo Becker last May. Those stories, based on administration leaks, detailed President Obama’s personal role in approving whom drones should set out to kill.

Groundbreaking as that article was, it left a host of unanswered questions. The Times and the American Civil Liberties Union have filed Freedom of Information requests to learn more about the drone program, so far in vain. The Times and the A.C.L.U. also want to know more about the drone killing of an American teenager in Yemen, Abdulrahman al-Awlaki, also shrouded in secrecy.
But The Times has not been without fault. Since the article in May, its reporting has not aggressively challenged the administration’s description of those killed as “militants” — itself an undefined term. And it has been criticized for giving administration officials the cover of anonymity when they suggest that critics of drones are terrorist sympathizers.

Americans, according to polls, have a positive view of drones, but critics say that’s because the news media have not informed them well. The use of drones is deepening the resentment of the United States in volatile parts of the world and potentially undermining fragile democracies, said Naureen Shah, who directs the Human Rights Clinic at Columbia University’s law school.

“It’s portrayed as picking off the bad guys from a plane,” she said. “But it’s actually surveilling entire communities, locating behavior that might be suspicious and striking groups of unknown individuals based on video data that may or may not be corroborated by eyeballing it on the ground.”

On Sunday, Ms. Shah’s organization will release a report that raises important questions about media accuracy on drone strikes. But accuracy is only one of the concerns that have been raised about coverage of the issue.

“It’s very narrow,” said David Rohde, a columnist for Reuters who was kidnapped by the Taliban in 2008 when he was a Times reporter. “What’s missing is the human cost and the big strategic picture.”

Glenn Greenwald, a lawyer who has written extensively on this subject for Salon and now for The Guardian, told me he sees “a Western media aversion to focusing on the victims of U.S. militarism. As long as you keep the victims dehumanized it’s somehow all right.”

Mr. Rohde raised another objection: “If a Republican president had been carrying out this many drone strikes in such a secretive way, it would get much more scrutiny,” he said. Scott Shane, the Times reporter, finds the topic knotty and the secrecy hard to penetrate. “This is a category of public yet classified information,” he told me. “It’s impossible to keep the strikes themselves secret, but you’ve never had a serious public debate by Congress on it.” Last month, ProPublica admirably framed the issue in an article titled “How the Government Talks About a Drone Problem It Won’t Acknowledge Exists.”

As for the human cost, Sarah Knuckey, a veteran human rights investigator now at New York University School of Law, says she got a strong sense of everyday fear while spending 10 days in Pakistan last spring.
“I was struck by how afraid people are of the constant presence of drones,” said Ms. Knuckey, a co-author of a recent Stanford/N.Y.U. report on the drone campaign’s impact on Pakistanis. “They had the sense that they could be struck as collateral damage at any time.”

She is also troubled by the government’s lack of transparency. “The U.S. is creating a precedent by carrying out strikes in secrecy without accountability to anyone,” Ms. Knuckey said. “What if all countries did what the U.S. is doing?”

The Taliban and Al Qaeda are much worse problems for the Pakistani and Yemeni people than American drone strikes are. But acknowledging that doesn’t answer the moral and ethical questions of this push-button combat conducted without public accountability.

With its vast talent and resources, The Times has a responsibility to lead the way in covering this topic as aggressively and as forcefully as possible, and to keep pushing for transparency so that Americans can understand just what their government is doing.

Follow the public editor on Twitter at twitter.com/sulliview and read her blog at publiceditor.blogs.nytimes.com. The public editor can also be reached by e-mail: public@nytimes.com.
According to the new national survey, Americans believe that only high-level suspects who may be involved in planning attacks should be targeted -- and not if there's a risk that innocent people may also be killed.

According to the new Huffpost/YouGov poll, 56 percent of Americans say that the drone program should be used to target and kill high-level terrorists, while only 13 percent say that anyone suspected of being associated with a terrorist group should be targeted. Another 13 percent said that nobody should be killed using the drones program. A majority of Americans across most demographic and partisan groups agreed that the program should be used for high-level targets.

Only 27 percent of respondents said they were in favor of using the program if there was a possibility of killing innocent people, while 43 percent said they were opposed. Republicans in the survey were evenly divided on whether to use drone strikes if there was a risk of killing innocents, but both Democrats and independents were more likely to oppose than favor such strikes.

While media reports have largely asserted that the program is limited to senior-level targets, a New America Foundation report found that only 2 percent of those killed met that definition. One memo justifying the program repeatedly refers to a "member" of a terrorist group, without qualifying the seniority of that member.

A previous HuffPost/YouGov poll found that 54 percent of Americans approve of using drones to kill high-level terrorism suspects, with 18 percent saying that they disapprove. That support dropped below 50 percent if the suspects being targeted were American citizens, although more approved than disapproved even under that circumstance, 43 percent to 27 percent. As with the new poll, though, support dropped even further if civilians might also be killed, with 29 percent saying they approved and 42 percent saying they disapproved.

A poll released Monday by the Pew Research Center also found that endangering civilians is the aspect of the drones program that concerns civilians the most. Fifty-three percent of respondents to that survey said they were very concerned about
drones endangering civilian lives. Only 32 percent said they were very concerned that drone strikes could lead to retaliation by extremists, 31 percent said they were very concerned about whether the program is conducted legally, and 26 percent said they were very concerned that drones could damage America’s reputation.

The relative lack of concern in Pew’s survey about whether the drone program is conducted legally perhaps helps to explain another aspect of public opinion: Although the earlier HuffPost/YouGov survey found that more Americans approve than disapprove of killing high-level terrorism suspects who are American citizens, another recent poll, this one conducted by Fairleigh Dickinson University, found that by a 48 percent to 24 percent margin most respondents said that doing so was illegal. In the debate over drones, moral concerns about killing innocents seem to outweigh legal concerns about killing Americans.

The new HuffPost/YouGov poll was conducted Feb. 11-12 among 1,000 U.S. adults. The poll used a sample selected from YouGov’s opt-in online panel to match the demographics and other characteristics of the adult U.S. population. Factors considered include age, race, gender, education, employment, income, marital status, number of children, voter registration, time and location of Internet access, interest in politics, religion and church attendance.

The Huffington Post has teamed up with YouGov to conduct daily opinion polls. You can learn more about this project and take part in YouGov’s nationally representative opinion polling.