

THE CHANGING ROLE OF LAW IN SECURITY GOVERNANCE:

POST-9/11 “GRAY ZONES” AND STRATEGIC IMPACTS

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[Joint Special Operations Command (JSOC)] became 80 percent intelligence. We got up in the morning thinking about intelligence. That’s what I worked on. That’s what the focus became. Operations were something we did to get more intelligence. . . . People who are traditional shooters, by 2005 and 2006, they thought of themselves as intelligence people that carried a gun. It was an amazing difference.¹

INTRODUCTION

One neglected aspect of the modern battlefield is the growing overlap between intelligence and warfighting activities—with

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1. See Stanley McChrystal, General, *The Evolution of Joint Special Operations Command and the Pursuit of Al Qaeda in Iraq: A Conversation with General Stanley A. McChrystal* 12 (Jan. 28, 2013).

underappreciated and often unintended strategic effects.² Various terms (shadow wars, military operations other than war, special operations, covert, kaleidoscopic, and gray wars) are used to describe these post-9/11 approaches to unconventional threats and terrorism.³ Such trends in “hybrid military and intelligence activity in countries beyond war zones,” as legal scholar Jennifer Kibbe defines shadow wars,⁴ are apparent in the unprecedented expansion of unmanned drones, often as Central Intelligence Agency (CIA or “Agency”) not Defense Department (DoD) assets, and in Special Operations Forces expanded role in planning and executing counterterrorism operations (U.S. Special Operations Command (SOCOM) now includes over seventy thousand personnel).⁵ Operationalized CIA personnel—the first U.S. agents on the ground in Afghanistan in October 2001 after the 9/11 attacks—have likewise transformed the Agency from a client-based Cold War intelligence and espionage service to a counterterrorism force with paramilitary units, armed predator drones, and detention responsibilities worldwide.⁶ Even former CIA and private contractor Edward Snowden’s disclosure of the National Security Agency’s (NSA) mass surveillance programs in 2013 revealed how much global surveillance technologies were embedded in “military capabilities, operations, tactics, techniques and procedures”—more than government oversight of domestic activities with obvious privacy implications.⁷

2. Jeff Mustin & Harvey Rishikof, *Projecting Force in the 21st Century—Legitimacy and the Rule of Law: Title 50, Title 10, Title 18, and Art. 75*, 63 RUTGERS L. REV. 1235, 1236 (2011) (defining the modern battlefield as military operations since 2001).

3. See Martha Crenshaw, *There Is No Global Jihadist ‘Movement,’* DEF. ONE (Mar. 11, 2015), <http://www.defenseone.com/threats/2015/03/therenoglobaljihadistmovement/107337/>; James Kitfeld, *Inside America’s Shadow War on Terror—and Why It Will Never End*, DEF. ONE (May 18, 2014), <http://www.defenseone.com/threats/2014/05/insideamericasshadowwarterrorandwhyitwillneverend/84685/>; Eric Olsen, *America’s Not Ready for Today’s Gray Wars*, DEF. ONE (Dec. 10, 2015), <http://www.defenseone.com/ideas/2015/12/Americasnotreadytodaysgreywars/124381/>.

4. Jennifer D. Kibbe, *Conducting Shadow Wars*, 5 J. NAT’L SECURITY L. & POL’Y 373, 373 (2012).

5. *Id.* at 373–76, 384; see also ANDREW FEICKERT, CONG. RESEARCH SERVS., RS21048, SUMMARY OF U.S. SPECIAL OPERATIONS FORCES (SOF): BACKGROUND AND ISSUES FOR CONGRESS (2016).

6. Greg Miller & Julie Tate, *CIA Shifts Focus to Killing Targets*, WASH. POST (Sept. 1, 2011), https://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/g1QA7MZGvJ_story.html.

7. On March 7, 2014, Chairman of the Joint Chiefs of Staff, General Martin Dempsey, told the House Armed Services Committee, “The vast majority of the documents . . . exfiltrated . . . had nothing to do with exposing government oversight of domestic activities,” but “were related to our military capabilities, operations, tactics, techniques and procedures.” *Chairman of Joint Chiefs of Staff Dempsey Tells HASC Snowden Leaks Endangered the Military, Will Cost Billions to Overcome*, DEF. DRUMBEAT (Mar. 7, 2014),

Much of these developments have international dimensions. In the case of “direct action” strikes, which coalesce military and intelligence methods, these are broadly used against terrorist operatives (like Anwar al-Awlaki, a U.S. citizen killed in Yemen in 2011, in recent U.S. support of Royal Air Force (RAF) strikes on British-ISIS members Reyaad Khan and Ruhul Amin in Raqqa in September 2015), and outside “hot” battlefields (as in U.S. strikes on al-Shabab’s Abdullahi Haji Da’ud in Somalia in May 2016).⁸ Beyond high-profile individuals, such strikes, like CIA-backed Free Syrian Army (FSA) rebel units in Syria, can evolve into the total of U.S. efforts, thus, replacing traditional joint military operations.⁹ For those in Afghanistan, Pakistan, Yemen, Iraq, Syria, Somalia, Djibouti, and elsewhere, these covert wars are hard to miss—even when, as in the case of Mali, Niger, the Sinai, Balkans, and elsewhere, drones are deployed mostly for intelligence gathering and partner support.¹⁰ Such blurred lines between traditional military and

<https://armedservices.house.gov/news/drumbeat-blog-posts/chairman-joint-chiefs-staff-dempsey-tells-hasc-snowden-leaks-endangered>; see also PEW RESEARCH CTR., FEW SEE ADEQUATE LIMITS ON NSA SURVEILLANCE PROGRAM 1 (July 26, 2013), <http://www.peoplepress.org/files/legacy-pdf/7-26-2013%20NSA%20release.pdf>.

8. See U.S. Dep’t of Justice, Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities 1 (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download [hereinafter Presidential Policy Guidance]; Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel to Eric Holder, Attorney Gen., Office of the Attorney Gen., Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 27, 29, 40–41 (July 16, 2010), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf; Fact Sheet, U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities 1–3 (May 23, 2013), https://obamawhitehouse.archives.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf; Ewen MacAskill & Richard Norton-Taylor, *How UK Government Decided to Kill Reyaad Khan*, GUARDIAN (Sept. 8, 2015, 11:52 AM), <https://www.theguardian.com/world/2015/sep/08/how-did-britain-decide-to-assassinate-uk-isis-fighter-reyaad-khan-drone-strike>; Mark Mazzetti et al., *How a U.S. Citizen Came to Be in America’s Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html>; Carlo Muñoz, *U.S. Airstrike Kills Key al-Shabab Leader; Terrorist Group Bombs Somali Hotel*, WASH. TIMES (June 1, 2016), <http://www.washingtontimes.com/news/2016/jun/1/abdullahi-daud-key-al-shabaab-leader-killed-us-air/>.

9. See Presidential Policy Guidance, *supra* note 8, at 1 (discussing the United States taking direct action against terrorist targets outside the United States); Sam Heller, *Are CIA-Backed Syrian Rebels Really Fighting Pentagon-Backed Syrian Rebels*, WAR ON ROCKS (Mar. 28, 2016), <http://warontherocks.com/2016/03/are-cia-backed-syrian-rebels-really-fighting-pentagon-backed-syrian-rebels/>.

10. Nick Turse, *America’s Secret Empire of Drone Bases*, WORLD CAN’T WAIT, <http://www.worldcantwait.net/index.php/features/covert-drone-war/7447-americas-secret-empire-of-drone-bases> (last visited Feb. 19, 2017).

intelligence operations means, as legal scholar Rosa Brooks observes, that increasingly “everything has become war,” an ironic result for an anti-war President bent on keeping U.S. troops from campaigns abroad.¹¹

Not only has war made a comeback, as historian Max Boot explains, covert and secret warfare have returned with a vengeance.¹² While disparaged in the 1970s and 1980s—recall the Church Commission, the Iran-Contra Affair, paramilitary assaults on Laos and Cambodia, assassination attempts, even clandestine aid for Afghan anti-Soviet mujahedeen—such “shadow wars” are not only popular again¹³ but objects of bipartisan embrace.¹⁴

For legal scholar Robert Chesney, the upside of the last fifteen years of law and policy discussion of nonconventional warfare is that we have entered a period in which the intense debates of the first decade after 9/11 have “settled,” and the legal architecture for managing transnational terrorism has matured into a durable consensus in legislation, judicial rulings, even executive policies.¹⁵ While criticism continues apace in law reviews, advocacy briefs, and deliberative policy processes, there is broad “cross-party and cross-branch consensus” across a range of key issues: military detention policy at Guantanamo and abroad, reformed military commissions, and use of lethal force beyond active hostilities.¹⁶ Even aside from Obama’s expansion of Bush-era policies, post *Boumediene v. Bush*¹⁷ habeas corpus litigation has helped “validate the legal foundation

11. See ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING 363 (2016); Jonathan Chait, *Five Days that Shaped a Presidency*, N.Y. MAG. (Oct. 2, 2016, 9:00 PM), <http://nymag.com/daily/intelligencer/2016/10/barack-obama-on-5-days-that-shaped-his-presidency.html>.

12. Max Boot, *Covert Action Makes a Comeback*, WALL STREET J. (Jan. 5, 2011, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703909904576051991245498326> (arguing for covert action as a valuable part of policymaking, if integrated into a larger strategic policy and plan).

13. See William C. Banks, *Shadow Wars*, 5 J. NAT’L SECURITY L. & POL’Y 315, 315 (2011); Michael Powelson, *U.S. Support for Anti-Soviet and Anti-Russian Guerilla Movements and the Undermining of Democracy*, 11 DEMOKRATIZATSIYA 297, 297 (2003); *Assassinations and Attempts in U.S. Since 1865*, INFO. PLEASE, <http://www.infoplease.com/ipa/A0194022.html> (last visited Feb. 19, 2017).

14. See Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 168, 174 (2013) (arguing that counterterrorism law and policy stabilized in the first decade after 9/11 in consensus over armed conflict in Afghanistan under the laws of armed conflict and an identifiable enemy in al Qaeda); see also CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY 37, 61 (2015) (providing a journalistic account of Obama’s continuation and even expansion of Bush-era post-9/11 detention, direct action, and surveillance policies).

15. Chesney, *supra* note 14, at 174, 177.

16. See *id.* at 167.

17. 553 U.S. 723 (2008).

of the detention system”¹⁸ and increased protections for detainees.¹⁹ Congress, in turn, has revamped the military commission system and amended the 2001 Authorization for Use of Military Force (AUMF) in the National Defense Authorization Act (NDAA) of 2012, with a clear (if controversial) provision on military detention for suspects involved in terrorism, including U.S. citizens and those arrested in the United States.²⁰

In this iterative period of legal, scholarly, and policy reform on interrogation, military trials, detention, civilian wartime protections, targeted killing, counterinsurgency (“COIN”) rules of engagement, etc., much of the debate has been framed in constitutional terms: with emphasis on the First and Fourth Amendments (free speech, privacy, prohibited search and seizure), Due Process, and related items.²¹ Relying on what Stephen Dycus et al. (2016) term the constitutional “framework” to anchor national security law and policy measures—especially in times of crises—lawmakers and policymakers have achieved some significant success, not only in balancing security and civil liberties, but in pushing the pendulum back toward a protective posture for civil liberties, no small feat in the aftermath of national emergencies.²²

The strength of the U.S. constitutional tradition²³ indeed confers

18. Chesney, *supra* note 14, at 167.

19. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 635, 653 (2006) (holding that the Bush administration military commissions at Guantanamo Bay violated the Uniform Code of Military Justice (UCMJ) and common article 3 of the Geneva Conventions). This cluster of landmark cases include *Boumediene*, 553 U.S. at 732–33; *Hamdan*, 548 U.S. 557; *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–37 (2004), which held that U.S. citizen enemy combatants could challenge their detention by due process clause protections enforceable through judicial review; and *Rasul v. Bush*, 542 U.S. 466, 475, 477–79, 484 (2004), which established U.S. court jurisdiction over foreign detainees, given U.S. sovereign control (which implies the right to habeas corpus).

20. See Military Commissions Act of 2009, 10 U.S.C. §§ 948a, 984b (2012); see also National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1027, 125 Stat. 1298, 1566–67 (2011).

21. Privacy was the main subject of debate in the narrowly-defeated Amash-Conyers amendment (House Bill 2937) designed to end indiscriminate collection of American records under section 215 of the Patriot Act. 159 Cong. Rec. H5023–24 (daily ed. July 24, 2013) (statement of Rep. Amash).

22. See generally STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW (6th ed. 2016) (discussing national security law of the United States, beginning with the constitutional framework, then discussing several national security policies that comport with the Constitution and other civil liberties); Gabriella Blum, *The Individualization of War: From Collectivism to Individualism in the Regulation of Armed Conflicts*, in LAW AND WAR 48, 75 (Douglas Sarat et al. eds., 2013); Jules Lobel, *Covert War and the Constitution*, 5 J. NAT'L SECURITY L. & POL'Y 393, 402 (2012).

23. One neglected strength of the constitutional “framework,” as Peter Margulies’s work shows, is it enables innovation and dynamism grounded in core principles. Peter Margulies,

distinctive advantages in fighting complex, irregular wars—so long as presidents in particular, as Louis Fisher has repeatedly warned, keep their constitutional moorings.²⁴ By this, Fisher means that at least since President Harry Truman went to war against North Korea in 1950 and even after the War Powers Resolution of 1973, presidents have too often “claimed constitutional authority to take the country from a state of peace to a state of war” on the British executive-centered war model—“precisely the power that the Framers denied to the President and vested exclusively in Congress.”²⁵ Doing so does “great damage” in Fisher’s view—post-9/11 executives too exhibit troubled War Powers legacies—“to the U.S. constitutional system, separation of powers, checks and balances, the principle of self-government, and public participation.”²⁶

Mindful of these and other precautions, legal casebooks, particularly in the dynamic and young field of national security law,²⁷ are a kind of moving barometer of some measure of progress. As Dycus et al. wrote in reference to their earlier fifth edition (2011), “In the last edition of this casebook, we noted that, since the terrorist attacks of 9/11, judicial challenges, legislative initiatives, and executive reforms had produced more durable structures, processes, and institutions for counterterrorism, if not for the national security field generally. These trends continue.”²⁸ These are no small achievements, particularly as other nations’ ministries, as well as intergovernmental organizations, grapple mightily with these core national security challenges.²⁹

Yet, what is missing from much of this maturing post-9/11 “legal

Dynamic Surveillance: Evolving Procedures in Metadata and Foreign Content Collection after Snowden, 66 HASTINGS L.J. 1, 39, 46 (2014). Using the example of strategic advantage against adversaries, which Paul Revere would have forfeited on his 1775 midnight ride if he had disclosed his intelligence methods, Margulies argues for a dynamic conception of national security surveillance and collection authorities in section 215 of the USA Patriot Act and section 702 of the Foreign Intelligence Surveillance Act (FISA)—while increasing transparency, accountability, and use of technology to limit undue government intrusion. *Id.* at 3, 5, 60.

24. See LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 414, 418 (2014); Louis Fisher, *Basic Principles of the War Power*, 5 J. NAT’L SECURITY L. & POL’Y 319, 323, 332 (2011); Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRESIDENTIAL STUD. Q. 1, 15 (2007); Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1206–13, 1219, 1222–24, 1250 (2006); Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 570–71 (2009).

25. See Louis Fisher, Abstract, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199 (2006).

26. *Id.*

27. See DYCUS ET AL., *supra* note 22, at xxxiii; Steve Vladeck, *Is “National Security Law” Inherently Paradoxical?*, 1 AM. U. NAT’L SECURITY L. BRIEF 1, 14 (2011).

28. See DYCUS ET AL., *supra* note 22, at xxxiii.

29. See Blum, *supra* note 22, at 48.

status quo” discussion about “legal architecture”³⁰ is a deeper understanding of the systemic changes and strategic effects—including shifting institutions—underpinning the responses to counterterrorism and asymmetric warfare. The simultaneity of military-intelligence operations, as McChrystal explains in the epigraph, have pervaded executive law, notably the clandestine Joint Unconventional Warfare Task Force Execute Order (JUW), authorized by President Obama in 2009, which enabled CENTCOM commanders to deploy Special Operation Forces (among others) to collect intelligence, conduct reconnaissance for future strikes, and build partnerships with local forces, both friendly and unfriendly, in the Middle East, the Horn of Africa, and Central Asia.³¹

Such practices are associated with nontraditional military activities, often in countries without formal U.S. presence and, as such, subject to well-described concerns about domestic and international human rights norms.³² Yet, at stake in such shifts are more subtle organizational lessons, in this case, McChrystal’s proposal that commanders take a chief role in innovating the means to combat irregular actors in relation to the changing modern battlefield, not only leveraging executive legal tools such as executive orders, but also organizational instruments, such as specialized task forces.³³ This innovation has even filtered down into operator professional identity, as McChrystal underscores the “amazing difference” in which “[p]eople who are traditional shooters, by 2005 and 2006, . . . thought of themselves as intelligence people that carried a gun.”³⁴

There is little doubt that such shifts—well beyond McChrystal—have expanded the scope of the perceived battlefield, as Brooks emphasizes, in part to engage trenchant adversaries who have done the same.³⁵ Such shifts have also reshaped the roles and responsibilities for military and intelligence agency actors, with impacts for security governance, not to mention civil-military relations.³⁶ In introducing a vastly enlarged playing field, new and different kinds of organizations

30. For this term, see Chesney, *supra* note 14, at 167.

31. See Stanley McChrystal, *supra* note 1, at 12. For news accounts, see Marc Ambinder, *Obama Gives Commanders Wide Berth for Secret Warfare*, ATLANTIC (May 25, 2010), <http://www.theatlantic.com/politics/archive/2010/05/obama-gives-commanders-wide-berth-for-secret-warfare/57202/>; and Mark Mazzetti, *U.S. Is Said to Expand Secret Actions in Mideast*, N.Y. TIMES (May 24, 2010), <http://www.nytimes.com/2010/05/25/world/25/military.html>.

32. See Mazzetti, *supra* note 31, at 2.

33. See Ambinder, *supra* note 31, at 3.

34. See McChrystal, *supra* note 1, at 12.

35. See BROOKS, *supra* note 11, at 83.

36. See Ambinder, *supra* note 31, at 3–4.

and actors are needed, such as special operators, joint forces, task force specific agents, and droves of contractors. In turn, many of the same actors are taking unprecedented roles in even the most detailed aspects of security governance: intelligence officers planning kinetic operations; private contractor-produced presidential daily briefings; parallel “top secret” classification system for IT administrators; retired special operators who shift to contractors in CIA operations.³⁷

To understand these structural changes, the essay examines two contributing factors in law and strategy. Part I draws on Chesney’s analysis of “converging” title 50 and title 10 authorities, the federal laws regulating intelligence and military operations, respectively.³⁸ Some see this convergence as a helpful adaptation of wartime legal authorities and oversight processes to post-9/11 conflict dynamics and dispersed battlefields, while others fault such convergence for expanding executive authority in ways that invite potential misuse or even abuse.³⁹ Missing from both accounts are the strategic consequences resulting from operationalizing intelligence and deploying Special Military Units in ways that enable qualitative differences in government security functions. Part II then turns to these underappreciated strategic effects in unforgiving security environments.⁴⁰

To provide clarity on each of these areas of focus, a brief discussion is needed, both to provide an understanding of at least one aspect of the contemporary security environment in the concept of “gray zone,” as well as an interdisciplinary definition of strategic effects.

I. CONCEPTS FOR CONTEMPORARY SECURITY ENVIRONMENTS

A robust theoretical and increasingly empirical literature now exists in the interdisciplinary social sciences and international affairs to address

37. See Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT’L SECURITY L. & POL’Y 539, 562, 577, 584, 615 (2012). Some of these shifts are technological, as Joel Brenner shows, in which the cyber playing field erodes at once individual privacy, national defense secrets, and corporate intellectual property—such as personal, corporate, and defense data—“all live on the same [vulnerable] electronic systems.” JOEL BRENNER, *AMERICA THE VULNERABLE: INSIDE THE NEW THREAT MATRIX OF DIGITAL ESPIONAGE, CRIME, AND WARFARE* 7–9 (2011).

38. See Chesney, *supra* note 37, at 542.

39. See Mustin & Rishikof, *supra* note 2, at 1251; Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT’L SECURITY J. 85, 86, 92, 104, 108, 141 (2011). For one example of the latter, see Jennifer D. Kibbe, *The Military, the CIA, and America’s Shadow Wars*, in *MISSION CREEP: THE MILITARIZATION OF U.S. FOREIGN POLICY* 227 (Gordon Adams & Shoon Murray eds., 2014).

40. See Margulies, *supra* note 23, at 5, 27, 31; see also THE FEDERALIST NO. 41 (James Madison); Boot, *supra* note 12.

the post-Cold War security environment and the specific ways in which the rise of transnational terrorism has shaped contemporary security challenges. For the purposes of this essay, “gray zone” is a helpful descriptive concept, more so than related cognate terms such as shadow wars and covert warfare, which comprise much of the same phenomena, in that it captures a calculating adversary who deliberately designs a warfare strategy and use of violence to achieve political aims—while remaining below the traditional threshold of conventional military conflict and open interstate war. Contemporary gray zone examples are proliferating and include both state and non-state actors: Russian irregulars aiding in the unlawful annexation of Crimea; ISIS attacks against religious minorities as part of its state formation strategy in the Levant; Chinese deployment of ordinary fishermen in expansionist tactics in the South China Sea; Somalian al-Shabab attacks against neighboring civilian sites like the Kenyan Westgate mall; and Iranian Mideast destabilization tactics using proxy forces, including targeting diplomats abroad.⁴¹

While the gray zone concept is debated in policy and scholarly circles and being refined in military and defense strategy, it helpfully captures the many tactical and strategic elements of the modern battlefield and the general features of thinking adversaries, as described below.⁴²

41. See Meetings Coverage, Security Council, Security Council Urged to ‘Stop Madness’ as Terrorists Trample Cultural, Religious Diversity of Middle East, U.N. Meetings Coverage SC/11840 (Mar. 27, 2015), <http://www.un.org/press/en/2015/sc11840.doc.htm>; Lisa De Bode, *Why Is al-Shabab Attacking Kenya?*, ALJAZEERA AMERICA (Apr. 3, 2016, 6:00 PM), <http://america.aljazeera.com/articles/2015/4/3/why-is-al-shabab-attacking-kenya.html>; Simon Denyer, *How China’s Fishermen Are Fighting a Covert War in the South China Sea*, WASH. POST (Apr. 12, 2016), https://www.washingtonpost.com/world/asia_pacific/fishing-fleet-puts-china-on-collision-course-with-neighbors-in-south-china-sea/2016/04/12/8a6a9e3c-fff3-11e5-8bb1-f124a43f84dc_story.html; Reuters, *UN: Russia’s Annexation of Crimea Is Illegal*, N.Y. POST (Mar. 27, 2014, 12:36 PM), <http://nypost.com/2014/03/27/un-russias-annexation-of-crimea-is-illegal/>; Joby Warrick, *U.S. Officials Among the Targets of Iran-linked Assassination Plots*, WASH. POST (May 27, 2012), https://www.washingtonpost.com/world/national-security/us-officials-among-the-targets-of-iran-linked-assassination-plots/2012/05/27/gJQAHIaOvU_story.html.

42. In the U.S. Army doctrine context, see *Special Operations Forces in an Uncertain Threat Environment: A Review of the Fiscal Year 2016 Budget Request for U.S. Special Operations Command: Hearing on the National Defense Authorization Act for Fiscal Year 2016 and Oversight of Previously Authorized Programs Before the Subcomm. on Emerging Threats & Capabilities of the H. Comm. on Armed Servs.*, 114th Cong. 1, 3–4, 6–7 (2015) (statement of General Joseph L. Votel, Commander, U.S. Special Operations Command); PHILIP KAPUSTA, U.S. SPECIAL OPERATIONS COMMAND, WHITE PAPER: THE GRAY ZONE 1, 7–9 (2015); MICHAEL J. MAZARR, MASTERING THE GRAY ZONE: UNDERSTANDING A CHANGING ERA OF CONFLICT 4, 43–45, 63 (2015); and Charles T. Cleveland et al., *Shedding Light on the Gray Zone: A New Approach to Human-Centric Warfare*, ASS’N U.S. ARMY (Aug. 17, 2015),

A. Gray Zones

Former SOCOM commanders Eric T. Olsen and Joseph L. Votel define “gray zones” as places in which violent conflict is conducted by entities that “seek to secure their objectives while minimizing the scope and scale of actual combat.”⁴³ In this “murky middle” zone, Votel explains, “we are confronted with ambiguity on the nature of the conflict, the parties involved, and the validity of the legal and political claims at stake,” all of which confounds “our ‘traditional’ views of war.”⁴⁴ Such conflicts are often deliberately designed both to fall below the traditional law of armed conflict threshold and to leverage such ambiguity for tactical and strategic advantage.⁴⁵

In approaching the use of force this way, such irregular actors (states and non-states alike) maximize ambiguity—in goals, tactics, participants, methods—and in the process escape scrutiny, traditional restraints, and even penalties, whether from domestic public order efforts or international interventions to maintain peace and security.⁴⁶ Thus, such gray zone approaches achieve political gains without triggering formal response processes—or even recognition of the nature of such actions—and succeed in shielding conflict actors from the risks or costs that such escalation would usually bring.⁴⁷ At the same time, when needed, these actors achieve their goals by the use of even spectacular forms of political violence, often with excessive focus on civilian soft targets, from vulnerable segments of populations to religious, ethnic, and other minority subpopulations.⁴⁸

B. Strategic Effect

Two reference points—from law and international politics—help shape the definition of strategic effect for purposes of this analysis.

First, legal scholar Peter Margulies, drawing on *Federalist Paper*

<https://www.ausa.org/articles/shedding-light-gray-zone-new-approach-human-centric-warfare>. In policy and academic discussions, see David Barno & Nora Bensahel, *Fighting and Winning in the “Gray Zone,”* WAR ON ROCKS (May 19, 2015), <http://warontherocks.com/2015/05/fighting-and-winning-in-the-gray-zone/>; Hal Brands, *Paradoxes of the Gray Zone,* FOREIGN POL’Y RES. INST. (Feb. 5, 2016), <http://www.fpri.org/article/2016/02/paradoxes-gray-zone/>; and Asbjorn Eide et al., *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards,* 89 AM. J. INT’L. L. 216, 218 (1995).

43. Olsen, *supra* note 3.

44. *Id.*

45. Margulies, *supra* note 23, at 35.

46. *See id.*

47. *See* Brands, *supra* note 42.

48. *See* Cleveland et al., *supra* note 42.

No. 41 in which Publius (James Madison) addresses how much power the people are willing to submit to government, defines strategic advantage as “the edge that a state obtains over its adversaries, including other states or non-state actors.”⁴⁹ Margulies then links this “edge” relative to other countries in Madison’s prescient discussion on the institutional design of the fledgling government, noting the Framers may craft limits on power, but that no Constitution can “chain the ambition or set bounds to the exertions of all other nations.”⁵⁰ Madison’s test is as follows: “in all cases where power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be . . . to guard as effectually as possible against a perversion of the power to the public detriment.”⁵¹ Strategic effect is thus the advantage a state maintains over adversaries and other states, while simultaneously preserving the government’s ability to structure the power conferred (by the people) for the public good not detriment.

Adding to this definition, military historian John Lewis Gaddis identifies the post-Cold War gap in the ability of the U.S. national security policy community to coherently define vital national security interests and from that vantage point its capacity to mobilize all instruments of national power in concert to meet those identified ends, discussed more fully in Part III.⁵² By no means the only analyst to identify the contemporary disconnect between policy and strategy, increasingly

49. Margulies, *supra* note 23, at 4 (citing THE FEDERALIST NO. 41, *supra* note 40).

50. Margulies, *supra* note 23, at 4–5, 4 n.13 (citing THE FEDERALIST NO. 41, *supra* note 40).

51. THE FEDERALIST NO. 41, *supra* note 40.

52. Often termed “grand strategy,” the concept guides how nations use varied instruments of national power, such as military, diplomatic, and economic resources, to achieve security objectives defined in the national interest and which link national resources (“means”) with national goals (“ends”) to unify and strengthen a nation’s security capacities. See B.H. LIDDELL HART, STRATEGY 322 (1974); Paul Kennedy, *Grand Strategy in War and Peace: Toward a Broader Definition*, in GRAND STRATEGIES IN WAR AND PEACE 5 (Paul M. Kennedy ed., 1991) (“The crux of grand strategy lies therefore in policy, that is, in the capacity of the nation’s leaders to bring together all of the elements, both military and nonmilitary, for the preservation and enhancement of the nation’s long-term (that is, in wartime and peacetime) best interests.”); John Lewis Gaddis, Professor, Yale Univ., Keynote Address at the “American Grand Strategy after War” Conference: What Is Grand Strategy? 6–7, 14 (Feb. 26, 2009); Peter Feaver, *What Is Grand Strategy and Why Do We Need It?*, FOREIGN POL’Y (Apr. 8, 2009, 10:59 PM), <http://foreignpolicy.com/2009/04/08/what-is-grand-strategy-and-why-do-we-need-it/> (“Grand strategy . . . refers to the collection of plans and policies that comprise the state’s deliberate effort to harness political, military, diplomatic, and economic tools together to advance that state’s national interest. Grand strategy is the art of reconciling ends and means. It involves purposive action Such action is constrained.”). For the post-9/11 strategic deficit, see STEPHEN D. BIDDLE, AMERICAN GRAND STRATEGY AFTER 9/11: AN ASSESSMENT 1 (2005).

severe in light of the 9/11 wars,⁵³ current post-9/11 strategic deficits, while derived from multiple challenges (e.g., resilient adversaries, new asymmetric warfare tactics, a fiscally-constrained U.S. foreign policy posture), reveal a disoriented means-ends relationship between U.S. policy processes and the end goal of security and global strategic advantage.⁵⁴

As we will see, in many respects the convergence between military and intelligence authorities and capabilities exposes such core policy weaknesses. That is, in the course of operationalizing intelligence, as McChrystal defines the push to integrate military and intelligence operations⁵⁵—a shift needed to counter network-based adversaries—defense policymakers have tackled the tactical and operational issues, but largely neglected the broader policy and grand strategic priorities or even coherently defined national interests.⁵⁶

The current challenge, thus, remains to reckon with the changing pressures drawing together military and intelligence authorities and organizations and to push for their recalibration in their rightful place in the policymaking ecosystem, directed by the political branches in their interpretive oversight over national security law and policy.⁵⁷

53. See generally ANTHONY CORDESMAN, CTR. FOR STRATEGIC & INT'L STUDIES, THE AFGHAN WAR: RESHAPING AMERICAN STRATEGY AND FINDING WAYS TO WIN 50–51 (2016) (discussing substantial disconnect between policy goals and levels of effort in military spending); Gian Gentile, *A Strategy of Tactics: Population-centric COIN and the Army*, PARAMETERS, Autumn 2009, at 5, 7 (discussing now the American Army's new ways of war have "utterly eclipsed strategy"); Hew Strachan, *Strategy or Alibi? Obama, McChrystal and the Operational Level of War*, SURVIVAL, Oct.–Nov. 2010, at 157, 162 (discussing the confusion between strategy and policy in U.S. operations).

54. Whitney McNamara, *Rethinking U.S. Security Assistance*, CIPHER BRIEF (Nov. 17, 2015), <https://www.thecipherbrief.com/article/rethinking-us-security-assistance>; see Decision Making in a Fiscally-Constrained Environment, Presentation at the Defense Business Board (Oct. 23, 2008); Brian Jenkins, *A Persistent and Resilient Adversary: Al Qaeda in the Arabian Peninsula*, CIPHER BRIEF (Aug. 21, 2016), <https://www.thecipherbrief.com/column/agenda-setter/persistent-and-resilient-adversary-al-qaeda-arabian-peninsula-1089>; see generally EDWARD N. LUTTWAK, *STRATEGY: THE LOGIC OF WAR AND PEACE* (2001) (discussing the challenges facing the means of U.S. foreign policy and the ends of U.S. security interests).

55. See Strachan, *supra* note 53, at 173.

56. See *id.* at 161, 164.

57. These efforts, as Gaddis and others indicate, require reinvigorated teaching and training of grand strategic thinking. See YALE U. BRADY-JOHNSON PROGRAM GRAND STRATEGY, <http://grandstrategy.yale.edu/> (last visited Feb. 19, 2017); see generally CHARLES HILL, *GRAND STRATEGIES: LITERATURE, STATECRAFT, AND WORLD ORDER* (2010) (arguing that contemporary military strategy training needs to involve education on the writings of ancient military strategists).

II. FALL OF THE WALL: TITLE 50 SPECIAL MISSION UNITS AND THE COVERT/CLANDESTINE LINE

Many scholars, strategists, and policymakers have puzzled over former CIA Director Leon Panetta's curious statement to the press on May 3, 2011, two days after the successful raid on Osama bin Laden's compound in Abbottabad, Pakistan.⁵⁸ Panetta termed the covert raid a "Title 50 Operation," referencing the U.S. federal statutes covering War and National Defense that authorize CIA activities.⁵⁹ This label appeared at odds with the mission conducted by Navy SEALs from the Naval Special Warfare Development Group (NSWDG) under JSOC, normally covered under title 10 authorities for the military.⁶⁰ By publically calling the raid a "covert operation" by the official responsible⁶¹ for its design, the mission appeared to contradict 50 U.S.C. § 3093(e), which defines "covert action" as U.S. government activities that "influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government *will not be apparent or acknowledged publicly*."⁶² Traditional intelligence (including clandestine missions), military, and law enforcement, among other activities, are expressly excluded from this definition.⁶³

Title 50 regulates not only CIA intelligence, espionage, and covert operations, but how the U.S. government conducts wars in general, ensures national security, manages the national security bureaucracy and its assets, handles emergency powers, among many other topics—its broad title with over fifty diverse chapters indicates the breadth of items covered.⁶⁴ A kind of backbone legislation for government's core function of providing security, title 50 outlines foundational rules and authorities

58. *PBS NewsHour: Interview by Jim Lehrer with Leon Panetta, Director, Cent. Intelligence Agency* (PBS television broadcast May 3, 2011), http://www.pbs.org/newshour/bb/terrorism-jan-june11-panetta_05-03/.

59. *See id.*

60. *See id.*; *Naval Special Warfare Development Group (DEVGRU)*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/agency/navy/nswdg.htm> (last visited Feb. 19, 2017); Micah Zenko, *Transferring CIA Drone Strike to the Pentagon*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/drones/transferringciadronestrikespentagon/p30434> (last visited Feb. 19, 2017).

61. *PBS NewsHour: Interview by Jim Lehrer with Leon Panetta, supra* note 58. Leon Panetta was Director of the CIA (nominated by President Obama on January 5, 2009) from February 13, 2009 to July 1, 2011, and presided over the bin Laden raid on May 1, 2011; Panetta was then Secretary of Defense from July 1, 2011 to February 27, 2013. *Leon Panetta*, ALLGOV, <http://www.allgov.com/officials/panetta-leon?officialid=28872> (last visited Feb. 19, 2017).

62. 50 U.S.C. § 3093(e) (Supp. II 2014) (emphasis added).

63. *Id.* § 3093(e)(1)–(4).

64. *See* 50 U.S.C. § 413b(e)(2) (2012).

(statutory and delegated power) for much of the federal government's national security system. It also captures how federal security and defense functions evolve over time, including intensive periods of Congressional pushback against executive overreach, and is interlaced with related titles—title 6 for domestic security, title 10 for the armed forces, title 22 for public diplomacy, title 32 for the reserves and national guard.⁶⁵ Title 10, by contrast, is devoted to the armed forces and military law and is relatively narrow and concise.⁶⁶

National security experts traditionally reflect these distinctions by using a legal shorthand, “Title 50 authority” and “Title 10 authority,” to refer to relatively distinct spheres of intelligence and military operations, statutory authorizations, constraints, and Congressional oversight.⁶⁷ What has emerged, notes Andru Wall, is thus “an ill-defined policy debate” in which “Title 10” colloquially refers to DoD and military operations, whereas “Title 50” invokes CIA, intelligence activities, and covert action—though at stake in the debate are the appropriate roles and missions for respective agencies in the post-9/11 context.⁶⁸ As discussants at a recent American Bar Association's (ABA) Standing Committee on Law and National Security reflect and as Jeff Mustin and Harvey Rishikof summarize, “[T]here is much confusion and debate on how to conceptualize the projection of force in the twenty-first century where traditional military activities and covert operations are merging.”⁶⁹

For many critics, making public the raid, its nature, unit, and command, and the fact that a military operation was commanded by the CIA, indicated a mismatch of mission and legal authorities—one that conveyed how far the “ongoing process of convergence among military and intelligence activities, institutions, and authorities” had gone.⁷⁰ Indeed, once analysts scratched the surface, there were several aspects of

65. See 50 U.S.C. §§ 1–2932 (2012).

66. See 10 U.S.C. §§ 101–18506 (2012).

67. Wall, *supra* note 39, at 86, 94, 102, 125 (“[W]hen an operation is termed a ‘Title 10’ operation, that statutory label simply refers to the statutory origins of the mission commander’s authority; this does not preclude other government agencies operating under separate statutory authorities from using their personnel and resources to support the ‘Title 10’ operation.”).

68. *Id.* at 86–87.

69. Mustin & Rishikof, *supra* note 2, at 1240; see MATTHEW C. DAHL, EVENT SUMMARY: THE BIN LADEN OPERATION—THE LEGAL FRAMEWORK (2011), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/50-7_nat_sec_bin_laden_operation.authcheckdam.pdf.

70. Chesney, *supra* note 37, at 539; *but see* Wall, *supra* note 39, at 92 (discussing the increased interagency coordination and cooperation against interconnected national security threats).

the raid that—through technically legal questions—introduced more vexing policy issues, many of which were hard to peel apart from the law: the status of lawful combatancy in covert missions, command and control issues in hybrid military-intelligence operations, the role of the nation’s law-of-war-abiding military in so-called “fifth function” activities, and the erosion of covert missions by their overuse or overexposure.

The most obvious concern, as mentioned, was intentional public disclosure by government officials in the chain of command of a designated “covert operation,” a move that ran squarely against the plain language and statutory intent of 50 U.S.C. § 3093(e), whose very definition of covert action relayed the statute’s evergreen policy rationale.⁷¹ This cluster of rules represented one of the first times that such covert activities were expressly defined in a statute (outside of executive law) and, thus, openly acknowledged as part of the codified U.S. national security and foreign policy toolkit.⁷² Indeed, the very existence of these public rules was a product of legislative “push back” against executive overreach in the Intelligence Authorization Act of 1991 after the Iran-Contra scandal, a Congressional victory of sorts in a far longer tradition of productive tension between legislative and executive control over such “fifth function” activities, including private armies. As W. Michael Reisman and James E. Baker have long pointed out, the national debate has “focused not on the lawfulness of covert action but on the constitutional allocation of competence to control it,” the first step of which is its legal definition.⁷³

A critical part of that definition is its exclusions—what covert action is not.⁷⁴ Under the same statute, “traditional diplomatic or military

71. Wall, *supra* note 39, at 86, 128–29. Title 50 was a product of Congress’s tightening of intelligence oversight procedures governing intelligence covert actions after the Iran-Contra affair, which revealed the Reagan Administration’s secret arms sales to Iran, an enemy and terrorist designee, to fund the Nicaraguan Democratic Resistance (“Contras”). *Id.* at 127–29. The changes were the first time Congress statutorily defined covert action, which included restrictions on conduct, and established new oversight procedures by which Congress must be notified of all such programs. *Id.* at 128.

72. *Id.* at 127.

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

74. Under the same statute 50 U.S.C. § 3093(e)(1)–(4), covert action does not include:
 (1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;
 (2) traditional diplomatic or military activities or routine support to such activities;
 (3) traditional law enforcement activities conducted by United States Government law

activities” (i.e., use of Navy and Army Special Forces) and their “routine support” are expressly excluded from covert action, the purposes of which are obvious to any professional soldier.⁷⁵ As Joseph Berger points out,⁷⁶ engaging in hostilities out of uniform may impact a soldier’s law of war status and privilege of combatant immunity, the legal immunity from sanction for lawful combatants who kill in the course of armed conflict, provided they comply with the laws of war.⁷⁷ But such “out of uniform” missions not only implicate protections for regular warfighters—rules established both within U.S. domestic law and defense policy in all military operations.⁷⁸ Because combat privilege is status based, accruing to individuals as members of their state’s armed forces, they implicate the military as a whole and, in turn, the nation itself, insofar as militaries are agents of the sovereign.⁷⁹ So tightly woven is this system of combat immunity, professional militaries, and the strategic legitimacy of law-abiding states, that when the legal status of the warfighter or commanders shifts, it has the potential to implicate the system as a whole.⁸⁰

Another problem involves the legal definition of “armed forces,” which under both U.S. national security law and the law of armed conflict, rests upon clear, military command authority.⁸¹ Panetta went on to discuss his own role in the raid, distinguishing himself from the Commander-in-Chief, “who made the decision to conduct this operation in a covert way,” noting, as Director of the CIA, “I am, you know, the person who then commands the mission,” while acknowledging “the real commander was Admiral [William] McRaven because he was on site, and he was actually in charge of the military operation that went in and got bin Laden.”⁸² In customary law, “[t]he armed forces of a Party to a

enforcement agencies or routine support to such activities; or

(4) activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad.

50 U.S.C. § 3093(e)(1)–(4) (Supp. II 2014). Likewise, covert action is prohibited if it is intended to influence United States political processes, public opinion, policies, or media. *Id.* § 3093(f).

75. *Id.* § 3093(e)(2).

76. Joseph B. Berger, *Covert Action: Title 10, Title 50, and the Chain of Command*, JOINT FORCES Q., 4th Quarter 2012, at 32, 32 (2012).

77. *Id.* at 37; see Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(1)–(3), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

78. Wall, *supra* note 39, at 89.

79. Berger, *supra* note 76, at 36–37.

80. *Id.* at 36.

81. *Id.*

82. *Id.* at 32 (alteration in original) (citing *PBS NewsHour: Interview by Jim Lehrer with*

conflict consist of all organized armed forces, groups, and units which are under a command responsible to that Party for the conduct of its subordinates.”⁸³ As U.S. Army regulations stipulate, “Command is the inherently military ‘privilege’ that is exercised by virtue of office and the special assignment of members of the US Armed Forces holding military grade.”⁸⁴ As such rules further clarify, “A civilian, other than the President as Commander-in-Chief [(or National Command Authority)] . . . may not exercise command.”⁸⁵ Thus, as Berger explains, insofar as soldiers are routinely applied to operational environments outside traditional military command structures, missions that involve CIA command (not just control) of armed forces or those that blend CIA and DoD leadership, run the risk of command confusion along the operational, legal, and policy dimensions in ways that invite risks—legal, organizational, and diplomatic.⁸⁶

These very rules have, in turn, shaped organizational cultures, which then shape expectations and relationships in international affairs.⁸⁷ The CIA is the default agency responsible for unacknowledged “clandestine” operations, not the military which, by contrast, operates in the open (wearing distinctive uniforms) and under the protections and obligations of international and domestic laws regulating warfare—rules that themselves underpin regularized relations between states in the international system.⁸⁸ The CIA by design provides the executive in his Article 2 Commander-in-Chief capacity certain capabilities when diplomacy fails, or when large-scale kinetic actions are too costly (politically, financially).⁸⁹ But when the executive chooses to use overt political instruments such as military forces in a covert capacity, such interventions (without consent) into other states’ sovereign territory

Leon Panetta, supra note 58; see Eric Talbot Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 CHI. J. INT’L L. 685, 689 (2012) (“[If a State refuses to designate] an armed conflict at all, it can use its armed forces to do things that are not covered by the [law of armed conflict], thus potentially creating the ‘no law’ zone the US sought with regard to terrorists.”).

83. Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43(1), June 8, 1977, 1125 U.N.T.S. 3.

84. Berger, *supra* note 76, at 36; see also JOINT PUBLICATION 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES GL-5 (2013), http://www.dtic.mil/doctrine/new_pubs/jp1.pdf (“The authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment.”).

85. Berger, *supra* note 76, at 36.

86. *Id.* at 32–33, 36, 38.

87. *See id.* at 36.

88. *Id.* at 34, 37–38.

89. *Id.* at 35 figs. 1A & 1B, 36–37.

convey a vastly different message than strict use of covert assets. In the case of Pakistan, a nominal ally directly involved in ongoing U.S. armed conflict with Afghanistan, the choice of kinetic instrument sent the message, once publicized, that neither Pakistan forces nor its political leaders were capable partners—a somewhat clumsy message in that the U.S. was conducting security force assistance with Pakistan.⁹⁰ That political calculus—which weighs the opinion of a nominal ally lower than the priority of defeating the functional commander of a non-state adversary with whom one has been at open war for over a decade⁹¹—is not hard to fathom. Nevertheless, the message undercuts existing U.S.-Pakistan investments, from security force assistance to State Department initiatives, which must be managed at some level.

Beyond creating cross-purposes in programs, this choice, misunderstands how the traditional military-intelligence distinction is meaningful in U.S. foreign policy in general and for specific allies. Saudi Arabia, for instance, will not allow a visible U.S. military installation in the Kingdom even while it has authorized a CIA drone base, as government leaders know that Saudi domestic stability, regional standing, and its ability to support U.S. counterterrorism efforts depends on denying the existence of military operations on their soil.⁹²

There are practical reasons why a Commander-in-Chief may unveil a covert mission and declassify a legally covert raid bound by title 50 authorities granting and restraining executive action and its oversight—such as routine declassification, usually much later, or the failure of a covert mission, such that further denial is pointless or counterproductive, as in the case of Operation Eagle Claw to recover U.S. embassy hostages in Tehran in 1980.⁹³ The complicating issue in the bin Laden raid is that

90. Berger, *supra* note 76, at 33, 38; see Tom Vanden Brook, *Raid on bin Laden 'Humiliated' Pakistan, Gates Says*, USA TODAY (May 19, 2011, 2:08 AM), usatoday30.usatoday.com/news/Washington/2011-05-18-Osama-bin-laden-raid-Pakistan-Robert-Gates-Michael-Mullen_n.htm.

91. See Joshua Foust, *Osama bin Laden's Death and Its Impact on U.S. Foreign Policy*, PBS (May 4, 2011), <http://www.pbs.org/wnet/need-to-know/five-things/osama-bin-ladens-death-and-its-impact-on-u-s-foreign-policy/9057/>; Jeff Muskus, *Osama bin Laden Dead: The Rise, Fall and Legacy of America's Most Wanted Terrorist*, HUFFINGTON POST (May 2, 2011), www.huffingtonpost.com/2011/05/02/osama-bin-laden-killed-legacy_n_856138.html.

92. See Erik Wemple, *News Orgs Had 'Informal Arrangement' Not to Mention Saudi Drone Base*, WASH. POST (Feb. 6, 2013), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2013/02/06/news-orgs-had-informal-arrangement-not-to-mention-saudi-drone-base/>; Robert F. Worth, *Drone Strikes' Risks to Get Rare Moment in the Public Eye*, N.Y. TIMES (Feb. 5, 2013), <http://www.nytimes.com/2013/02/06/world/middleeast/with-brennan-pick-a-light-on-drone-strikes-hazards.html>.

93. See generally Ann Scott Tyson, *From a Failed Mission, A Legacy*, WASH. POST (Apr. 25, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/25/AR20050425>

the President could have achieved the same task with clandestine Special Military Units—not covert forces—now commonly used in high-risk, politically sensitive engagements, such as the Title 10 units tasked in counterterrorist missions throughout northern Africa or to rescue the MV Maersk Alabama hijacked by Somalian pirates.⁹⁴ This choice entails lawful but still secret use of force, traditional military personnel and leadership, without intervening CIA direction, and the need for a special presidential finding and its attendant congressional oversight procedures.⁹⁵

Some critics simply presume the President's calculus for disclosing a wildly successful raid of keen public interest was obvious and self-serving: if successful, the public would know; if not the plausible denial standard would prevail.⁹⁶ Whatever the motive for disclosure, the more troubling question is why the executive felt no organized pressure from the national security system, least of all Congress, whose statutes the executive had after all ignored, and which conflated distinctions at the core of U.S. national security law and policy.⁹⁷ Critics detected a national security team beholden to their client more than to the law, as the President's gamble called into question at least two generations of post-World War II legislation—much of it hard won—reflected in the history of the statutes ignored.⁹⁸ The rules governing the bin Laden raid are thematically part of a longer discussion of executive power in the nation's defense, whose antecedents include the Constitution's early delegation of the power over private armies to Congress in the Marque and Reprisal Clause and later in the Neutrality Act of 1794.⁹⁹ Some historians believe

00069.html (discussing how the failed mission produced a sea of changes).

94. See David Axe, *8,000 Miles, 96 Hours, 3 Dead Pirates: Inside a Navy Seal Rescue*, WIRED (Oct. 17, 2012, 2:07 PM), <https://www.wired.com/2012/10/navy-seals-pirates/>; Lesley Anne Warner, *Capacity-Building Key to Africom's Mission*, WORLD POL. REV. (Feb. 5, 2013), <http://www.worldpoliticsreview.com/articles/12689/capacity-building-key-to-africomsmission>.

95. Berger, *supra* note 76, at 33–36.

96. See Peter Baker & Michael Shear, *Obama Trumpets Killing of bin Laden, and Critics Pounce*, N.Y. TIMES (Apr. 27, 2012), <http://www.nytimes.com/2012/04/28/us/politics/critics-pounce-on-obamas-trumpeting-of-bin-laden-death.html>; Scott Wilson, *Obama Strategy of Taking Credit for Osama bin Laden Killing Risky, Observers Say*, WASH. POST (Apr. 30, 2012), https://www.washingtonpost.com/politics/obama-strategy-of-taking-credit-for-osama-bin-laden-killing-risky-some-observers-say/2012/04/30/gIQApuAxrT_story.html.

97. See 50 U.S.C. § 413b(b) (2012).

98. See generally Baker & Shear, *supra* note 96 (discussing how critics reacted to President Obama taking the credit for the killing of Osama bin Laden because he made the decision to send in Special Operations Forces).

99. See U.S. CONST. art. I, § 8, cl. 11; Grant E. Courtney, *American Mercenaries and the Neutrality Act: Shortening the Leash on the Dogs of War*, 12 J. LEGIS. 175, 183, 186–87 (1985) (describing the Neutrality Act of 1794).

these early legislative restrictions on executive use of private armies functioned as much to consolidate the early republic as they were to refute the British unfettered “royal prerogative” of force in foreign affairs.¹⁰⁰ In any case, the choice in the bin Laden raid, itself part of the increasing tempo of using title 50 missions with traditional military forces for “self-defense,” tips the balance toward executive control over private and even secret armies in a longer debate over the limits of executive power in the security domain.¹⁰¹

The bin Laden raid is by no means the only example of such convergence in the use of title 50 “covert” authority and oversight mechanisms to conduct traditional military operations commanded by CIA, which places Special Military Units in the position of straddling the covert/ clandestine line in ways that are risky and potentially problematic (not least for the status of service members themselves).¹⁰² Likewise, there are many instances where military forces under title 10 authority are being used for heavy intelligence-gathering missions in which the use of military force is almost an afterthought.¹⁰³ In these ways, the bin Laden raid is both exemplary of these larger trends and an opportunity to evaluate these shifts, and as such, instructive for understanding the extent, utility, and meaning of legal convergence across the government’s kinetic capabilities—including where we now stand in longstanding national security debates over some of these approaches.

In other respects, the Administration’s choice in this case crystallizes a more elemental set of legal confusions, with policy and even diplomatic ripple effects across the strategic realm, and even certain unfounded assumptions about the deterrent value of covert force.¹⁰⁴ We turn to these next: first, the historical evolution of convergence and Special Military Units, and second, the strategic policy confusion and deficit that comes to characterize the post-9/11 wars.

100. Mike Rappaport, *Does the President Possess the Prerogative? Part II: The Textual Argument*, LIBERTYLAWBSITE.ORG (Oct. 3, 2013), <http://www.libertylawsite.org/2013/10/03/does-the-president-possess-the-prerogative-part-ii-the-textual-argument/>.

101. See Ronald E. Neumann, *Book Reviews: Afghanistan*, PARAMETERS, Autumn 2014, at 141, 141–42 (reviewing YANIV BARZILAI, *102 DAYS OF WAR: HOW OSAMA BIN LADEN, AL QAEDA & THE TALIBAN SURVIVED 2001* (2014)).

102. See Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 719, 731, 779 (2014).

103. See WILLIAM E. GORTNEY, *INTERORGANIZATIONAL COORDINATION DURING JOINT OPERATIONS* 26 (2011).

104. Some national security advisors presumed that intelligence kinetic operations could be used as deterrents, not realizing deterrence rests upon displays of strength, open foreign policy relations, and the perception of fair play that stronger adversaries have something to lose too. See DEP’T OF DEF., *DETERRENCE OPERATIONS JOINT OPERATING CONCEPT* 39 (2006).

III. HISTORICIZING CONVERGENCE IN MILITARY-INTELLIGENCE ORGANIZATIONS: SPECIAL MILITARY UNITS

Before the National Security Act of 1947 and its amendments, there was little distinction between military and intelligence operations: intelligence was simply a military affair, housed in the Office of Strategic Services (OSS), formed during World War II for espionage behind enemy lines.¹⁰⁵ Yet, in the increasingly Cold War climate, an independent (nonmilitary) civilian spy agency reporting directly to the President was seen as needed to establish disinterested (i.e., nonmilitary) analysis, conduct covert action outside open and conventional armed conflict, and ramp up human intelligence (“HUMINT”) beyond existing military signals intelligence (“SIGINT”) expertise.¹⁰⁶ These innovations, the purposes of which were not necessarily self-evident, formed the organizational skeleton for subsequently separate title 10 and title 50 rules.

The National Security Act of 1947, thus, achieved these and other goals procedurally and organizationally: in the overarching National Military Establishment (later, the DoD); the reorganized armed forces into the current service branch structure (including a stand-alone Air Force from Army); the military command structure reshuffled under the DoD and the Joint Chiefs of Staff, replacing service branch leadership in the chain of command; the installation of national security and foreign policy affairs firmly in the executive branch, including the advisory National Security Council (NSC); and the first peacetime civilian intelligence agency in the CIA.¹⁰⁷ Notably, the United States would distinguish itself by publicly regulating government covert conduct as part of the title 50 statutes.¹⁰⁸

The National Security Act of 1947 institutions—particularly the CIA—were bastions of Cold War strategic thinking in durable ways that all but necessitated separated authorities. The bilateralism of twin nuclear powers locked into mutual assured destruction made actual combat near impossible, even while global influence still needed to be exerted.¹⁰⁹

105. See OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, HISTORY OF THE NATIONAL SECURITY COUNCIL 1947–1997 (1997), reprinted in FED’N AM. SCIENTISTS, <http://fas.org/irp/offdocs/NSChistory.htm> (last visited Feb. 19, 2017).

106. See COMM. ON THE ROLES & CAPABILITIES OF THE U.S. INTELLIGENCE CMTY., 104TH CONG., PREPARING FOR THE 21ST CENTURY: AN APPRAISAL OF U.S. INTELLIGENCE app. at A-1, -3, -5 to -7, -10, -21 to -23 (1996).

107. See National Security Act of 1947, Pub. L. No. 80-253, §§ 101–03, 201–02, 211, 61 Stat. 495, 495–505.

108. Wall, *supra* note 39, at 87.

109. Michael Shermer, *Will Mutual Assured Destruction Continue to Deter Nuclear*

Beyond conventional force buildups and nuclear proliferation, “cold” war and soft power tactics thus prevailed, with a newly emboldened United States taking an activist role in psychological warfare, indirect proxy wars, guerilla warfare (Vietnam War 1959–1975), back-channel military coalitions (Yom Kippur War 1973, Soviet-Afghan War 1979–1989), aid to client states, political interference in decolonizing states, and in social movements, propaganda, economic warfare, et cetera.¹¹⁰ All such postures necessitated intelligence and espionage consumption beyond the traditional needs of the conventional application of force.¹¹¹ As the CIA became the “repository” of U.S. covert action as that realm expanded, the distinction—legal and practical—between military and intelligence activities became more pronounced and institutionalized.¹¹² These separate authorities are a strategic artifact of Cold War history.¹¹³

Yet, by the early 1980s, a reversal in this trend—the early signs of what Chesney calls “convergence”—was visible. Early convergence was in many ways inseparable from the rise of the special operations community itself, whose own growth was sparked by yet another national security flashpoint, the Iran hostage crisis in 1979–1980. This crisis was itself a byproduct of U.S. Cold War covert activism and a symptom of the changing geopolitical alignments of Gulf, Middle East, and Arab states in U.S. policy priorities.¹¹⁴ The spectacular failure of Operation Eagle Claw, the mission moniker for Army Delta (among other) special forces tasked with extracting State Department and CIA officials from the besieged U.S. Embassy in Tehran, arose from inter-service rivalry, command-control and planning issues, and limited intelligence, all subsequently described by Admiral James L. Holloway in a brutally frank follow-up investigative report.¹¹⁵

These criticisms catalyzed broad reform efforts, many outlined in

War?, SCI. AM. (June 1, 2014), <https://www.scientificamerican.com/article/will-mutual-assured-destruction-continue-to-deter-nuclear-war/>.

110. See generally Gregory A. Daddis, *American Military Strategy in the Vietnam War, 1965–1973*, OXFORD RES. ENCYCLOPEDIA AM. HIST. (2015), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-239?print=pdf> (explaining the different themes of war throughout our country’s history).

111. See LOUISE I. GERDES, *ESPIONAGE AND INTELLIGENCE GATHERING* 117, 172 (2004).

112. Chesney, *supra* note 37, at 539, 545, 582, 624–25.

113. *Id.* at 544–45, 582. For a different view, see Wall, *supra* note 39, at 92, 101, which notes that convergence is a mutually reinforcing—not a mutually exclusive—relationship between the statutes that promote interagency partnerships needed for modern unconventional and covert warfare.

114. Chesney, *supra* note 37, at 545–46, 614.

115. See ADMIRAL J.L. HOLLOWAY III, *IRAN HOSTAGE RESCUE MISSION REPORT (“HOLLOWAY REPORT”)*, at vi, 27, 40, 42, 66 (1980), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB63/doc8.pdf>.

the Goldwater-Nichols Act of 1986, that streamlined military command structures; developed dedicated special operation commands in SOCOM in 1987 and JSOC in 1980; and stood up new elite units to fill identified gap areas, such as Army helicopter pilots in the 160th Special Operations Aviation Regiment (SOAR/“Night Stalkers”) in 1981, the Naval Special Warfare Command group in 1980, and the Air Force’s 24th Special Tactics Squadron in 1987.¹¹⁶ Many of these units were leveraged in the 2010 Osama bin Laden raid in Pakistan.¹¹⁷ The convergence trend thus had institutional as well as foreign policy roots before the 9/11 attacks, which already involved highly-specialized actors in secret foreign policy activities.¹¹⁸

An early case in point in both convergence and the rising role of specialized unit actors is evident in the return to clandestine HUMINT operations by both Navy and Army in the late 1960s as military operations other than war grew.¹¹⁹ Secretary of the Navy, Paul Nitze, approved the secret Navy HUMINT program, Naval Field Operations Support Group (NFOSG/“Task Force 157”), for instance, in a classified memorandum in 1966 that rationalized its need given the emerging pattern of limited warfare engagements.¹²⁰ The Army’s Field Operations Group (FOG), which later became the now powerful Intelligence Support Activity (ISA) active in post-9/11 missions, was initiated in 1980 to remedy dismal battlespace intelligence capabilities, as a second rescue of hostages from the U.S. Embassy in Tehran was being planned.¹²¹ As Chesney emphasizes, the “in-house capacities” of the military programs “compete[d] directly with functions associated with the CIA” (collection, direct action capacities) and, thus, “an early manifestation of convergence” was on the horizon.¹²² An equally important rationale for

116. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, tit. II, §§ 201, 211(a), 100 Stat. 992, 1005–10, 1012–17 (current version at 10 U.S.C. §§ 151–156, 161–168 (Supp. II 2014)).

117. Jeremy Scahill, *JSOC: The Black Ops Force that Took Down bin Laden*, NATION (May 2, 2011), <https://www.thenation.com/article/jsoc-black-ops-force-took-down-bin-laden/>.

118. Chesney, *supra* note 37, at 540, 549, 581–82.

119. See JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-07: STABILITY, at xiv–xv, 17, 34 (2016).

120. Paul H. Nitze, *The Pentagon’s Spies: Documents Detail Histories of Once Secret Spy Units*, NAT’L SECURITY ARCHIVE (May 23, 2001), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB46/>.

121. See MICHAEL SMITH, KILLER ELITE 19 (2007); Memorandum from Lieutenant General Philip C. Gast, Dir. for Operations, The Joint Chiefs of Staff on Intelligence Capability to Lieutenant General Eugene Francis Tighe, Jr., Dir., Def. Intelligence Agency (Dec. 10, 1980), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB46/document6.pdf>.

122. Chesney, *supra* note 37, at 548–49.

early convergence, particularly by visionary operational commanders, also was becoming clear, as we shall see: strategic effect.

Thus, convergence ran both ways in special operations involvement in covert missions, most especially after 9/11: not only were Special Military Units enlisted into Title 50 missions, but civilian intelligence leaders, units, and capabilities were beginning to play a role in formal combat mission execution (i.e., direct action).¹²³ Special Military Units (Delta, NSWDC, among others) attached to JSOC, the classified counterterrorism arm of SOCOM,¹²⁴ knit together operators from CIA Special Activities Division (SAD) and ISA, newly housed under JSOC, in taskforces that fused intelligence collection, logistics, and targeting functions in a wide range of disparate missions—many exceeding the geographical boundaries of the traditional battlespace.¹²⁵

This unprecedented organizational integration, much of it developed by McChrystal and his deputies during his first and second command posts in Iraq and Afghanistan, meant that SAD routinely played a key role in military operations in theatre, used military bases, even recruited from JSOC directly, just as CIA contractors were often poached from special forces, as exposed in the terrorist attack on the U.S. Consulate in Benghazi.¹²⁶ Under these circumstances of convergence, drones as a targeting technology—essentially, a tactical capability—were beginning to transform, redirect, and even overshadow the role of intelligence in military strategy.

There is no doubt that the strategic motivations of post-9/11 adversaries and the operational tempo needed to defeat them drove these innovative, institutional partnerships at the pragmatic core of convergence.¹²⁷ McChrystal describes how building a true network in

123. Dana Priest & William M. Arkin, *'Top Secret America': A Look at the Military's Joint Special Operations Command*, WASH. POST (Sept. 2, 2011), https://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ_story.html.

124. See FEICKERT, *supra* note 5, at 5; Priest & Arkin, *supra* note 123.

125. See Priest & Arkin, *supra* note 123.

126. *Id.* The Benghazi attack indicated to both the public and Congressional oversight committees the extent to which private contractors were part of the “fused” military-intelligence organizations and operational decisions. *Id.*

127. Charles Faint & Michael Harris, *F3EAD: Ops/Intel Fusion “Feeds” the SOF Targeting Process*, SMALL WARS J. (Jan. 31, 2012, 6:54 PM), <http://smallwarsjournal.com/jrnl/art/f3ead-opsintel-fusion-%E2%80%9Cfeeds%E2%80%9D-the-sof-targeting-process>. For a description of “fusion cells” partnerships and their role in F3EA intelligence-targeting cycles from an intelligence officer in a Joint Special Operations Task Force (JSOTF) deployed in Afghanistan in 2009, see Paul Lushenko, *“Partnership ‘till It Hurts’”: The Use of Fusion Cells to Establish Unity of Effort Between SOF (Yin) and Conventional Forces (Yang)*, SMALL WARS J. (May 20, 2010, 5:49 PM), <http://smallwarsjournal.com/jrnl/art/>

military-intelligence forces was needed to defeat a network—that transnationally dispersed, flat organization—which was part insurgency, part regional proxy forces, part transnational sectarian violence, and part social-political movement in troubled states.¹²⁸ Operational success, McChrystal learned in his five years hunting terrorists before taking on ISAF leadership in Afghanistan in June of 2009, required “connecting everyone who had a role—no matter how small, geographically dispersed, or organizationally diverse”—in an accelerated communication and operational cycle that produced results in hours, not days.¹²⁹

McChrystal’s team labeled this highly-integrated process that came to shape overall Army targeting doctrine, “F3EA” (find, fix, finish, exploit, and analyze): it combined “analysts who found the enemy (through intelligence, surveillance, and reconnaissance); drone operators who fixed the target; combat teams who finished the target by capturing or killing him; specialists who exploited the intelligence” yielded by the raid, from cell phones, maps, to detainees themselves; and the intelligence analysts who turned this raw information into directly and quickly “usable knowledge” or “actionable intelligence.”¹³⁰ McChrystal’s highly innovative intelligence officer, Michael Flynn, was quick to grasp the meaning of the changing tactical landscape, noting that “[i]ntelligence and information . . . are the fire and maneuver of the 21st

partnership-till-it-hurts; see also Mustin & Rishikof, *supra* note 2, at 1236 (“The modern battlefield, defined in this Article as military operations since 2001, has contributed to the operational synthesis of intelligence and military organizations.”).

128. Gideon Rose, *Generation Kill: A Conversation with Stanley McChrystal*, FOREIGN AFF. (Mar. 1, 2013), <http://www.foreignaffairs.com/discussions/interviews/generation-kill?page=show> (noting the geographical spread of the network, McChrystal explains JSOC forces “were in 27 countries simultaneously.”). The comments in this interview appear to span McChrystal’s commands in JSOC (2003–2008) and in Afghanistan for ISAF/USFOR-A (2008–2010). *Id.*

129. Stanley McChrystal, *It Takes a Network: The New Front Line of Modern Warfare*, FOREIGN POL’Y (Feb. 21, 2011), <http://foreignpolicy.com/2011/02/21/it-takes-a-network/>. Elsewhere McChrystal described the communications technology revolution that was part of the success of this mission cycle. See *Stanley McChrystal*, BIOGRAPHY, <http://www.biography.com/people/stanley-mcchrystal-578710#climbing-military-ranks> (last visited Feb. 19, 2017). McChrystal served as Commanding General, JSOC, from September 2003 to February 2006, and then as Commander, JSOC/Commander, JSOC Forward, from February 2006 to August 2008. PETER L. BERGEN, *MANHUNT: THE TEN-YEAR SEARCH FOR BIN LADEN FROM 9/11 TO ABBOTTABAD 152–58* (2012); *Stanley McChrystal, supra*.

130. McChrystal, *supra* note 129. The F3EA intelligence-targeting cycle was developed, according to McChrystal in 2003, when then Petraeus commanded the 101st Airborne Division in northern Iraq and McChrystal had just assumed command of a JSOTF. Faint & Harris, *supra* note 127. For analysis of the F3EA and doctrine on targeting, see DEP’T OF THE ARMY, *ARMY FIELD MANUAL (FM) 3-60: THE TARGETING PROCESS* (2010); Faint & Harris, *supra* note 127.

Century.”¹³¹ The mistake, of course, which does not lie with military commanders, was in presuming that the tactical transformation of the battlefield by information saturation and sheer quantity of campaign wins could translate into broader strategic effects in ways that could ultimately impact, even win, the political war. That was a bridge too far, based on some fundamental misconceptions by the political branches about the nature of the conflict, national policy, and military strategy, as we shall see below.

Ultimately, broader organizational and institutional shifts were needed to realize this accelerated, dynamic, intelligence-centric operational approach—an insight McChrystal also gleaned intuitively and had the leadership acumen to tackle. McChrystal recognized the need “to create a shared consciousness” at all levels of the counterterrorism teams, for instance, so that “[v]ideo streamed by the drones [were] sent to all the participants [at once,] not just the reconnaissance and surveillance analysts controlling them,” and experts from every possible node on the COIN spectrum were placed in the room together to collectively design responses.¹³² Once a mission was underway, information was still made available, “continuously communicated to and from the combat team, so that intelligence specialists miles away could alert the team on the ground,” just as “[i]ntelligence recovered on the spot was instantly pushed digitally from the target to analysts who could translate it into actionable data while the operators would still be clearing rooms and returning fire.”¹³³

McChrystal also identified the cultural factors that might waylay such intense organizational feedback loops and thus erode quality intelligence: “fashioning ourselves to counter our enemy’s network was” a challenge because “an effective network involves much more than relaying data,” he noted.¹³⁴ While a savvy network may start with “robust communications connectivity,” it must ultimately “leverage[] physical and cultural proximity, shared purpose, established decision-making processes, personal relationships, and trust,” as success will depend upon

131. Michael T. Flynn, *Sandals and Robes to Business Suits and Gulf Streams: Warfare in the 21st Century*, SMALL WARS J. (Apr. 20, 2011, 11:29 AM), <http://smallwarsjournal.com/jrnl/art/sandals-and-ropes-to-business-suits-and-gulf-streams-warfare-in-the-21st-century>; see also MARK BOWDEN, *THE FINISH: THE KILLING OF OSAMA BIN LADEN*, at xii (2012) (explaining that Flynn’s philosophy of intelligence sparked unusual decisions, such as McChrystal declassifying Sinjar records for research).

132. McChrystal, *supra* note 129.

133. *Id.*

134. *Id.*

“how well it allows its members to see, decide, and effectively act.”¹³⁵ In the many respective accolades and criticisms applied to McChrystal’s leadership in service, few recognize his savvy as a rapid institution builder and ability to devise such structures through the vehicle of organizational cultures.¹³⁶ This transformation of “a traditional military structure into a truly flexible, empowered network” was both aided by and drove legal convergence.¹³⁷

Today, this organizational intimacy, blended boundaries, even reversals of roles is not only a *fait accompli* but an open secret. Journalists and other commentators routinely observe that CIA has been “transformed [from] an intelligence service struggling to emerge from the Cold War to a counterterrorism force with its own prisons, paramilitary teams and armed Predator drones,” responsible for over two thousand “kills” since 2001.¹³⁸ Hina Shamsi, Director of the ACLU National Security Project, explains, “We’re seeing the CIA turn into more of a paramilitary organization without the oversight and accountability that we traditionally expect of the military,” oversight which is embedded in overarching law of war rules.¹³⁹ Even former CIA directors express surprise at the pace and extent of the change: Michael Hayden observed that “CIA has never looked more like its direct ancestor, the OSS, than it does right now,” and that “[i]t is as intensely operational as it’s ever been.”¹⁴⁰

These insider observations about identity-level institutional change are routinely made about Special Operations Forces as well, whose own energetic and joint use has made demands back on the broader military

135. *Id.*

136. *Id.*

137. McChrystal, *supra* note 129.

138. Greg Miller, *CIA Closing Bases in Afghanistan as It Shifts Focus amid Military Drawdown*, WASH. POST (July 23, 2013), https://www.washingtonpost.com/world/national-security/cia-closing-bases-in-afghanistan-as-it-shifts-focus-amid-military-drawdown/2013/07/23/7771a8c2-f081-11e2-a1f9-ea873b7e0424_story.html; Miller & Tate, *supra* note 6; see also Spencer Ackerman, *Special Operations Chiefs Quietly Sway Afghanistan Policy*, WASH. INDEP. (Nov. 9, 2009, 7:22 PM) (“[A new Task Force 435 (120 personnel) led by Admiral Robert Harward] will take charge of detention facilities in Afghanistan [and focus on] ‘defeat[ing] the insurgency through intelligence collection and analysis,’ prisoner de-radicalization, and working with the Afghan corrections apparatus to ‘employ best correctional practices [and] comply with Afghan laws.’”), *reprinted in* INTERNATE ARCHIVE, <https://web.archive.org/web/20140822150314/http://washingtonindependent.com/67136/special-operations-chiefs-quietly-sway-afghanistan-policy> (last visited Feb. 19, 2017).

139. Miller & Tate, *supra* note 6.

140. Siobhan Gorman, *Drones Evolve into Weapon in Age of Terror*, WALL STREET J. (Sept. 8, 2011), <http://www.wsj.com/articles/SB10001424053111904836104576556952946952670>.

and its organizational culture.¹⁴¹

One of the most dramatic symbols of the rapidity of CIA's "kinetic turn" is embodied—not in the use of surveillance drones per se, a longstanding collection practice—but in their arming.¹⁴² Though Presidents Reagan and Clinton had authorized some judicious CIA use of force against terrorists and al Qaeda leadership in the 1980s and 1990s, White House, CIA, and Pentagon officials remained circumspect about the scope of such directives.¹⁴³ Shortly before 9/11, when "CIA gussied up the Air Force's castoff surveillance Predators and spotted bin Laden in Afghanistan," and just as White House counterterrorism advisor Richard Clarke realized "we need to be able to see him and kill him at the same time,"—the Agency received stiff push back.¹⁴⁴ Even when CIA succeeded in arming the Predator by the summer of 2001, conflicted government officials refused to allow its launch, as lethal force questions remained legally and politically murky.¹⁴⁵ Clarke explained, "We built it, and everyone was getting in a tizzy because it was an 'assassination tool,'" prohibited by Executive Order 12333.¹⁴⁶ In short, surveillance tools as weapons did not make sense within the pre-9/11 legal and policy culture. Only after 9/11 did armed-drone testing begin in earnest, and by November of 2002, the first reported CIA drone strike (against al Qaeda leader al-Harethi) occurred in Yemen.¹⁴⁷

Today, this intelligence-driven targeting technology—an exemplar of tactics if there ever was one—substitutes for nonexistent foreign policy directives in the twenty-eight plus countries in which special forces are active, according to the former Secretary of Defense, all while the absolute number of drone strikes and respective authorizing agencies (DoD or CIA or both) remain murky or simply unknown.¹⁴⁸

141. Chesney, *supra* note 37, at 545–46, 563–64, 475–76, 623–25; *see also* GEORGE TENET, AT THE CENTER OF THE STORM 208 (2007) ("The president approved our recommendations on Monday, September 17, and provided us broad authorities to engage al-Qa'ida."); Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid al Qaeda*, N.Y. TIMES (Nov. 9, 2008), <http://www.nytimes.com/2008/11/10/washington/10military.html>. The Obama administration issued Executive Order No. 13,491, Ensuring Lawful Interrogations, noting, "The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future." Exec. Order No. 13,491, 3 C.F.R. 199, 201 (2010).

142. Chesney, *supra* note 37, at 566.

143. *Id.* at 550–51, 553–54, 556–57, 574, 597–98.

144. Gorman, *supra* note 140.

145. *Id.*

146. *Id.*; *see also* Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1982).

147. Even two years earlier, the al Qaeda attack on the USS Cole did not prompt such license. Chesney, *supra* note 37, at 560, 567.

148. CORDESMAN, *supra* note 53, at 16, 18; *see also* Rose, *supra* note 128.

As Chesney notes, after 9/11, U.S. officials began to issue legal rationales for CIA strikes that sounded strangely similar to those once reserved for traditional military operations—a given strike was launched with “approval and cooperation” by Yemen’s government, for instance, an interesting claim to make given that the whole purpose of using covert action in foreign affairs is so that governments need not concede knowledge of such activities.¹⁴⁹ This rationale for force arises from *ius ad bellum* considerations enshrined in the U.N. Charter in articles 2(4) and 51, which prohibit states’ use of force as an instrument of foreign policy with three exceptions: self-defense; Security Council authorization; and permission or state consent to use of force by another state.¹⁵⁰ Likewise, the public was told that al-Harethi and his ilk were “combatants under international law” and, thus, the strike was “an act of self-defense . . . permitted under the international laws of war,” a familiar rationale from the bin Laden raid, which legal scholars have also questioned on *ius ad bellum* grounds.¹⁵¹ As the 9/11 wars wore on, such legal refrains gave the CIA greater license than traditional military forces in covert actions outside “hot” battlefields in Somalia, Pakistan, Mali, and elsewhere.¹⁵² In short, the “CIA and the military found themselves targeting not only the same enemy using the same legal rationale, but also using the same weapons platform,” as Chesney notes.¹⁵³ In this respect, convergence was, indeed, “complete.”

Such off-label uses of covert lethal force became so prevalent that some commanders and their spokespersons became brazen about the policy reach of newfound fusion activities. After the President’s Afghanistan review in 2009, when McChrystal enlisted Admirals McRaven and Harward for “direct-action units” to conduct “high-intensity hits,” NSC staffer Tadd Sholtis explained to reporters that he could not “go into much detail on authorities, etc.,” regarding Task Force 714, though he did concede it “was organized into ‘small groups of Rangers going wherever the hell they want[ed] to go’” and that they operated “under legal authority granted at the end of the Bush

149. Chesney, *supra* note 37, at 556–57, 567, 619.

150. *Id.* at 584, 621.

151. *Id.* at 567.

152. See Julian Barnes & Adam Entous, *Yemen Covert Role Pushed: Foiled Bomb Plot Heightens Talk of Putting Elite U.S. Squads in CIA Hands*, WALL STREET J. (Nov. 1, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704477904575586634028056268>; Greg Miller, *CIA to Operate Drones over Yemen*, WASH. POST (June 14, 2011), https://www.washingtonpost.com/national/national-security/cia-to-operate-drones-over-yemen/2011/06/13/AG7VyyTH_story.html.

153. Chesney, *supra* note 37, at 567.

administration that President Obama has not revoked.”¹⁵⁴ Such bravado, often borne of a combustible mix of executive overreach and a national foreign policy vacuum, formed an emergent discourse in the halls of government that made military professionals uncomfortable.¹⁵⁵ Daring-do storytelling often substituted for purposive policy discussions over specific national security policy goals—not to mention grand strategy.¹⁵⁶ Such were the emerging cultural and organizational dangers implicit in the otherwise tactically laudable goal of building a network capable of taking down a network.

Indeed, the operational upside of convergence was undeniable. Covert combat operations were, by most accounts, more efficient, precise, and welcomed by an American public chastened by an improbably resilient enemy—whether al Qaeda and associated forces, Afghan and Iraqi insurgents, or some greater foe—and the trillion-dollar bill in their name that bought them little more than service members’ deaths, a national recession, and the specter of American decline.¹⁵⁷ Existential worry increased over the squandered talent of an exceptional, all-volunteer force counterpoised with the reality that Iraq and Afghanistan schools and roads received greater investment than the U.S. crumbling infrastructure.¹⁵⁸ Such public anxieties led to the growing opposition to unconventional wars, which the Obama administration recognized and prioritized—at least publically.¹⁵⁹

Yet, despite the consensus about the strengths of the fusion approach and its myriad tactical and taskforce manifestations, stubborn questions lingered: why did such operational reforms not result in “strategic impact,” as McChrystal had sincerely hoped?¹⁶⁰ What were the goals, the end game, for Afghanistan, Iraq, even the Middle East, given longstanding U.S. investment in military alliances? The lion-share of responsibility for these and other unanswered questions belonged to the political branches and in the policy domain—the fact that neither victory in the post-9/11 COIN environment nor stable national policy goals and interests were defined for Iraq, Afghanistan, elsewhere in the Middle

154. Ackerman, *supra* note 138.

155. BERGEN, *supra* note 129, at 149, 156.

156. *Id.* at 156.

157. Chesney, *supra* note 37, at 557, 566, 602–03, 609.

158. Linda Blimes & Joseph Stiglitz, *The Iraq War Will Cost Us \$3 Trillion, and Much More*, WASH. POST (Mar. 9, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/07/AR2008030702846.html>.

159. Andreas Krieg, *Externalizing the Burden of War: The Obama Doctrine and U.S. Foreign Policy in the Middle East*, 92 INT’L AFF. 97, 97, 99–100 (2016).

160. McChrystal, *supra* note 1, at 21, 33.

East, and beyond in the twenty plus countries of classified U.S. special intervention.

Even the arguably generous case for operational performance cannot be equally made for legal convergence, least of all in its potential strategic implications. The results have, instead, been decidedly mixed.¹⁶¹ Even proponents of legal convergence accede that it has confused and at times undermined clear lines of command and control authority in military operations, muddled key concepts in U.S. national security law,¹⁶² eroded checks and balances on executive actions in the nation's defense—in some cases making executive branch lawful restraint on use of force irrelevant—and changed the balance between security goals and rule of law accountability.¹⁶³ The story of convergence today, then, is not only the story of post-9/11 adaptation to tactical, operational, and especially strategic challenges—though it is partly that—but also a story of tectonic changes in the law-based architecture of U.S. national security policy, an ad hoc apparatus that had until recently effectively preserved core distinctions established by the Framers.¹⁶⁴

More troubling, the story of legal convergence is playing out in hard-to-read symptoms that appear in fits and starts in the obvious deficits in defining U.S. national security policy, national security interests, and grand strategy, evident in any set of conflicts in and beyond the Middle East.¹⁶⁵ This deficit appears in at least two indirect ways: (1) the current post-9/11 habit of equating operational advances with strategic impact, thus, confusing military activity with progress toward larger wartime goals; and (2) the tendency to confuse technological capacity and information dominance with national security goal setting, even victory, in active conflicts.¹⁶⁶

161. See, e.g., Vladeck, *supra* note 27, at 16.

162. For a skeptical appraisal of the subfield itself, see *id.* at 11–12, 16.

163. See *United States v. Robel*, 389 U.S. 258, 264, 267 (1967) (“[T]his concept of ‘national defense’ cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”).

164. Chesney, *supra* note 37, at 562, 581, 629.

165. See H.R. McMaster, *The Pipe Dream of Easy War*, N.Y. TIMES (July 20, 2013), <http://www.nytimes.com/2013/07/21/opinion/sunday/the-pipe-dream-of-easy-war.html>.

166. See *id.* (“[W]ar is uncertain precisely because it is political and human . . .”). The lessons of the U.S. involvement in Iraq and Afghanistan is that wars are “contests of will” that unleash many dynamics making future events impossible to predict and that U.S. forces must cope with such dynamic and complex environments—not wage such wars remotely or with defense theories over-reliant on technologies—precision strikes, raids, and means of

These implications fall squarely within the responsibilities of those agencies, the respective intelligence, foreign policy, and national security communities, most transformed by convergence. The strategic surprise of recent events—whether the Arab Spring, the Benghazi consular attack, the Egyptian and Turkish coups, the annexation of Crimea by Russia—these are byproducts of the inability of policymakers to identify U.S. grand strategic bearings and to think from that perspective in framing a national approach and related set of actions to international events and trends. Moreover, legal convergence plays a contributing role in this deficit in national strategic thinking in practical ways: the overuse of drones and special forces in a covert capacity, for instance, enables officials to undercut the perceived need to justify, explain, or rationalize a given intervention, or explain to the public how it makes sense within U.S. national interests and policy priorities and national and international security law and policy traditions.¹⁶⁷

IV. STRATEGIC EFFECT: AGGRANDIZING STRATEGY AT THE EXPENSE OF NATIONAL SECURITY POLICY

A. *The Lost Art of Grand Strategic Thinking: Twenty-First Century Security Policy*

Many defense scholars treat strategic thinking—either in terms of narrow military strategy or broad-based grand strategy, which combines national policy ends with strategic means—as a lost skill.¹⁶⁸ Noting that much of the history of American statecraft is “strategically admirable”—the U.S. victory in the Cold War for “which any polity could be proud”¹⁶⁹—Colin Gray describes the more recent “grand strategic deficit” characterizing post-Cold War America.¹⁷⁰ Such problems, Gray believes,

targeting. In fact, the second set of symptoms associated with high-tech advances and organizational transformation—with their daunting pace of innovation and technical sophistication—is more dangerous precisely because they are more dazzling. *Id.*

167. See Chesney, *supra* note 37, at 572–73, 609, 616.

168. For recent discussions of the historical evolution of the terms strategy and grand strategy, see respectively Hew Strachan, *The Lost Meaning of Strategy*, SURVIVAL, at 33, 34–36, 38–41, 44–45, 52 (2005); Kennedy, *supra* note 52, at 2–3, 5; J.F.C. FULLER, THE REFORMATION OF WAR 215, 217–18, 220–22, 225 (1923); BASIL LIDDELL HART, WHEN BRITAIN GOES TO WAR 81–84, 86 (1935); and BASIL LIDDELL HART, THOUGHTS ON WAR 151–52 (1944). While broader than Clausewitz’s limited sense of strategy, as the use of the battle for the purposes of the war, this definition still comports with the core emphasis on the relationship between means and ends, an unavoidable subject for democracies that must gain public consent for any war’s purpose.

169. Colin S. Gray, *On Strategic Performance*, JOINT FORCE Q., Winter 1995–96, at 30, 31.

170. Gaddis, *supra* note 52, at 2.

began with the Vietnam War, the harbinger for this genre of strategic trouble, which now describes the U.S. post-9/11 wars and their routinized failures.¹⁷¹ In resonant language, he goes on to describe Vietnam as “a failure of understanding and imagination,” as U.S. political “leaders did not see that what for them was a limited war for limited ends was, for the Vietnamese, an unlimited war of survival” involving core cultural and national values: “loyalty to ancestors, love of country, [and] resistance to foreigners.”¹⁷² This confused U.S. posture might be neatly summed up as a neglect of Clausewitz’s infamous caution: no one should start a war “without first being clear in his mind what he intends to achieve by that war,” its “political purpose,” and “operational objective” in “how he intends to conduct it.”¹⁷³

In the case of Vietnam in a now familiar formula, the U.S. strategic deficit occurred on both sides of Clausewitz’s equation: U.S. political leadership left ill-defined the war’s purpose for U.S. national interests and they misunderstood the war’s meaning for Vietnamese national strategy.¹⁷⁴ Post-9/11 engagements in Iraq and Afghanistan have continued such elemental political and operational strategic confusions by failing to consider “the first of all strategic questions and the most comprehensive”: to establish by that test of war as an instrument of policy “the kind of war on which they are embarking; neither mistaking it for, nor trying to turn it into, something that is alien to its nature.”¹⁷⁵ The confused, murky, ever-shifting political goals framing U.S. intervention in Iraq, both in 2003, and continued involvement there and elsewhere since, have become a kind of cliché across military, policy, and academic spectrums of analysis.

John Lewis Gaddis reaches further back to contemplate the historical origins of this grand strategy deficit, especially given that George H.W. Bush faced, he writes, one of “the most favorable prospects ever for the use of American power in the international arena” after the Cold War.¹⁷⁶ For Gaddis, this post-Cold War period marks the beginning of the strategic failure trend, evident in the executive’s “inchoate visions” of high policy goals, which were themselves only “dim and swaying guiding lights for military effort[s].”¹⁷⁷ Bush had articulated a facile

171. Gray, *On Strategic Performance*, *supra* note 169, at 31.

172. *Id.* at 30, 32, 34.

173. CARL VON CLAUSEWITZ, ON WAR 579 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1976) (1832); Gray, *On Strategic Performance*, *supra* note 169, at 30.

174. Gray, *On Strategic Performance*, *supra* note 169, at 30–32, 35.

175. *Id.* at 30, 35 (quoting CLAUSEWITZ, *supra* note 173, at 88–89).

176. Gaddis, *supra* note 52, at 1, 6.

177. Gray, *On Strategic Performance*, *supra* note 169, at 31.

national security policy to grandly advocate for “a ‘new world order’ . . . as if the coining of a phrase alone would construct the reality.”¹⁷⁸ This strategic slide was then cemented in Clinton’s vague “enlargement and engagement” policy, an approach that saw no need to specify “what was to be ‘enlarged’ or who was to be ‘engaged’” in international affairs.¹⁷⁹ Clinton even embraced the ad hoc nature of his vague policy, expressing to aids that Roosevelt and Truman had done just fine without any grand strategies by simply “mak[ing] it up as they went along.”¹⁸⁰

Such policies, Gaddis explains, could not have contrasted more with effective U.S. grand strategy planning in the prior “fifty years of insecurity” between the 1941 Pearl Harbor attacks and the Soviet Union’s final collapse in 1991. “We had a grand strategy for fighting World War II already in place at the time of Pearl Harbor,” Gaddis notes, namely, “[G]o after Germany first”—which “we stuck to” throughout the conflict—and, later, a Cold War containment strategy “worked out within the first five years of that conflict” and maintained “[w]ith [minor] adjustments . . . for the next four decades.”¹⁸¹ This measured, effective, coherent approach was pursued despite domestic political challenges, complicated relations with allies, and the era’s “one grievous miscalculation of fundamental interests”—Vietnam.¹⁸² The post-Pearl Harbor years saw Roosevelt and Truman “vanquish[] two formidable adversaries,” while “containing a third,” all “while leaving the United States in a far stronger position at home and abroad than it had been in when external dangers first shook it out of its isolationism.” Against these successes, Clinton- and Bush-enabled strategic deficiencies stood out all the more starkly.¹⁸³

The surprise September 11, 2001 attacks dispelled the feasibility of ad hoc grand strategy making—if not soon enough. The Iraq surge, that rare Bush military success, Gaddis explains, unveiled the stubbornness of this U.S. commitment to strategic deficiency, namely in that the President started a war and even achieved his goal, but had no idea “what to do with

178. There is, of course, a difference between an absence of strategy and bad strategy. Gaddis, *supra* note 52, at 2.

179. *Id.* at 2, 11, 16–17.

180. Clinton went on to embrace the ad hoc nature of his policy, expressing to aids that Roosevelt and Truman had done “just fine” without any grand strategies by simply “making it up” as they went along. *Id.* at 2 (citing STROBE TALBOTT, *THE RUSSIA HAND: A MEMOIR OF PRESIDENTIAL DIPLOMACY* 133 (2002)).

181. *Id.* at 1.

182. *Id.*

183. Gaddis, *supra* note 52, at 2.

Iraq once he was in charge of it.”¹⁸⁴ Recent debates over the post-9/11 wars’ intervention, transition, and reconstruction efforts echo the broad, repetitive outlines of this strategic deficit narrative, only providing greater detail and countless examples for the genre of strategic decline.¹⁸⁵ This strategic floundering has also drawn into its matrix otherwise innovative humanitarian-military efforts: notably, the operational paradigm of COIN, which intended to displace kinetic force as the exclusive tool in the military’s toolbox and needed mass atrocity response operations, deployed to ill-effect in Libya and not used at all in Syria.¹⁸⁶ This strategic slide has gone on now so long that many worry that policymakers have forgotten what strategic competency looks like,¹⁸⁷ even while analysts have repeatedly called for national policy guidance to frame the many military actions, which have piled up in the fifteen years after 9/11.

In short, in the post-9/11 era, this strategic slide, the lack of articulated national policy to direct military operations, has become complete. While this is so for many complex reasons, one core contributing factor is the conflation of the instruments of power projection, the blurred boundaries between intelligence and military assets, and their legal and operational convergence for unconventional warfare.¹⁸⁸ To put this point differently, some aspects of the current strategic deficit which are especially costly in and after the 9/11 wars arise from proverbial best intentions—the otherwise laudable attempt to redesign a “whole of government” approach to prosecuting new kinds of war.¹⁸⁹

184. *Id.*

185. See Gian P. Gentile, *COIN Is Dead: U.S. Army Must Put Strategy Over Tactics*, WORLD POL. REV. (Nov. 22, 2011), <http://www.worldpoliticsreview.com/articles/10731/coin-is-dead-u-s-army-must-put-strategy-over-tactics>; Gentile, *supra* note 53, at 7, 14; see also Elisabeth Bumiller, *West Point Is Divided on a War Doctrine’s Fate*, N.Y. TIMES (May 27, 2012), <http://www.nytimes.com/2012/05/28/world/at-west-point-asking-if-a-war-doctrine-was-worth-it.html>. Gentile pointed out repeatedly, COIN is not a military strategy—let alone a national policy objective—but at best an operational doctrine and at worst, a “strategy of tactics.” Gentile, *supra* note 53, at 7, 11–13. He also noted, there is “no better measure of the failure of American strategy over the past decade than the fact that in both Iraq and Afghanistan, tactical objectives have been used to define victory.” *Id.*

186. There are many attempts at explaining the contingent, historical pressures for how and why we have come to this present condition of strategic deficit. Barry R. Posen & Andrew L. Ross, *Competing Visions for U.S. Grand Strategy*, INT’L SECURITY, Winter 1996–1997, at 5, 5, 14, 28–29, 48–49, 52; Stephen Walt, *The Case for Finite Containment: Analyzing U.S. Grand Strategy*, INT’L SECURITY, Summer 1989, at 5, 5, 22, 34, 40.

187. Gaddis, *supra* note 52, at 6.

188. Wall, *supra* note 39, at 90–91, 91 n.15, 94.

189. HEATHER HURLBURT & JAMES LAMOND, NAT’L SEC’Y NETWORK, LESSONS IN COUNTERTERRORISM TEN YEARS AFTER 9/11: WHAT WORKS AND WHAT DOESN’T (2011),

B. The Strategic Deficit and the 9/11 Wars

At the core of the strategic deficit, which encompasses the organizational shifts mentioned above, rests a simple confusion between the concepts of strategy and policy—in part enabled by the convergence evident in Title 10/Title 50 executive policy operations, as discussed above.¹⁹⁰

Perhaps one of the best early indications of this confusion emerges from military historian Hew Strachan's discussion of George W. Bush's famous "Freedom and Democracy" speech in November 2003 at the Royal United Services Institute (RUSI) in London—the speech that justified intervening in Iraq for an international audience, though the campaign had already begun in March.¹⁹¹ Strachan explains that Bush's comments were at first welcomed as an overdue, clear public statement of a new U.S. foreign policy orientation: "We will help the Iraqi people establish a peaceful and democratic country in the heart of the Middle East" and "by doing so, we will defend our [own] people from danger."¹⁹² Beyond this policy goal and without specifying what U.S. national interests were served—though certain national values were clear—Bush went on to argue for the broader application of "[t]he forward strategy of freedom" to the Arab–Israeli conflict.¹⁹³ Surely, Strachan asks, "strategy can be used to achieve freedom, but can freedom be a strategy in itself?"¹⁹⁴ Bush, thus, confused the relationship between "strategy" with political ends.¹⁹⁵

In the strategic studies literature, the classic definition of strategy is "the use that is made of force . . . for the ends of policy," a definition that draws on Clausewitz's famous dictum that "[s]trategy [is] the use of engagements [or battles] for the object of the war."¹⁹⁶ Strategy is thus "the bridge that relates military power to political purpose"—though it should be confused with "neither military power per se nor political purpose."¹⁹⁷ This distinction is critical: strategy can only serve policy, no matter how often these terms are used interchangeably, because "[p]olicy sets goals,

<http://spi.typepad.com/files/lessons-in-counterterrorism-ten-years-after-9-11.pdf>; *see* Gordon Adams, *Does Mission Creep Matter?*, in *MISSION CREEP*, *supra* note 39, at 257.

190. Strachan, *supra* note 168, at 33–34, 52; Wall, *supra* note 39, at 87–88, 99–100.

191. Strachan, *supra* note 168, at 33, 51.

192. *Id.* at 33.

193. *Id.*

194. *Id.*

195. *Id.*

196. Strachan, *supra* note 168, at 34; COLIN S. GRAY, *MODERN STRATEGY* 17 (1999) (quoting CLAUSEWITZ, *supra* note 173, at 178).

197. GRAY, *MODERN STRATEGY*, *supra* note 196, at 17.

indeed may well change goals, while strategy is always instrumental.”¹⁹⁸ No military instrument of power—whatever its form or quantity—has inherent strategic (or tactical or operational) traits in and of itself, even though instruments are often confused with objectives in ways that produce misnomers like “strategic airpower” (versus the strategic effect of airpower) or “counterinsurgency strategy.”¹⁹⁹

This analytical confusion, the idea that the strategy was to achieve democracy in Iraq by military means, as Strachan observes, was quickly reiterated in Britain in Jack Straw’s own *UK International Priorities: A Strategy for the Foreign and Commonwealth Office*, the first foreign policy statement since the 1970s, which argued that the Foreign Office should develop strategy to set national policy.²⁰⁰ Such statements revealed not only the confusion of policy with strategy but a telling reversal: the use of “strategy to set policy, rather than policy to set strategy,” thereby cementing the causal confusion in the ways, means, and ends for prosecuting wars.²⁰¹ This reversal was risky on the most obvious playing field—making and actually winning wars—it also helped prefigure a larger “existential crises” in modern strategic thinking because, as Paul Kennedy famously put it, “The crux of grand strategy lies therefore in *policy*, that is, in the capacity of the nation’s leaders to bring together all of the elements, both military and nonmilitary, for the preservation and enhancement of the nation’s long-term (that is, in wartime *and* peacetime) best interests.”²⁰²

The strategy-policy confusion problem, Strachan explained, thus has two troubling dimensions whose consequences remain with us today. First, insofar as the term strategy “acquired a universality,” it was robbed of its once clear instrumental meaning: the “use that is made of force . . . for the ends of policy.”²⁰³ Force, among all foreign policy tools, most strenuously cries out for a legitimate national level policy agenda—not the least to rationalize risks incurred by citizen soldiers.²⁰⁴ By stopping at strategy alone, by limiting public and legislative discussion to narrowed military tools and means, this ensures that the policy rationale is never tested by public deliberation and debate, let alone tested by actual

198. COLIN S. GRAY, *AFTER IRAQ: THE SEARCH FOR A SUSTAINABLE NATIONAL SECURITY STRATEGY* 1–2 (2009); GRAY, *MODERN STRATEGY*, *supra* note 196, at 17.

199. GRAY, *MODERN STRATEGY*, *supra* note 196, at 17.

200. Strachan, *supra* note 168, at 33–34.

201. *Id.* at 33–34, 49–50.

202. Kennedy, *supra* note 52, at 1, 5.

203. Strachan, *supra* note 168, at 34; GRAY, *MODERN STRATEGY*, *supra* note 196, at 17.

204. See GRAY, *AFTER IRAQ*, *supra* note 198, at 17–18, 47.

operations in theater.²⁰⁵ Second, this aggrandized “strategy” became not only a synonym for policy but a worrisome replacement for the need to hold lawmakers accountable for crafting a national security policy which squares national security interests with democratic values and consent, as part of the routine process of public support for conflict intervention.²⁰⁶

C. Policy/Strategy Reversal: Prosecuting Future Wars

There are, in turn, pivotal strengths in this distinction between policy and strategy, in holding the line between ends and means, which were also neglected as part of this strategy-policy confusion. The critical purpose of maintaining the policy-strategy distinction is that strategy is virtually useless—meaningless—in the absence of a national security policy, if it lacks political direction to advance political purposes via battles, campaigns, tactics, and risks. What is missed is the understanding that strategy is not “[a]rmed forces in action, indeed any instrument of power in action” (these are tactics), but the capacity “to direct and relate the use of those instruments to policy goals.”²⁰⁷

Thus, returning to Clausewitz’s baseline notion of “strategy as the ‘use of the engagement for the purpose of the war,’”²⁰⁸ the point of rigorously preserving this distinction between strategy and policy is not abstract, nor merely academic, nor even deferential to traditional theories of war—but a failsafe to prevent that which has now become ubiquitous: military national goal setting, especially at the operational level, to stand in for national security policy planning in ways that blur military-civilian lines of authority.

To complicate matters, when legislatures give overbroad authorities to war-prosecuting figures and institutions—whether by not holding the line on existing oversight measures or by allowing legal authorities to converge in ways that confuse law and policy—accountability failures become inevitable in civilian-dominated military systems.²⁰⁹ Notably,

205. *See id.* at 2, 23.

206. *See id.* at 1–2, 7, 9, 20, 52, 55, 57, 59, 64; GRAY, MODERN STRATEGY, *supra* note 196, at 17. W. Michael Reisman and Chris T. Antoniou noted in 1994 that the public support needed for democracies to wage war “can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane or iniquitous way.” W. MICHAEL REISMAN & CHRIS T. ANTONIOU, THE LAWS OF WAR, at xxiv (W. Michael Reisman & Chris T. Antoniou eds., Vintage Books 1994) (1993).

207. GRAY, MODERN STRATEGY, *supra* note 196, at 17.

208. Strachan, *supra* note 168, at 34. Strachan reiterates that Clausewitz “did not define policy” for a reason—namely, his “focus was on the nation and the state, not on party politics.” *Id.*

209. *See, e.g., id.* at 48–49, 52 (explaining that critics incorrectly put the blame for the State Department’s “readiness to [militarize] foreign policy” on the military rather than the

these propensities and their civic dangers have been criticized most often—not by lawmakers—but by military practitioners. In the post-9/11 moment, military leaders have argued that the political branches and civilian leaders have too easily abandoned their professional and constitutional duty to define the political aims of any given use of force—an obligation designed not only to protect the U.S. against unnecessary foreign entanglements, but also to reduce “mission creep,” evident in both Iraq and Afghanistan among other campaigns.²¹⁰ There is an irony indeed in the fact that this concept of strategy has become aggrandized at the very moment when its content—policy—is worrisomely vacant.

CONCLUSION

In the last fifteen years of warfare, not only has this slippage between strategy and policy, means and ends, instrument and object become complete, the political branches have too often been auspiciously silent—perhaps conflicted—about the specific national policy goals to guide strategic entanglements, especially beyond the combat phase. Opaque or incessantly shifting policy aims—as if Congress and the White House are out of ideas—have been folded into military strategy proper in ways that displace such policy-making responsibilities onto military expertise, even polarizing these communities around prosecuting wars.²¹¹ Moreover, in the absence of a clear policy, U.S./coalition campaigns default to fixating on operations, renamed strategy (i.e., counterinsurgency strategy, counterterrorism strategy), a misnomer in that neither methods imply a larger national policy goal or even a strategic blueprint for dictating how the campaign should serve policy.²¹²

Both counterterrorist and COIN strategies at different times, thus, have become a substitute for policy goals in Iraq, Afghanistan, and elsewhere at the highest levels of political leadership.²¹³ Without

responsible party—the legislature).

210. Adams, *supra* note 189, at 10–11, 255, 257.

211. Strachan, *supra* note 168, at 38–39, 47, 52; Gentile, *supra* note 185.

212. Strachan, *supra* note 53, at 157–59, 164, 166–68, 178 (“[COIN ideas] explain the use of armed force for the purposes of the war, but they do not explain the purpose of the war itself.”).

213. *Id.* at 35, 40, 46–47, 49–51; Gentile, *supra* note 185. The failure to craft national security policy and strategy to guide use of force interventions not only compromises constitutional principles in ways the legal academy has best identified, but also undermines the effectiveness of government institutions in their roles and relations in prosecuting armed conflict. See Geoffrey S. Corn & Laurie R. Blank, *The Laws of War: Regulating the Use of Force*, in NATIONAL SECURITY LAW IN THE NEWS 97 (Paul Rosenzweig, Timothy J. McNulty & Ellen Shearer eds., 2012) (“Never before [9/11] . . . has the law that regulates warfare been more comprehensive or central to the perception of strategic legitimacy.”).

statecraft articulating the purpose of war, tactically brilliant (e.g., the *blitzkrieg*, COIN, counterterrorism), even humanitarian uses of force (as per Libya), result in isolated battles won but the war itself lost.²¹⁴

This policy poverty also means frequent, cascading foreign policy intervention failures, many of which a wealthy nation can survive, but which result in lost strategic opportunities in and beyond the United States—a far more difficult and unpredictable state of affairs from which to recover. A subset of this strategic deficit is an inability to understand—let alone meet, face, mitigate, or fight—adversaries' own strategic aims, or to define next-generation U.S. global priorities, predicated on the ability to articulate the national interest relationally, all of which foreshadows our present era (of cyber warfare, proliferating extremisms, climate wars, conflict-induced humanitarian crises, et cetera).

214. Strachan, *supra* note 168, at 46; Gentile, *supra* note 185; Paul Richter & Christi Parsons, *U.S. Intervention in Libya Now Seen as Cautionary Tale*, L.A. TIMES (June 27, 2014, 4:00 AM), <http://www.latimes.com/world/middleeast/la-fg-us-libya-20140627-story.html>.