

Event Summary: The bin Laden Operation – The Legal Framework

On Thursday May 26, 2011, the ABA's Standing Committee on Law and National Security held an event entitled "The bin Laden Operation – The Legal Framework" at the Reserve Officers Association Building in Washington, D.C. The discussion – prompted by the recent bin Laden operation – focused on how and when operations carried out by the U.S. government fall under the legal framework of Title 10 and when they fall under Title 50 of the United States Code. Specifically, the panelists addressed whether the bin Laden operation had been properly designated a Title 50 operation rather than one under Title 10 authority. The panel included Syracuse Law professor William C. Banks; Senior Advisor to the Director of Operations for U.S. Cyber Command, Eric Greenwald; former Acting CIA General Counsel, John Rizzo; and, Deputy Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, Captain Stephanie Smart. Moderating the discussion was Special Advisor to the Committee, and Principal at Bingham Consulting Group, Suzanne Spaulding.

To understand the panelists' discussion it is necessary to provide a brief summary of the legal authorities at issue. Title 50 of the United States Code governs war and national defense; of particular concern to the event's discussion is 50 U.S.C. 413b which deals with the approval and reporting of covert actions. This statute defines "covert action," lays out the process by which such an operation is approved, and provides categories of activities that are exceptions to the covert action definition. Title 10 of the United States Code provides the legal framework for the U.S. military including the laws regarding roles, missions, and organization of the different military branches as well as the Department of Defense (DoD).

The four panelists gave opening statements in succession, and first was Professor Banks. He began by noting that soon after the bin Laden operation was conducted, CIA Director Leon Panetta explained that it was a Title 50 operation and not Title 10. Professor Banks then defined "covert action" as an activity carried out by the United States government that is meant to influence political, economic, or military conditions abroad and where the role of the U.S. government will not be apparent or publicly acknowledged.¹ He went on to highlight the major exceptions to 413b's requirements which are traditional counter-intelligence or police activities and traditional military activities. U.S. government entities carrying out these types of activities are not bound by 413b's requirements.

The traditional military activities exception (TMA) became a central issue of discussion for the panel as it was directly related to the bin Laden operation and has long been an area of confusion and concern vis-à-vis the oversight of covert activity. Professor Banks expressed skepticism as to how the bin Laden operation could be considered a Title 50 operation when

¹ 50 U.S.C. 413b(e).

the force that executed the mission was primarily military personnel from SEAL Team Six (or DEVGRU, as it is now known), and was commanded by Vice Admiral William McRaven, commander of the U.S. Joint Special Operations Command. He pointed out that a specific element of a TMA is that it be under the direction and control of a military commander which this operation was, thus making the bin Laden raid a TMA under Title 10 and not a covert action under Title 50.

The next panelist to speak was former Acting CIA General Counsel, John Rizzo. Mr. Rizzo worked in the CIA's Office of General Counsel for 34 years and spent the majority of that time dealing with covert action issues in congressional affairs and other capacities. He emphasized that covert operations are not solely the purview of the CIA, and that any U.S. government agency is technically authorized to carry out a covert operation provided that they comply with 413b, but Mr. Rizzo could not recall a single instance in his many years of dealing with this issue in which an agency other than the CIA sought and received the required written finding to conduct a covert action – even the U.S. military. (Later, during the Q & A session, Rizzo and Eric Greenwald further explained that this is partly because the CIA is the only agency equipped with the internal legal mechanisms to easily comply with the oversight requirements of 413b.)

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

Next to speak was Captain Stephanie Smart. Capt. Smart's career as a military lawyer has required her to address legal issues concerning the military's most sensitive operations. Also, as the sole panelist who has had the longest tenure at DoD, she had a slightly different perspective on the Title 10 versus Title 50 debate. She noted that military and CIA operations are equally subject to Congressional oversight, but that the TMA exception allows for a wide range of military operations not subject to 413b. She questioned Professor Banks' assertion that the bin Laden raid had been exclusively a Title 10 action because it was conducted under the direction and control of a military commander; Capt. Smart countered by pointing out multiple elements that can define a TMA, not just military “command and control.” She further opined that the bin Laden operation could have been carried out under Title 10 or Title 50, and that the mere involvement of the military does not exclude it from the realm of Title 50. This is

² Joint Explanatory Statement of the Committee of Conference, H.R. 1455, Jul. 25, 1991.

because 413b allows other U.S. entities to provide support to covert operations carried out by the CIA, meaning that the military can transfer personnel and control to the CIA during the execution of a covert operation.

The last panelist to speak was Eric Greenwald, whose current job as a senior advisor to the military's new Cyber Command presented a unique perspective as the only panelist to work for both Congress and the DoD. Mr. Greenwald was previously the Chief Counsel for the House Permanent Select Committee on Intelligence, one of the congressional committees to which 413b requires reporting for covert actions. Mr. Greenwald stated that during his time on the Hill, he encountered the blurry distinction between Title 10 and Title 50 authorities with regard to military operations termed "operational preparation of the environment" and intelligence activities under Title 50. While Title 50 intelligence activities are different than covert actions, this gave Mr. Greenwald experience with the often confusing interplay between Title 10 and Title 50; however, he stated that his current work with DoD has shown him how much care the military takes in ensuring that all operations are scrutinized to determine whether they properly fall under Title 10 or Title 50.

Mr. Greenwald also briefly spoke about 413b's relationship to the new U.S. Cyber Command. He noted the unsettled nature of the law as to whether cyber operations would fall under the TMA exception; however, he also pointed out that some Cyber Command operators go through training and certification that allows them to operate under both Title 10 and Title 50 requirements depending on the call of the mission. Operators are always aware of the specific legal authority under which they work, and take great care to ensure that whoever is at the keyboard executing a particular part of an operation has the proper training and authorization (under either Title 10 or Title 50) to carry out those actions.. There was no further elaboration on Cyber Command or how 413b and military cyber operations will interface, but it drew attention to an interesting issue that will likely be topic of future significance.

The discussion and audience questions that followed the panelists' opening remarks continued to swirl around the TMA exception to 413b. Mr. Rizzo reiterated that he was unaware of any situation in which the military sought a 413b written presidential finding to conduct a covert operation, which is surprising given the nature of some military operations. Professor Banks and Mr. Greenwald both agreed that the definition of a TMA is a moving target and that Congress may have intentionally meant the definition to be vague so as to allow flexibility in this area. (Capt. Smart agreed and admitted that defining TMA even internally is so difficult that it requires an extensive PowerPoint presentation.) However, Mr. Greenwald pointed out that an action is not a TMA just because it is carried out by the military and that any such blanket characterization could likely thwart the congressional intent behind 413b of providing

additional oversight to the type of paramilitary operations that had been carried out by CIA in the decades preceding the creation of these provisions in 1991.

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

The last short issue discussed was the possibility of a "Title 60" that would basically consolidate Title 10 and Title 50 in an attempt to clarify legal boundaries in the area of covert action. The major proponent of this plan was former Director of National Intelligence, Dennis Blair, who suggested this both during his confirmation hearing and during testimony at a recent congressional hearing. The idea of Title 60 would be to provide a more clear legal framework for joint covert activities such as the bin Laden operation. The panelists had little time to respond to this proposal but the general consensus seemed to be that the current legal framework for covert actions is sufficient – that Title 10 and Title 50 will always overlap, which is ok – and that a major overhaul would likely result in unnecessary confusion.

Written by Matthew C. Dahl