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**Continuity, Change and Future Challenges in the Use of Force Abroad**

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Panel V:

Continuity, Change and Future
Challenges in the Use of Force Abroad

Moderator:
Laura Donohue
How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden

By CHARLIE SAVAGE   OCT. 28, 2015

WASHINGTON — Weeks before President Obama ordered the raid on Osama bin Laden’s compound in May 2011, four administration lawyers developed rationales intended to overcome any legal obstacles — and made it all but inevitable that Navy SEALs would kill the fugitive Qaeda leader, not capture him.

Stretching sparse precedents, the lawyers worked in intense secrecy. Fearing leaks, the White House would not let them consult aides or even the administration’s top lawyer, Attorney General Eric H. Holder Jr. They did their own research, wrote memos on highly secure laptops and traded drafts hand-delivered by trusted couriers.

Just days before the raid, the lawyers drafted five secret memos so that if pressed later, they could prove they were not inventing after-the-fact reasons for having blessed it. “We should memorialize our rationales because we may be called upon to explain our legal conclusions, particularly if the operation goes terribly badly,” said Stephen W. Preston, the C.I.A.’s general counsel, according to officials familiar with the internal deliberations.

While the Bin Laden operation has been much scrutinized, the story of how a tiny team of government lawyers helped shape and justify Mr. Obama’s high-stakes
decision has not been previously told. The group worked as military and intelligence officials conducted a parallel effort to explore options and prepare members of SEAL Team 6 for the possible mission.

The legal analysis offered the administration wide flexibility to send ground forces onto Pakistani soil without the country’s consent, to explicitly authorize a lethal mission, to delay telling Congress until afterward, and to bury a wartime enemy at sea. By the end, one official said, the lawyers concluded that there was “clear and ample authority for the use of lethal force under U.S. and international law.”

Some legal scholars later raised objections, but criticism was muted after the successful operation. The administration lawyers, however, did not know at the time how events would play out, and they faced the “unenviable task” of “resolving a cluster of sensitive legal issues without any consultation with colleagues,” said Robert M. Chesney, a law professor at the University of Texas at Austin who worked on a Justice Department detainee policy task force in 2009.

“The proposed raid required answers to many hard legal questions, some of which were entirely novel despite a decade’s worth of conflict with Al Qaeda,” Mr. Chesney said.

This account of the role of the four lawyers — Mr. Preston; Mary B. DeRosa, the National Security Council’s legal adviser; Jeh C. Johnson, the Pentagon general counsel; and then-Rear Adm. James W. Crawford III, the Joint Chiefs of Staff legal adviser — is based on interviews with more than a half-dozen current and former administration officials who had direct knowledge of the planning for the raid. While outlines of some of the government’s rationales have been mentioned previously, the officials provided new insights and details about the analysis and decision-making process.

The officials described the secret legal deliberations and memos for a forthcoming book on national security legal policy under Mr. Obama. Most spoke on the condition of anonymity because the talks were confidential.

‘The Biggest Secret’
“I am about to read you into the biggest secret in Washington,” Michael G. Vickers, the under secretary of defense for intelligence, told Mr. Johnson.

It was March 24, 2011, about five weeks before the raid. Not long before, officials said, Mr. Preston and Ms. DeRosa had visited the Pentagon to meet with Mr. Johnson and Admiral Crawford, the nation’s two top military lawyers. The visitors posed what they said was a hypothetical question: “Suppose we found a very high-value target. What issues would be raised?”

One was where to take him if captured. Mr. Johnson said he would suggest the Guantánamo Bay prison, making an exception to Mr. Obama’s policy of not bringing new detainees there.

But the conversation was necessarily vague. The Pentagon lawyers needed to know the secret if they were going to help, Mr. Preston told Ms. DeRosa afterward.

By then, the two of them had known for over six months that the C.I.A. thought it might have found Bin Laden’s hiding place: a compound in Abbottabad, a military town in northeastern Pakistan. Policy makers initially focused on trying to get more intelligence about who was inside. By the spring of 2011, they turned to possible courses of action, raising legal issues; Thomas E. Donilon, national security adviser to Mr. Obama, then allowed the two military lawyers to be briefed.

One proposal Mr. Obama considered, as previously reported, was to destroy the compound with bombs capable of taking out any tunnels beneath. That would kill dozens of civilians in the neighborhood. But, the officials disclosed, the lawyers were prepared to deem significant collateral damage as lawful, given the circumstances. Still, the Obama team’s examination of the legal factors intertwined with policy concerns about the wisdom of that option, Mr. Donilon said.

“Not only would there be noncombatants at the compound killed, there could be completely innocent people. That was a key factor in the decision not to bomb it, he said, adding that the likely impossibility of verifying afterward that Bin Laden had been killed would have heightened controversy over bystander casualties. “All it would have bought us was a propaganda fight.”
Mr. Preston delivered a cabinet-level briefing on April 12, and as the National Security Council deliberated over that and two other options — a more surgical drone strike, which might miss, or a raid by American forces, which carried its own risks — a few other lawyers were eventually told the secret. But the White House kept senior lawyers at the Justice and State Departments in the dark.

On April 28, 2011, a week before the raid, Michael E. Leiter, the director of the National Counterterrorism Center, proposed at least telling Mr. Holder. “I think the A.G. should be here, just to make sure,” Mr. Leiter told Ms. DeRosa.

But Mr. Donilon decided that there was no need for the attorney general to know. Mr. Holder was briefed the day before the raid, long after the legal questions had been resolved.

As they worked out their reasoning, the four lawyers conferred in secure conference calls and stopped by Ms. DeRosa’s office after unrelated meetings. They gave no hint to colleagues that anything was afoot. Then, as the possible date for a raid neared, Mr. Preston grew tense and proposed writing the memos.

Mr. Johnson wrote one on violating Pakistani sovereignty. When two countries are not at war, international law generally forbids one from using force on the other’s soil without consent. That appeared to require that the United States ask the Pakistani government to arrest Bin Laden itself or to authorize an American raid. But the administration feared that the Pakistani intelligence service might have sanctioned Bin Laden’s presence; if so, the reasoning went, asking for Pakistan’s help might enable his escape.

The lawyers decided that a unilateral military incursion would be lawful because of a disputed exception to sovereignty for situations in which a government is “unwilling or unable” to suppress a threat to others emanating from its soil.

Invoking this exception was a legal stretch, for two reasons. Many countries have not accepted its legitimacy. And there was no precedent for applying it to a situation in which the United States did not first ask Pakistan, which had helped with or granted consent for other counterterrorism operations. But given fears of a tip-off, the lawyers signed off on invoking the exception.
There was also a trump card. While the lawyers believed that Mr. Obama was bound to obey domestic law, they also believed he could decide to violate international law when authorizing a “covert” action, officials said.

If the SEALs got Bin Laden, the Obama administration would lift the secrecy and trumpet the accomplishment. But if it turned out that the founder and head of Al Qaeda was not there, some officials thought the SEALs might be able to slip back out, allowing the United States to pretend the raid never happened.

Mr. Preston wrote a memo addressing when the administration had to alert congressional leaders under a statute governing covert actions. Given the circumstances, the lawyers decided that the administration would be legally justified in delaying notification until after the raid. But then they learned that the C.I.A. director, Leon E. Panetta, had already briefed several top lawmakers about Abbottabad without White House permission.

The lawyers also grappled with whether it was lawful for the SEAL team to go in intending to kill Bin Laden as its default option. They agreed that it would be legal, in a memo written by Ms. DeRosa, and Mr. Obama later explicitly ordered a kill mission, officials said. The SEAL team expected to face resistance and would go in shooting, relying on the congressional authorization to use military force against perpetrators of the Sept. 11 terrorist attacks.

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The law of war required acceptance of any surrender offer that was feasible to accept, the lawyers cautioned. But they also knew that military rules of engagement in such a situation narrowly define what would count. They discussed possible situations in which it might still be lawful to shoot Bin Laden even if he appeared to be surrendering — for instance, if militants next to him were firing weapons, or if he could be concealing a suicide vest under his clothing, officials said.

Matt Bissonnette, one of the SEALs who participated in the raid, recalled in his 2012 memoir, “No Easy Day,” that during their preparations, a Washington lawyer told them, “If he is naked with his hands up, you’re not going to engage him.” Mr. Bissonnette and Robert O’Neill, who also joined in the raid, disagree about who fired the fatal shot at Bin Laden. But on a key point they concur: In Bin Laden’s final moments, he neither resisted nor surrendered.

Ms. DeRosa wrote a memo on plans for detaining Bin Laden in the event of his capture. But in a sign of how little expectation there was for his survival, the administration made no hard decisions. The plan was to take him to the brig of a naval ship for interrogation and then figure out how to proceed. The lawyers also considered writing a memo describing their earlier analysis about what to do with
any other living prisoners taken out of the compound, but did not write it because
the final plan did not call for the SEALs to leave with anyone else.

No Shrines

The final legal question had been whether the United States, to avoid creating a
potential Islamist shrine, could bury Bin Laden at sea.

The Geneva Conventions call for burying enemies slain in battle, “if possible,” in
accordance with their religion — which for Muslims means swift interment in soil,
facing Mecca — and in marked graves. Still, some Islamic writings permit burial at
sea during voyages. The burial memo, handled by Admiral Crawford, focused on that
exception; ultimately, burial at sea is religiously acceptable if necessary, and is not a
desecration, it said.

The lawyers decided that Saudi Arabia, Bin Laden’s home, must be asked
whether it wanted his remains. If not, burial at sea would be permissible. As
expected, the Saudis declined, officials said.

On Sunday, May 1, the day of the raid, Mr. Johnson rose early, planted
impatiens in his yard, put on a sport coat and told his wife he had to go to the office.
First, he took communion at his Episcopal church. Admiral Crawford attended Mass
at his Catholic parish. He and Mr. Johnson converged at a Pentagon operations
center.

Mr. Preston packed a toothbrush and a change of clothes so he could stay
overnight at C.I.A. headquarters if the operation went awry. He joined Mr. Panetta
in the director’s conference room, then doubling as a command center. Ms. DeRosa
came to the White House.

As the SEALs arrived at the compound in Pakistan, Mr. Obama went into a
small anteroom off the Situation Room to watch a live video feed. Most of his senior
team followed him, as depicted in a famous photo. The four lawyers who had helped
clear the way for the operation were not in the frame.
Correction: October 28, 2015

Because of an editing error, an earlier version of a photo caption with this article reversed the two men on the right in photos of four lawyers who worked for the Obama administration. Jeh Johnson is on the far right, and Rear Admiral James W. Crawford III is second from right. An earlier version of this article also had the wrong middle initial for the national security adviser to Mr. Obama in 2011. He is Thomas E. Donilon, not Thomas W. Donilon.

This article is adapted from "Power Wars: Inside Obama’s Post-9/11 Presidency," by Charlie Savage, to be published next week by Little, Brown & Company.

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A version of this article appears in print on October 29, 2015, on page A1 of the New York edition with the headline: How 4 Lawyers Enabled Killing of Bin Laden.
POLITICS | NEWS ANALYSIS

Is the U.S. Now at War With the Shabab? Not Exactly

By CHARLIE SAVAGE    MARCH 14, 2016

WASHINGTON — A striking fact about post-9/11 life is that Americans can wake up and discover that they are already at war with yet another Islamist group in yet another part of the world — based not on congressional debate but on an executive branch decision that the group is sufficiently linked to Al Qaeda.

So last week, when the Pentagon announced that an American airstrike on a Shabab training camp in Somalia had killed about 150 people it said were low-level fighters preparing to attack peacekeeping forces, it raised a crucial question: Is the United States now at war with the Shabab, too?

The short answer, several officials said, is no. But there turned out to be a twist that illustrates how the fight against terrorism keeps eroding limits on presidential war-making powers. The Obama administration thinks that the Authorization for Use of Military Force against the perpetrators of the Sept. 11, 2001, terrorist attacks, or A.U.M.F., enacted by Congress, covered the attack last week — a claim legal scholars described as novel and worthy of attention.

First, some context. Over time, the executive branch has stretched the nearly 15-year-old authorization by Congress to justify military actions far from Afghanistan and against foes other than Al Qaeda and the Taliban. It has done so by deeming
other groups to be part of or “associated forces” with Al Qaeda, including the Yemen-based Al Qaeda in the Arabian Peninsula, the Syria-based Nusra Front, and the Islamic State, a former Qaeda affiliate in Iraq that Al Qaeda excommunicated.

As the distance has grown between the text of the 2001 authorization and the combat waged in its name, critics have called on Congress to vindicate its constitutional role in decisions about war and peace by modernizing it. But Congress has been too polarized and gridlocked to act, essentially acquiescing to the executive branch’s interpretations of what the authorization covers.

Such legislative paralysis only reinforces the executive branch’s inclination to stretch the law. President Obama originally made his claim that the authorization permitted him to attack the Islamic State, even though that group is Al Qaeda’s enemy, because he saw Congress as too dysfunctional to hold a timely vote on any new war measure.

Against that backdrop, administration officials have long been arguing internally about whether the Shabab, as a group, are a Qaeda “associated force” and therefore part of the authorized war. The question is ambiguous because even though the Shabab share Qaeda ideology, many members are just focused on controlling Somalia. But some of them have Qaeda links and want to commit terrorist attacks abroad — like the Shabab’s attack on a Kenyan shopping mall in 2013.

For years, how the Shabab were defined has seemed at once crucial — is the United States at war with a few dozen people in Somalia, or with thousands? — and yet academic. In practice, the Obama White House has pursued a strategy of selectively targeting individual Shabab leaders who have Qaeda links.

But the enormous death toll of the March 5 airstrike, and the fact that its target seemed to be mere foot soldiers, suggested that something new might be happening that the public had a right to know about. So The New York Times pressed the Pentagon for an explanation.

In response, Lt. Col. Joe Sowers, a Pentagon spokesman, provided a statement indicating that the government has still not deemed the Shabab to be an “associated
force” in the Qaeda war. Nevertheless, he said, the airstrike was “authorized by the 2001 A.U.M.F.” — as were three smaller airstrikes last year in Somalia, on June 28, July 29 and Nov. 21, that have received scant attention.

All four strikes were undertaken “in the tactical defense of U.S. and partner ground force units,” he said, referring to the African Union peacekeeping force known as Amisom. Its mandate is to stabilize Somalia, and several dozen American troops are embedded with it as advisers.

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The administration’s position is that Mr. Obama had two motivations in dispatching the advisers: to help stabilize Somalia against the Shabab as a whole, and to help counter those elements within the Shabab who have Qaeda links. The second motive means that the authorization for force covers the entire mission.

And once forces deploy, the military can protect them. That includes hitting adversaries who are about to attack them as well as launching a pre-emptive strike against insurgents who pose what officials call a “continuing and imminent” threat, and who have briefly surfaced but probably will not be spotted again before a future attack.

The administration’s theory raised another question: By that logic, may the United States target all Shabab fighters because they pose, by definition, a “continuing” threat to the peacekeepers and their advisers? (In January, Shabab fighters overran a peacekeeper base, killing as many as 100 Kenyan soldiers.)

But Robert S. Taylor, the acting Pentagon general counsel, said the theory did not go that far: Its “limiting principle” was the “specificity of the intelligence” indicating that the Shabab fighters killed on March 5 had been scheduled to depart the camp and attack in the near future.

“This is not a totally expansive theory that ‘Al Shabab folks are dangerous and they pose a risk whenever and wherever they are’ — that would be an unlimited principle,” he said. “Here there was a determination from the commander that this was the last, best opportunity to stop what was believed to be a very serious attack that there were no adequate defenses for.”

Still, two legal scholars who previously worked on security issues for the government, Ashley Deeks of the University of Virginia and Robert Chesney of the University of Texas at Austin, portrayed the Obama administration’s rationale as an innovation with significant implications for limits on a president’s power to start a war.

Ms. Deeks noted that by citing the authorization in order to deploy counterterrorism advisers even when Al Qaeda was not the main focus, the executive branch would avoid any fight over whether the mission was subject to the War
Powers Resolution’s 60-day legal limit for certain dangerous missions that lack congressional authorization.

And Mr. Chesney said the government’s arguments could “boot strap” any presidential dispatch of military advisers to trouble spots into authority for a direct combat role — including missions with no connection to the authorization for force, like assisting African forces battling the Lord’s Resistance Army.

“Where couldn’t the president just decide to use force on that model?” he asked. “According to this logic, if you have got a ‘continuing and imminent threat’ to those advisers, it sounds like you have a really broad aperture for pre-emptively attacking the threat.”

A version of this news analysis appears in print on March 15, 2016, on page A11 of the New York edition with the headline: Is the U.S. Now at War With the Shabab? Not Exactly.
COUNTERTERRORISM

A New Way of Engaging Pakistan

By C. Christine Fair  Monday, April 11, 2016, 12:07 PM

Omphalos: Middle East Conflict in Perspective

Since 9/11, the United States has furnished Pakistan with some $33 billion dollars in economics assistance, foreign military sales, and lucrative “reimbursements” under the coalition support funds (CSF) program. The United States has also provided Pakistan with access to U.S. strategic weapons systems, most notoriously the F-16 fighter aircraft. This multi-dimensional largesse has several motivations:

• First, it was meant to provide Pakistan with positive inducements to facilitate U.S. operations in Afghanistan against the Taliban and to support the U.S. efforts to degrade Islamist militants associated with Al Qaeda and its affiliates.

• Second, (the widely abused) CSF funds were intended to reimburse Pakistan for the marginal costs associated with supporting the United States in its efforts at counterinsurgency and counterterrorism activities in Afghanistan and Pakistan.

• Third, the various aid programs—and most importantly US-support for various IMF programs—were intended to buttress the Pakistani government from financial shocks while it supported the U.S. regional and global efforts to retard Islamist militants’ capabilities. Pakistan is widely viewed as “too dangerous to fail” because of the toxic mix of the terrorist proxies it nurtures under its ever-expanding nuclear umbrella.

• Fourth, the U.S. government has justified the provision of weapons systems under the base canard that they will enable Pakistan to fight the various militants ensconced in Pakistan.

• Finally, these programs were intended to win Pakistanis’ hearts and minds and diminish their support for Islamist terror groups targeting the United States and afford the United States some degree of insight into and influence over Pakistan’s rapid nuclear proliferation and ceaseless raising of terrorist proxies.

At first blush each of these arguments makes sense—until you look at the data. Once you do, you realize that the US’s Pakistan policy is a washed-out approach to managing the country that has not made Pakistan more secure, has not advanced U.S. interests and, in fact, has encouraged the worst behavior from Pakistan.

It is time to develop coercive means to manage the international menace that is Pakistan.
What do the Facts Say?

If the overall logic of this largesse is to reward Pakistan for its support to U.S. efforts, proponents of this policy have much to answer for. In fact, since 2001, at least 3,515 U.S. and coalition military personnel have been killed in Afghanistan and more than 20,000 US military personnel have been injured. Data on killed and injured U.S. and coalition civilians and defense contractors are nearly impossible to find, although the Department of Labor reports that 1,629 contractors have been killed in Afghanistan since September 2001 and the end of 2015. This in addition to tens of thousands of Afghan civilian and military personnel who have been killed or injured. Professor Neta Crawford at Boston University estimates that, between 2001 and December 2014, some 7,750 members of the Afghan National Army have been killed, as well as about 14,200 members of the Afghan police—in addition to the nearly 17,000 wounded Afghan police and military personnel as of 2014. These deaths and injuries are overwhelmingly not due to al Qaeda: rather, they are from Pakistan’s proxies, including the Afghan Taliban, the Haqqani Network, and Lashkar-e-Taiba, among others.

Economic support has not won over Pakistani hearts and minds. A majority of Pakistanis dislike the United States. Pakistan continues to provide overt support to an array of Islamist militant groups which are proscribed by the United States, such as the Haqqani Network, Jaish-e-Mohammad, Lashkar-e-Taiba among numerous others, in addition to the Afghan Taliban. Pakistan has the world’s fastest growing nuclear weapons program, inclusive of tactical nuclear weapons. Despite Secretary of State John Kerry’s robust defense of Pakistan’s efforts against groups such as the Haqqani Network to justify the provision of another round of F-16s to Pakistan, others in the U.S. government robustly counter that Pakistan’s actions are far from adequate. Pakistan launched the military farce Zarb-e-Azab in North Waziristan in the summer of 2014 only after the United States hounded it to do so and after U.S. Senator Carl Levin successfully put forward a June 2014 amendment to the 2015 National Defense Authorization Act. Under amended law, the Secretary of Defense cannot waive the certification requirements needed to release $300 million of the $900 million Coalition Support Funds to Pakistan, unless he can certify that “Pakistan has undertaken military operations in North Waziristan that have significantly disrupted the safe haven and freedom of movement of the Haqqani network.” Moreover, Pakistan gave months of notice to the militants in North Waziristan and even relocated key Haqqani assets to safehouses before commencing the offensive in the first place. Finally, Pakistan’s support for a veritable zoo of Islamist terrorists has deepened, not retrenched, with no end in sight despite the lucrative perquisites lavished upon the Pakistanis by the Americans.

Why does Pakistan do what it does? Simply put: terrorism under its nuclear umbrella is cheap and effective. It has an army that cannot win a war (except against its own civilians) and nuclear weapons it cannot use. Its Islamist terrorist proxies are the most effective tool it has to achieve its interests in Afghanistan and India. Outrageously, Pakistan has never born any cost for its behavior. Taken together, Pakistan has benefited from a simple moral hazard: the United States rewards Pakistan for the very behaviors it seeks to curb and the behaviors its perpetrates are self-rewarding. Pakistan faces no incentive to behave differently.
Ending Pakistan’s Impunity and Immunity

The United States needs to cease promulgating the fiction that Pakistan is an ally. What ally takes more than $33 billion from the United States while continuing to undermine key U.S. national security interests and while killing our men and women in and out of uniform, along with our allies in Afghanistan and elsewhere? The facts suggest that Pakistan behaves more like a strategic competitor or perhaps an enemy of the United States rather than a problematic ally.

The most important reason why the United States has been reticent to “cut Pakistan off” is Pakistan’s nuclear weapons and ever-expanding menageries of Islamist terrorists. Together, these “strategic assets” raise the specter of terrorists acquiring nuclear weapons, material, or know-how. But we should dispense with the ruse that our resources have enabled the United States to execute influence over this program. Worse yet, on the U.S. dime, Pakistan has invested in the very assets—nuclear weapons and terrorists—that disquiet Americans the most. In other words, Pakistan is engaging in nuclear blackmail against the United States to ensure that the checks keep coming. There have been recent efforts to offer Pakistan a path towards becoming a “mainstream nuclear power” should it wish to become a responsible nuclear state, but Pakistan has repudiated such offers with gusto. Pakistan’s rejecting such a path to normalcy should be a wakeup call to a somnolent Washington that resists new approaches to an old, dangerous problem.

It’s time to end Pakistan’s impunity. What does a new set of policies look like that could over time dissuade Pakistan from being a source of regional instability? There are three dimensions to this.

First, the United States needs to remove itself from the nuclear coercion loop. Rather than embracing the impossible responsibility of policing the potential proliferators in Pakistan, the United States needs to remand responsibility for securing Pakistan’s nuclear materials to the Pakistani state itself. The United States should make it clear that Pakistan will be held responsible should non-state actors acquire its materials. The international community is in a good position to identify a putative Pakistani role because Pakistan’s “nuclear signature” is now well known. The United States should also make it clear that should the Pakistani state engage in first use of nuclear weapons on an adversary, that adversary will not be on its own in retaliating against Pakistan. The United States should consider undertaking countermeasures to subvert Pakistan’s program, as it did with Iran, and even consider imposing the kinds of sanctions that crippled Iran and brought it to the negotiating table. Pakistan is not, has not, and will not be a responsible nuclear state if left to its own devices. To believe otherwise is the reckless Beltway folly that brought us to current impasse in the first instance.

Second, Washington must cease incentivizing Pakistan to continue producing “good jihadi assets” while fighting “terrorists of the Pakistani state.” Unfortunately, Pakistan is engaging in simple asset banking. As long as Pakistan has terrorists to kill, the United States will pay exorbitant amounts to Pakistan to do so. If Pakistan were not a vast swamp of Islamist terrorism, the United
States would be less concerned about the place. Instead of continuing to incentivize the security establishment to groom more terrorists, the United States should incentive them to abandon Islamist terrorists as tools of foreign policy.

How does Washington do this? As a preliminary matter, it should cease providing CSF funds. Pakistan should not be paid to do what sovereign states are supposed to do. Washington should also cease supplying Pakistan with strategic weapon systems. Instead, the United States should be willing to provide a narrow set of platforms which have proven utility in counterterror and counter-insurgency operations. None of these platforms should have significant value in fighting India. The United States should also offer Pakistan military training in these areas, as well other areas that fit squarely within the rubric of domestic security: natural disaster relief, for example. The United States should remain willing to provide police training and counterinsurgency training to Pakistan’s security forces and other forms of assistance to Pakistan’s shambolic justice system should Pakistan permit the United States to so and should the United States be able to provide meaningful assistance to these organizations.

A key part of this change of incentives is that the United States should deliver a very clear statement that it will declare Pakistan to be a state sponsor of terror because it is. Such a declaration will impose sweeping and devastating sanctions against Pakistan. To pre-empt such an outcome, the United States should provide a time-line of concrete steps that the Pakistan must take against the various militant groups it now supports. The first such step is ceasing active support for these groups, constricting their space for operations and recruitment; ultimately, we should demand the elimination of the remnants. Even if Pakistan were willing to do so, this will be long-term project akin to any disarmament, demobilization and reintegration program. Pakistan has trained tens of thousands of militants, if not more. However, there should be no economic support to Pakistan for these efforts as long as it continues to actively raise, nurture, support and deploy so-called jihadis for state goals.

If Pakistan does not play ball, Washington must develop negative inducements and the concomitant political will to use them. What do these look like in addition to declaring the country to be a state sponsor of terrorism? The United States needs to be willing to target specific individuals who are providing material support to terrorist groups and individuals. This means international prosecution, Department of Treasury designation and seizure of accounts, and visa denials. Pakistan’s civilian and military personalities enjoy coming to the United States for medical treatment, holidays and for educating their children. These privileges should be sharply curbed for any person found to be supporting terrorist groups The United States should work with its allies to ensure that its other partners follow suit. If China does not wish to cooperate, that is literally China’s problem. The United States should be less concerned about “lost access and influence” than about coercing Pakistan to abandon the most dangerous policies that it currently pursues with American subsidies.
Third, even it does none of the above, the United States can curb Pakistan’s appetite for terrorist misadventures by depriving it of the principle benefit it derives: international attention to its pet cause, Kashmir. Recent administration statements that reiterate support for India and Pakistan to achieve “peaceful resolution of outstanding issues, including Kashmir” reward Pakistan for its malfeasance while treating India as an equal party to the crime. India is, in fact, a victim of Pakistani terrorism.

Not only does this language gratuitously reward Pakistan for its use of terrorism in Kashmir, it is historically ill-informed and dangerously misguided. Despite Pakistan’s vocal assertions that it has legitimate claims to Kashmir, the facts bely Pakistan’s narrative. First, the Indian Independence Act of 1947 did not allocate Kashmir to Pakistan; rather allowed the princely state to select the dominion of its choice. Second, Pakistan started the first war of Kashmir by dispatching militants who enjoyed various levels of state support in an effort to seize Kashmir by force, despite having signed a standstill agreement which bound it to not undertake a military invasion. As a consequence of Pakistan’s invasion, the Maharaja of Kashmir Hari Singh signed an instrument of accession to India in exchange for military assistance. Thus, all of Kashmir, including that portion currently administered by Pakistan and that portion “ceded” to China in 1963, are lawful parts of India. Moreover, India is the status-quo power on Kashmir notwithstanding some Hindu nationalists’ efforts to revivify demands for all of Kashmir under the rubric of “Akhand Bharat,” whereas Pakistan is the revisionist state seeking territorial changes through the use of military force (1947-48, 1965, 1999) and through terrorist proxies (1947-present). Not only does Pakistan lack any defensible equities in Kashmir, India has been the victim of Pakistan’s reliance upon Islamist militant proxies in Kashmir literally since 1947.

U.S. statements of this type also reveal an astonishing ignorance about the relevant United Nations Security Council Resolutions pertaining to Kashmir. While Pakistan is fond of demanding implementation of the UN Security Council Resolution 47 (1948), it obfuscates what the resolution actually says. It first required Pakistan to “secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein who have entered the State for the purposes of fighting, and to prevent any intrusion into the State of such elements and any furnishing of material aid to those fighting in the State.” When the Pakistani withdrawal has occurred and that the “arrangements for the cessation of the fighting have become effective,” India was to begin withdrawing its forces from Jammu to a “minimum strength required for the support of the civil power in the maintenance of law and order.” Finally, when India had followed through, India was to ensure that a free and fair plebiscite would be carried out. However, despite Pakistan’s adamancy that this resolution be executed, Pakistan only focuses upon the plebiscite, rather than the first step which Pakistan was supposed to undertake as a precondition to the subsequent actions to be undertaken by India. Needless to say, it is India’s position that the Simla Agreement of 1972, which formally concluded the 1971 war with Pakistan, obviates UNSCR 47 and other related resolutions. In that Agreement, both India and Pakistan agreed to pursue the “peaceful resolution of all issues through direct bilateral approaches.”
When the United States acknowledges Kashmir as a disputed area, it either demonstrates an enormous historical ignorance of the issues or evidences an effort to placate Pakistan at the costs of facts, law and history. Worse yet, it rewards Pakistan for its continued use of terrorism in Kashmir and elsewhere in India.

Consistent with historical facts, the United States should refuse to interject any mention of Kashmir in its various statements with and about Pakistan. Equally, it should abjure making any statements encouraging India to engage with Pakistan on the subject. Pakistan craves such language because it legitimizes Pakistan's contention that it is seeking peace from India, which obstructs its efforts. While it would be preferable if the United States adopted strong language placing the onus on the conflict firmly upon Pakistan, a middle ground may simply be omitting such language altogether. The Pakistanis are very sensitive to such omissions and will understand the intent that such an omission conveys. Such signaling would also advance U.S. interests in discouraging Pakistani terrorism in some measure by depriving Pakistan of this much sought-after benefit.

Along similar lines, when Pakistan-based terrorist organizations attack India, the United States should abandon its usual practice of encouraging India publicly to observe restraint and offering the usual bromidic calls for the both sides to continue dialogue. Such language imposes a false equivalence on India, the victim, and Pakistan, the victimizer. Most importantly, such language rewards Pakistan for using terrorism, and one of the reasons why Pakistan does so is to continue focusing international attention upon the area and incentivizing the international community to continue identifying Kashmir as “the most dangerous place on earth.” Instead, the United States should consider encouraging Pakistan publicly to take action against the militant groups in question and to cooperate with Indian and international law enforcement agencies to bring the terrorists to justice. This is a far cry from what the United States should do to punish Pakistan for continuing to use Islamist terrorism as a tool of foreign policy, but it may be something that the current or next administration would consider.

The United States inter-agency should have a serious conversation about its official position on the Kashmir “dispute.” I would encourage the inter-agency to officially adopt support for converting the Line of Control into the international boundary. After all, such a conversion requires India to forego its claims on Pakistan-administered Kashmir while allowing Pakistan to retain that which it currently controls without legal sanction.

The Counter Arguments?

There are several counter-argument to what I am proposing here, all of which are flawed. First, there are those who note that the aide cut-off in 1990 failed to prevent Pakistan from testing nuclear weapons in 1998 and even enabled the rise of the Taliban. This is bad history. Pakistan developed a crude nuclear weapon by 1984. Moreover, nothing in the cut-off required the United States to outsource its Afghanistan policies to Pakistan.
Second, Pakistan is not likely to fail. In fact, Pakistan is one of the most stable instabilities. It survived the 1971 war, in which it lost half of its population and nearly half of its terrain. It has survived calamitous natural disasters and it has managed to survive the avarice and mendacity of its own leadership.

Third, there are those who say Pakistan will not continue fighting the terrorists unless the United States pays it to do so. This too is likely wrong. The terrorists Pakistan is killing are Pakistan’s terrorists. Pakistan will continue fighting them for reasons of its own. And it doesn’t fight the people we consider terrorists, except to the extent they are also Pakistan’s terrorists. It continues to nurture a raft of militants that the United States views as foes.

Finally, there are those who are risk averse. They would rather maintain the status quo with the full knowledge that the United States is not getting value for its money than risk a new approach. These risk averse persons are seriously mistaken. The current U.S. policy has made Pakistan more dangerous to itself, to its neighbors, and to U.S. interests principally by politically rewarding and bankrolling Pakistan’s twinned expansion of its nuclear and jihadi arsenals. It’s time this madness stopped. Even if the withdrawal of U.S. resources doesn’t change Pakistan’s behavior, at least the United States would not be subsidizing the undermining of its own most delicate policies.

Topics: Counterterrorism, Omphalos

Tags: pakistan

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Understanding Support for Islamist Militancy in Pakistan

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Pakistan has used Islamist militants to pursue its regional interests since its inception in 1947. In the last ten years, however, Islamist militancy in Pakistan has become a key international security concern. In December 2001, the attack on the Indian parliament by Jaish-e-Mohammed militants allegedly based in Pakistan nearly sparked a war between India and Pakistan. The perceived threat has intensified further in recent years, as the Pakistani Taliban has established parallel administrative bodies along the Pakistan-Afghanistan border, executed suicide attacks against Pakistani government targets, and even seized the Red Mosque in Pakistan’s capital. Concerns about Pakistan’s stability are exacerbated by its nuclear status, dysfunctional civil-military relationship, a demonstrated propensity for risk-seeking behavior, and ever-expanding connections between local groups and transnational Islamist terrorist organizations.

Summarizing the myriad security problems posed by Pakistan—including Islamist militancy and nuclear proliferation—U.S. Secretary of State Hillary Clinton argued before the U.S. Congress that Pakistan “poses a mortal threat to the security and safety of our country and the world.” Similar sentiments were echoed during recent deliberations on aid to Pakistan in the U.S. House of Representatives Foreign Affairs Committee. Subcommittee Chairman Howard Berman opened the hearings by noting that “the United States has an

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The authors are grateful for responses and criticism from copanelists, discussants, and audience members at the Forty-ninth Annual Convention of the International Studies Association, where an earlier draft of this article was presented. In addition, the authors thank the anonymous reviewers for their cogent and insightful criticisms of previous drafts.

1. Pakistan precipitated the first Indo-Pakistani War (1947–48) a few weeks after independence by launching tribal lashkar (militia) from Waziristan in an effort to wrest Kashmir from India. Pakistan has supported various insurgent cells in Kashmir from 1947 to the present. With the security provided by its covert nuclearization, Pakistan expanded its “jihad” to the rest of the region in the late 1980s. After overt nuclearization in 1998, Pakistan became even more aggressive about supporting asymmetric actions within India. See, for example, Ashley J. Tellis, C. Christine Fair, and Jamison Jo Medby, “Limited Conflicts under the Nuclear Umbrella—Indian and Pakistani Lessons from the Kargil Crisis” (Santa Monica, Calif.: RAND, 2001); Praveen Swami, India, Pakistan, and the Secret Jihad: The Covert War in Kashmir, 1947–2004 (New York: Routledge, 2007); and S. Paul Kapur, Dangerous Deterrent: Nuclear Weapons Proliferation and Conflict in South Asia (Stanford, Calif.: Stanford University Press, 2007).


enormous stake in the security and stability of that country. We can’t allow al-Qaeda or any other terrorist group that threatens our national security to operate with impunity in the tribal regions of Pakistan. Nor can we permit the Pakistani state—and its nuclear arsenal—to be taken over by the Taliban.”

Beyond a substantial investment in security assistance, U.S. and Western policies toward Pakistan over the last ten years have been geared toward encouraging economic and social development as an explicit means of diminishing the terrorist threat and turning back Islamization. Legislation before the U.S. House of Representatives in April 2009 called for the United States to “strengthen Pakistan’s public education system, increase literacy, expand opportunities for vocational training, and help create an appropriate national curriculum for all schools in Pakistan.”

In testimony on this bill, U.S. Special Envoy Richard Holbrooke argued that Washington should “target the economic and social roots of extremism in western Pakistan with more economic aid.” Washington also played a pivotal role in the April 2009 donors’ conference in Tokyo, where nearly thirty countries and international organizations pledged some $5 billion in development aid explicitly intended to “enable Pakistan to fight off Islamic extremism.”

These policy prescriptions rest on—and indeed reflect—four powerful conventional wisdoms. The first is that poverty is a root cause of support for militancy, or at least that poorer and less-educated individuals are more prone to militants’ appeals. The second is that personal religiosity and support for


7. These arguments are reflected in both Pakistani and Western discourse. On the Pakistani side, see “Marshall Plan-Style Aid Drive Needed for Pakistan: Zardari,” Daily Times (Islamabad), April 17, 2009. On the Western side, see the 9/11 Commission’s claim that “Pakistan’s endemic poverty, widespread corruption, and often ineffective government create opportunities for Islamist recruitment. Poor education is a particular concern,” National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (New York: W.W. Norton, 2004), p. 367. A more nuanced argument is that Pakistan’s derelict public schools and poverty compel Pakistani families to send their children to the madrassas (religious schools), which provide recruits for Pakistan’s jihadi groups. Jessica Stern,
sharia (Islamic law) are strongly correlated with support for Islamist militancy. The third is that support for political goals espoused by legal Islamist parties predicts support for militant organizations. The fourth is that those who support democracy—either in terms of supporting democratic processes such as voting or in terms of valuing core democratic principles—oppose Islamism and militancy.

None of these conventional wisdoms rests on a firm evidentiary basis, yet they dominate in varying degrees popular media accounts of Pakistan’s political woes, debates in the U.S. Congress, and policies adopted by Western states to help stabilize Pakistan since 2001. Given the manifest importance of Islamist militancy in Pakistan and the vast resources being directed against it, this lack of evidence is deeply disheartening. Although there has been some systematic survey research on variation over time in how Pakistanis feel about militancy generally, none has been done on subnational variation in those trends, and only recently have these surveys probed how Pakistanis feel about specific militant organizations. These lacunas leave analysts with little evi-


8. In recent years, policymakers and commentators have demurred from articulating these views publicly owing to increased political sensitivity. In private, however, these concerns persist, and they animate many meetings convened by the U.S. and U.K. governments attended by the authors as well as numerous author interactions with British, Canadian, Dutch, Indian, and U.S. intelligence officials, policymakers, and politicians in Afghanistan, Pakistan, the United Kingdom, and the United States. For a thoughtful discussion of these political concerns, see Toni Johnson, “Sharia and Militancy,” Backgrounder (Washington, D.C.: Council on Foreign Relations, April 22, 2009), http://www.cfr.org/publication/19155/sharia_and_militancy.html. See also Shadi Hamid, “Resolving America’s Islamist Dilemma: Lessons from South and South East Asia” (Washington, D.C.: Century Foundation, 2008), http://www.tcf.org/publications/internationalaffairs/Hamid.pdf.

9. This belief, in turn, drives concerns about the potential role of Islamist parties in expanding militancy.

10. The United States Agency for International Development’s (USAID’s) $750 million Federally Administered Tribal Area (FATA) development plan, for example, was predicated on the hypothesis that insurgency and terrorism in the FATA is driven by poverty, lack of education, and unemployment. See United States Agency for International Development, “USAID/Pakistan Interim Strategic Plan, May 2003–September 2006” (Islamabad: USAID, May 2003), http://www.docstoc.com/docs/679677/USAID-Pakistan-Interim-Strategic-Plan. The plan explicitly argues that “economic growth means more jobs, which can accelerate economic recovery and thwart those who would recruit the unemployed for terrorism.”

11. The Pew Research Center and the International Republican Institute (IRI) conduct surveys that ask general questions about militancy, such as, “Do you agree or disagree with the following statement: the Taliban and Al-Qaeda operating in Pakistan is a serious problem?” Neither organization analyzes its data to identify sources of subnational variation, and they do not appear to collect data on the economic, social, and ideational variables required for such an analysis. See International Republican Institute, “IRI Pakistan Index,” January 19–29, 2008, http://www.iri.org/mena/pakistan/pdfs/2008%20February%202008%20IRI%20Pakistan%20Index,%20January%2029,%202008.pdf.
vidence as to why Pakistanis support specific militant organizations and therefore little means of efficaciously undermining such support.  

There are strong reasons to think that these conventional wisdoms may be mistaken. Before Pakistan’s February 2008 general election, for example, they drove concerns that Islamist political parties would triumph in open democratic elections. Indeed, the conventional wisdoms were so powerful that they overwhelmed two key facts. First, Islamists have never done well in Pakistani elections. Second, the Islamists’ record of governing the two provinces they won in 2002—the North-West Frontier Province and Baluchistan—was every bit as corrupt and inept as that of the left-of-center parties they replaced. As a more evidence-based analysis might have predicted, the Islamists were routed in the February 2008 election.

The widespread failure to anticipate the 2008 election results dramatically illustrates that the current Western consensus about the politics of Islamist militancy is decisively unhelpful. Worse yet, public discourse decrying Pakistan’s Islamist parties, with its strong anti-Islamist motivations, likely alienated many Pakistanis who view militant groups as a critical threat to their nation and would thus naturally support many core Western priorities. Facile reductions of the militant-Islamism nexus also led to a misdiagnosis of the problem. Just as support for Islamist parties may not imply support for militant groups, support for secular parties or routing of Islamist parties at the ballot box need not correlate with negative perceptions of Islamist militants and support for Western action to eliminate them.

As a first step in building a solid empirical basis for policymaking toward Islamist militancy in Pakistan, we use data from a national survey of urban Pakistanis to test the four conventional wisdoms. Our analysis breaks new ground by identifying the correlates of support for specific militant groups. Doing so allows us to develop a more nuanced understanding of the politics of

12. Presumably, policy-oriented organizations field such surveys because there is an implicit assumption that demand for militancy (e.g., support) correlates in some straightforward way with the supply of violence. There is little evidence to support this assumption, however. Surveys can cast little light on how to reduce violence without more sophisticated data collection and analysis.
Islamist militancy than was possible with earlier surveys that asked overly general questions. The respondents' answers to questions about specific militant organizations reveal little support for any of the conventional wisdoms; neither religiosity, nor poverty, nor support for Islamist politics predicts support across these organizations. Moreover, those who support core democratic values are not less supportive across the range of militant groups.

These findings suggest the alternative theory that urban Pakistanis support small militant organizations when two conditions hold: (1) those organizations are using violence in support of political goals the individual cares about; and (2) violence makes sense as a way to achieve those goals, given the respondent's understanding of the strategic environment. Because small militant organizations such as the Pakistani Taliban or even al-Qaeda have no real chance of taking over the state, analysts should not expect support to be determined by big-picture issues such as the role of Islamic law in Pakistani governance, much less by al-Qaeda's purported goal of reestablishing the Caliphate.

This alternative theory returns politics to a central role and treats those who support militancy as the cognitive equals of militant leaders and the governments opposing them. This is not to say that peoples' political choices can be separated from their religious views and economic interests. Rather, we argue that the influence of those factors is tempered by perceptions of the strategic environment in which militant groups operate.

This theory can account for two key findings. First, Pakistani support for militants attacking Indian forces in Kashmir is not greater among those more concerned with India's treatment of Kashmiri Muslims. An individual who believes that such attacks will not free Kashmir from Indian rule may reasonably expect militant activity to lead to greater repression and suffering for Kashmiri Muslims and therefore withhold support from militants fighting in Kashmir. Second, after controlling for relevant political concerns, we found that support for the Taliban is lower among respondents who believe that U.S.
forces in Afghanistan pose a threat to Pakistan. This finding suggests that would-be supporters of militant organizations consider the potential backlash against Pakistan created by Taliban attacks on U.S. forces when evaluating whether those groups pose a threat to Pakistan.

Beyond the specifics of Pakistan, studying the sources of variation in support for specific groups complements previous work on the characteristics of militants and the factors influencing rates of terrorism within countries. Rather than focus on the fighters, we provide evidence about what drives support among nonparticipants. To put it differently, we focus on the demand for militancy rather than the supply of militants.

This approach has academic and practical advantages. From an academic perspective, the obvious sensitivities of the topic mean that attitudinal measures are the best evidence researchers can gather about the willingness of nonparticipating Pakistanis to tolerate militant activity and contribute money or recruits to these organizations. From a policy perspective, the belief that reduced support leads to less militant violence is clearly why so many Western policy-oriented organizations field opinion surveys of Pakistanis. How much of a concern reducing support should be, though, is unclear given the current state of knowledge. There are no rigorous studies that demonstrate a linkage between expressed support for militancy and the supply of militants, much less studies that show a linkage between expressed support and realized levels of militant violence. Identifying such relationships requires research designs that move beyond examining public attitudes toward militancy. That said, the fact that militant organizations cannot engage in meaningful levels of violence without some measure of popular support means that understanding how to erode such support remains a first-order concern.


This article proceeds as follows. The first section reviews critically important but poorly understood differences between militant organizations operating in and around Pakistan. The second section discusses the four conventional wisdoms in greater detail and identifies testable hypotheses implied by each. The third section describes our data and the limitations inherent in our urban sample. The fourth section reports our results. The fifth section concludes by summarizing the policy implications of our research.

All Militants Are Not the Same

Analysts tend to describe militancy in Pakistan as a homogeneous phenomenon, or they tend to focus on a particular group presumed responsible for a particular attack. Popular accounts generally fail to note the differences across Pakistan’s militant groups, typically casting them all as al-Qaida affiliates. Because understanding the variation in support across militant groups requires first understanding the potentially salient differences between them, this section describes key differences between the three groups of greatest concern to Western analysts: al-Qaida, the Taliban, and the diverse “askari tanzeems,” (militant groups), which claim to focus mostly on the Kashmir issue but are also involved in sectarian violence.21

AL-QAIDA

The most important militant transnational group operating in Pakistan is al-Qaida. In the broadest terms, Pakistanis see the al-Qaida threat very differently than the average well-informed Westerner. Many Pakistanis are dubious that al-Qaida exists and that Osama bin Laden is its leader. Even fewer believe that al-Qaida and bin Laden were behind the September 11, 2001, terrorist attacks on the United States. Among Pakistanis who even tentatively concede that al-Qaida may exist, most view al-Qaida operatives as “foreign,” and Arab, in particular, or Central Asian militants such as those who make up the Islamic Movement of Uzbekistan.22


22. Author fieldwork in Pakistan since 2002. Most recently, the authors trained six teams of survey enumerators from across the country for a national sample of Pakistanis in April 2009.
In 2004 there was a spate of arrests of so-called Pakistani al-Qaida, which began to alter beliefs among Pakistanis about al-Qaida and its composition. Since the onset of dedicated suicide attacks first throughout Pakistan’s tribal areas in 2004 and later throughout important cities, more Pakistanis are coming to believe that al-Qaida could be real and that it—along with its allied groups—poses a genuine threat to Pakistan itself. Despite these developments, a 2009 poll showed that only 4 percent of Pakistanis said al-Qaida was responsible for the September 11 attacks; 29 percent blamed the United States; and 4 percent blamed Israel. The remaining 72 percent either refused to answer or said they did not know who was responsible. Statements by Interior Minister Hamid Nawaz that the United States, India, and Afghanistan are behind the lawlessness and terrorism in Pakistan are a salient reminder that many Pakistanis do not blame Islamist militants for the violence killing so many on Pakistani soil.

THE TALIBAN

Since the September 11 attacks, the international community has been focused on the Afghan Taliban. In recent years, a loose network of tribal-based Pakistani militants has formed under the name Tehrik-e-Taliban-e-Pakistan or the Pakistani Taliban. Despite some evidence of professionalization among the Afghan Taliban and their long-standing alliance with the transnational al-Qaida, the Afghan Taliban’s expressed goals are distinctly local. They remain focused on ousting international military forces from Afghanistan and overturning the Western-leaning Afghan government. The Pakistani Taliban, which emerged in 2004 and rose to prominence in 2007, is interested in the Pashtun areas of Pakistan. Its immediate goal is to oust the Pakistani military from the

26. Hamid’s subsequent clarifications suggest he meant to say those countries “are believed to be behind” the attacks. “U.S. Concerned over Hamid’s Remarks,” Daily Times (Lahore), March 3, 2008.
Federally Administered Tribal Area (FATA). To accomplish this objective, Pakistani Taliban have attacked the Pakistani military in the tribal areas and adjacent regions. Since 2006 a number of suicide attacks against government targets—military, paramilitary and police forces, and civilian leadership—have been tied to Pakistani Taliban operating from the FATA. The most prominent of these was the December 2007 assassination of former Prime Minister Benazir Bhutto.

THE ASKARI TANZEEMS
There are also a number of Pakistani militant groups that are focused on India. Hizb-ul-Mujahideen, Jaish-e-Mohammed, and Lashkar-e-Taiba have traditionally claimed to focus on the Kashmir issue. Whereas Hizb-ul-Mujahideen has remained active only in Kashmir, since at least 1999, Jaish-e-Mohammed and Lashkar-e-Taiba have begun operating beyond Kashmir and have increasingly concentrated their activities within the Indian hinterland.

In addition, Pakistan is home to several anti-Shiite groups (e.g., Lashkar-e-Jhangvi and Sipah-e-Sahaba Pakistan), which came into being to target domestic sectarian targets. These groups argue that Shiites are apostates, and they seek to establish Pakistan as a Sunni state that favors the Deobandi interpretative tradition. When our survey was in the field, Pakistaniis tended to group the Kashmir-oriented and sectarian groups under the general label of “askari tanzeems.” These militants are, or at least were, viewed by Pakistanis as distinct from al-Qaeda and the Taliban.

These distinctions seems less clear to many outside observers who note that (1) both sectarian and Kashmir-oriented groups have operated in Afghanistan; and (2) the militant infrastructure (i.e., training camps) of regionally and domestically focused groups has been used by operatives conducting transnational attacks.29

There are two complicating factors in studying support for the askari tanzeems. First, they do not all adhere to the same interpretative traditions within Sunni Islam. This makes studying the relationship between religiosity and support more challenging, as respondents following the Deobandi tradition are unlikely to feel kindly toward Lashkar-e-Taiba, which is associated

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with the Ahl-e-Hadith school and is overtly hostile to adherents of the Deobandi tradition.30

The second complicating factor is that there has been substantial changeover time in the goals and actions of the askari tanzeems. Prior to Pakistan's 2001 reorientation toward the U.S. war on terrorism, it was possible to make sound operational distinctions among militant groups. Before 2002 Lashkar-e-Taiba, Jaish-e-Mohammed, and Hizb-ul-Mujahideen operated in Indian-administered Kashmir and India, whereas the sectarian groups focused on killing Shiites in Pakistan.

Since 2002 these lines have become less distinct. There has been an important, if poorly understood, shift in the Kashmiri-oriented groups’ objectives.31 Although Lashkar-e-Taiba has not targeted the Pakistani state, it has begun operating in Afghanistan, where it originated in the late 1980s.32 Many of the Deobandi groups have shifted to anti-Pakistan rhetoric, and their stated goals now include undermining the government, the army, and other state organs. A similar evolution has occurred among sectarian groups, which have begun to support the Pakistani Taliban's efforts to establish a Deobandi-influenced parallel system of government in portions of the FATA. It should be noted that Pakistan's anti-Shiite Deobandi groups have long been active in Afghanistan, despite their stated sectarian goals.

Because the Pakistani state has always characterized many of the once Kashmir-focused groups as “freedom fighters;” it is unlikely that our analysis was affected by the broad reorientation of these groups. Even today we suspect that most Pakistanis view Lashkar-e-Taiba, Jaish-e-Mohammed, and certainly Hizb-ul-Mujahideen as remaining Kashmir focused. Similarly, most Pakistanis likely still see Lashkar-e-Jhangvi and Sipha-e-Sahaba as primarily anti-Shiite, even though they have been involved in conducting suicide attacks in the FATA and have operated in Afghanistan.

30. This relationship is further complicated because the theological divisions between Pakistani militant organizations do not match their patterns of operational cooperation. C. Christine Fair, “Militant Recruitment in Pakistan: Implications for Al Qaeda and Other Organizations,” Studies in Conflict and Terrorism, Vol. 27, No. 6 (November/December 2004), pp. 489–504.
32. During recent fieldwork in Afghanistan, Fair learned of a small but important Lashkar-e-Taiba presence in Kunar and Nuristan, two Afghan provinces bordering Pakistan.
Four Common Views about Pakistan

Most discussions of the politics of militancy in Pakistan rest on a series of four widely accepted views about who supports militancy and why. The first is that poverty is a root cause of support for militancy, or at least that poorer and less-educated individuals are more prone to militants' appeals. This is a view that is held within and without Pakistan. The second is that personal religiosity and support for sharia law are strongly correlated with support for Islamist militancy. The third is that support for political goals espoused by legal Islamist parties predicts support for militant organizations. The fourth is that those who support democracy—either in terms of supporting democratic processes such as voting or in terms of valuing core democratic principles—oppose Islamism and militancy.

Drawing on these conventional wisdoms, popular media and policy analysts in the West and even in Pakistan tend to describe support for militant groups as derivative of a person's poverty, personal religiosity, and other presumed proxies for "fanaticism." This perspective naturally leads to the view that some proportion of Pakistanis simply supports militancy outright. If Pakistanis support Kashmiri militant groups, then they are thought to be more likely to support other Islamist militant groups such as al-Qaeda, the Taliban, or even sectarian groups. This viewpoint further manifests itself in claims that all of Pakistan's militant groups must be tied to al-Qaeda.

The view that general socioreligious factors predict support for militancy suggests the existence of a discernible "taste for militancy" among supporters of Pakistani militant groups. If these conventional wisdoms as a package are correct, then support for one group should correlate with support for others, because it is underlying factors such as poverty and religiosity that drive support. This leads naturally to the following testable hypothesis.

34. We believe that this view is driven in part by the conflation of shared networks with shared supporters. Analysts mistakenly assume that because Jaish-e-Mohammed has operational ties to al-Qaeda, the two groups also share networks of supporters. This need not be the case, and our data suggest that it is not, at least not among passive supporters. For an example, see "The Mumbai Attacks: A Wake-up Call for America's Private Sector," hearing before the Subcommittee on Transportation Security and Infrastructure Protection, U.S. House Committee on Homeland Security, 111th Cong., 1st sess., March 11, 2009. Witnesses' statements showed a remarkable lack of clarity about the perpetrators' ties to other groups, their tactics, and their goals.
**H1:** Support for militant groups should be highly correlated across groups whose perceived missions and goals differ.\textsuperscript{35}

Even if the survey data do not support \textit{H1}, one might still think that specific conventional wisdoms have merit. The remainder of this section therefore examines each in detail and derives testable hypotheses from them.

**CONVENTIONAL WISDOM \#1: POVERTY PREDICTS MILITANCY**

The poverty-militancy linkage animated the April 2009 donors’ conference in Tokyo that netted nearly $6 billion in aid for Pakistan.\textsuperscript{36} It also animates the U.S. government’s ambitious FATA development plan and other activities in Pakistan.\textsuperscript{37} This approach is motivated by a desire to reduce both the demand for militancy and the supply of militants. As the former action plan of the U.S. Agency for International Development for Pakistan argued, “Economic growth means more jobs, which can . . . thwart those who would recruit the unemployed for terrorism.”\textsuperscript{38} Because the current survey cannot directly measure the likelihood of becoming a militant, we test the following demand-side hypothesis.

**H2:** Poorer people should be more supportive of militant organizations.

**CONVENTIONAL WISDOM \#2: RELIGIOSITY PREDICTS MILITANCY**

The religiosity-militancy linkage is seldom expressed so clearly, for obvious political reasons, but it drives public policy discussions about reform of the madrassas (religious schools) and education reform generally as enshrined in the 9/11 Commission Report and in U.S. government efforts to help Pakistan reform its educational system.\textsuperscript{39} The more nuanced hypothesis that religiosity

\textsuperscript{35} We use “perceived missions and goals” because Pakistanis’ perceptions of these goals and missions likely differ from the actual goals and missions in the post-2002 period.

\textsuperscript{36} After Pakistan’s foreign minister, Shah Mahmood Qureshi, spoke at the successful donors’ conference in Tokyo, a Pakistani press release emphasized that “poverty alleviation is fundamental to contain and reverse extremism. Alternatives have to be offered to the youth from disadvantaged parts of the population to wean them away from the appeal of extremism.” Stuart Biggs and Takashi Hirokawa, “Pakistan Gets $5.28 Billion for Economy, Security (Update #2),” Bloomberg, April 17, 2009.


\textsuperscript{38} See “USAID/Pakistan Interim Strategic Plan May 2003—September 2006.”

\textsuperscript{39} This view is reflected in the 9/11 Commission Report, which recommends that “the United States should support Pakistan’s government in its struggle against extremists with a comprehensive effort that extends from military aid to support for better education.” National Commission on Terrorist Attacks upon the United States, \textit{The 9/11 Commission Report}, p. 369.
and poverty work in tandem was raised during a May 2009 hearing of the U.S. House of Representatives Foreign Affairs Committee, when several members asserted that madrassa attendance and militant recruitment were related to both poverty and the lack of available options for the poor. Such nuance aside, arguments about the threat posed by religious schooling and Islamism suggest another simple hypothesis. \(^{41}\)

**H3:** The more religious people are, the more likely they are to support militant organizations.

**CONVENTIONAL WISDOM #3: ISLAMISM PREDICTS MILITANCY**

Since 2002 analysts have paid considerable attention to Islamist parties in Pakistan. Prior to the February 2008 general election, many believed that if these parties prevailed at the ballot box, militants would enjoy a more permissive operational environment. This view rested on the idea that supporters of Islamism and sharia are less likely to view Islamist militant groups as threats and may be more inclined to find their operations justifiable. A corollary is that Muslims who are less supportive of Islamism and sharia will be more likely to reject militancy and even embrace aggressive efforts to diminish the operational space of militants.

An alternative view suggests that individuals who express a preference for greater sharia and Islamization do so because they believe themselves to be pious Muslims, some subset of whom will reject militancy because it violates notions of justice or other aspects of sharia. More broadly, the association between Islamist militancy, on the one hand, and violence, vigilantism, and theft, on the other, suggests that a preference for greater Islamization may imply less support for militant organizations.

There is limited evidence to adjudicate between these divergent possibilities. Christine Fair and Bryan Shepherd’s study of support for suicide attacks in

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42. The Islamist political party coalition—the Muttahida Majlis-e-Amal—was consistently criticized for supporting the Taliban and accommodating the Pashtun Islamist insurgency riling the border areas between Pakistan and Afghanistan. See, for example, Magnus Norell, “The Taliban and the Muttahida Majlis-e-Amal (MMA),” *China and Eurasia Forum Quarterly*, Vol. 5, No. 3 (August 2007), pp. 61–82. For a more nuanced view, see Joshua T. White, *Pakistan’s Islamist Frontier: Islamic Politics and U.S. Policy in Pakistan’s North-West Frontier* (Washington, D.C.: Center on Faith and International Affairs, 2008).
fourteen countries finds that supporters of a greater role for religious parties in politics were more inclined to find suicide attacks and other acts of violence against civilians to be justifiable.\textsuperscript{43} Quintan Wiktorowicz's study of al-Muhajirun recruits found the opposite relationship: those who were pious were far less vulnerable to al-Muhajirun's message.\textsuperscript{44} Despite the evidence presented in Wiktorowicz's work, the prevailing view is that support for Islamism and sharia correlates with support for militancy, leading to the following hypothesis.

\textit{H4:} Support for militant organizations should be positively correlated with support for the expressed goals of Islamist political parties and the importance respondents place on religion as a source of governing principles for society.

\textbf{CONVENTIONAL WISDOM \#4: ISLAMISM AND TERRORISM VERSUS DEMOCRACY}

Policymakers and analysts of Pakistan often assume that democracy exists in opposition to Islamism and militancy.\textsuperscript{45} There are two aspects to this assumption: (1) those who lack faith in democratic institutions are more likely to support militancy; and (2) those who feel that core democratic values are important are less likely to support militancy.\textsuperscript{46} This leads to two hypotheses.

\textit{H5a:} The greater the degree to which respondents believe Pakistan should be or is governed by democratic principles, the less they will support militancy.

\textit{H5b:} The more that respondents value representative government and other core democratic values, the less they will support militancy.

\textbf{SOPHISTICATED CONSUMERS OF MILITANCY}

Returning politics to the center of explanations for why individuals support militant organizations suggests that they will do so when two conditions hold: (1) those organizations are using violence to advance political goals about which the individual cares deeply; and (2) violence appears to be a reasonable means to achieve those goals, given the strategic situation. This perspective does not ignore religion or poverty: both should clearly influence the political goals individuals care about. Instead, we argue that the influence of those factors is strongly tempered by perceptions of the strategic environment in which groups operate. This perspective has two advantages over the conventional

\textsuperscript{43} Fair and Shepherd, “Research Note: Who Supports Terrorism?”
\textsuperscript{44} Quintan Wiktorowicz, \textit{Radical Islam Rising: Muslim Extremism in the West} (Lanham, Md.: Rowman and Littlefield, 2005).
\textsuperscript{45} Author interactions with several staff members of the U.S. House of Representatives and Senate between January 2007 and May 2009.
\textsuperscript{46} The way in which "secularization" is translated into Urdu (\textit{laadiniyat}) connotes a social state devoid of religion. There are few proponents for such a worldview in Pakistan. Thus many Pakistanis reject the notion of secularization.
wisdoms described above. First, it treats supporters of militancy as the cognitive equals of militant leaders and the governments opposing them. Second, it can explain why individual Pakistanis support some kinds of militancy but not others.

That Pakistanis make nuanced judgments among militant groups should not be surprising. Militant groups that operate with different objectives should be expected to mobilize different grievances. Someone who supports a group operating in Kashmir because they believe that Kashmiris living under Indian control are grievously abused, or because they believe that other means of alleviating Kashmiris’ suffering are nonexistent, or because they hold both beliefs, need not have strong feelings toward the Afghan Taliban. Likewise, a person motivated by anti-Shiite sentiment may support those groups targeting Shiites, but remain ambivalent about the Kashmiri cause.

If our alternative theory is correct, support for different militant groups should vary as a function of the causes they espouse, the utility of violence in pursuit of that cause, and the other benefits they provide. This view leads to three hypotheses about specific groups.

H6a: People dissatisfied with the Afghan government and the U.S. role in Afghanistan should be more supportive of the Taliban.

H6b: People who believe that the United States has a negative effect on the world should be more supportive of al-Qaida.

H6c: People who are concerned with India’s treatment of Muslims in Kashmir should be more supportive of the askari tanzeems.

Of course, our alternative hypothesis also predicts that concern with these issues should be tempered by beliefs about elements of the strategic environment that make violence more or less useful as a means of achieving valued political ends. Although we can identify several group-specific conditional hypotheses suggested by our theory, we are unable to test them with the current survey instrument. We do so in ongoing work.

Methodology and Data

Our survey data were developed through a joint project between the United States Institute of Peace and the Program on International Policy Attitudes (PIPA). Fair and the PIPA research staff designed the survey instrument with input from Shapiro and other scholars.47 The questionnaire probes Pakistani

47. Question-by-question results are reported in C. Christine Fair, Clay Ramsay, and Steven Kull,
public opinion on an array of policy concerns, including: (1) attitudes toward a variety of militant groups including al-Qaida, the Taliban, and various askari tanzeems, as well as toward ethnic militant movements such as the Baluch insurgency; (2) the government’s handling of the crises in the FATA and at the Red Mosque; and (3) respondents’ opinions about the legitimacy of attacks by militants on different kinds of targets (e.g., Indian police, female relatives and children of armed forces personnel, and civilian targets such as the Indian parliament).

This section describes the data, discusses the limitations of our sample, and then briefly describes how we measured support for militant organizations.

SAMPLE AND LIMITATIONS
The survey was conducted by A.C. Nielsen Pakistan, which carried out 907 face-to-face interviews with urban Pakistanis in nineteen cities from September 12 to September 28, 2007. This was before President Pervez Musharraf declared a six-week state of emergency on November 2007 and three months before the assassination of former Prime Minister Benazir Bhutto. The sample was designed to be broadly representative of urban Pakistani adults aged eighteen and older. The overall response rate was 35 percent. If a respondent was not initially available, the surveyor made three attempts to establish contact. If those efforts failed, a substitution was made in the same locality with a person having similar demographics. Efforts were made to ensure that the substituted respondent was of the same gender and within two years of the selected respondent’s age. This design yields a margin of error of +/− 3.3 percent.

A.C. Nielsen Pakistan used the 1998 Population Census of Pakistan as the main sampling frame to determine the sample sizes for the nineteen cities. To control for possible deviations from random sampling in the administration of the survey, we used a vector of demographic variables—age, education, and gender—to construct sample weights based on the 2004–05 Household Integrated Economic Survey, the most recent national survey for which data have

48. Cities included were Hyderabad, Kambar Ali Khan, Karachi, Khangarh, Kharian, Khudzdar, Lachi, Lahore, Lalian, Mingora, Multan, Okara, Peshawar, Quaidabad, Quetta, Rawalpindi/ Islamabad, Sadiqabad, Shahpur Jahania, and Tando Adam.
49. A.C. Nielsen Pakistan made 2,618 contacts, yielding 907 completed interviews. Many (268) houses were locked on contact, 26 refused contact, 699 selected respondents were not at home, and 83 refused because they could not speak Urdu.
been released. We found that the survey was not well balanced and note wherever using our sample weights changes the results. Weighting changes few results but does provide additional evidence against the conventional wisdoms regarding education and democratic values.

A key limitation of these data is that they reflect the views of urban Pakistanis, who represent 36 percent of Pakistan’s estimated population of 176 million people. Although studying these issues with an urban sample is less than ideal, these results remain extremely informative for several reasons. First, no similarly systematic data exist that cover both urban and rural areas, so these data represent a large step in the right direction. Second, most of the desirable targets for Pakistani militant groups are located in urban areas, as is most of the country’s wealth. Third, Islamist political parties such as the Jamaat-e-Islami enjoy higher levels of support in Pakistan’s urban areas—especially its universities—than they do in the countryside.

Most important, there are strong reasons to suspect that urban areas are the prime recruiting grounds for militant organizations. Despite numerous anecdotal accounts of the impoverished, poorly educated countryside producing militants, no one to date has collected systematic data on the characteristics of Pakistani militants. Studies of militant characteristics using convenience samples or textual analyses of militant publications find that many of Pakistan’s most lethal militants are from urban areas and are better educated and wealthier than the average Pakistani.

Given these facts, we argue that understanding which factors influence the attitudes of urban Pakistanis vis-à-vis militancy is crucial. We therefore proceed with our analysis with the caveat that these results cannot be generalized to rural Pakistanis.

51. Pakistan has not conducted a census since 1998. Thus estimates of population as well as the breakdown of rural and urban population may be subject to considerable measurement error. Figure taken from the CIA World Factbook, “Pakistan,” last updated April 23, 2009, https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html.
52. We are currently fielding a survey that will remedy this situation.
MEASURING SUPPORT FOR MILITANT ORGANIZATIONS

Because Pakistanis are understandably reluctant to say they support groups such as al-Qaida when being questioned by someone noting their answers on a clipboard, we could not directly inquire about support for militant groups. Instead, we asked our respondents about the extent to which the activities of the following six groups posed a threat to “the vital interests of Pakistan in the next ten years”: Sindhi nationalists in Pakistan; Mohajir nationalists in Pakistan; Baluch nationalists in Pakistan; Islamist militants and local Taliban in the FATA and settled areas; al-Qaida; and askari tanzeems in Pakistan.55

Asking the question in this way yields higher response rates than asking directly about support for militant groups and allows us to test hypotheses about respondents’ support if we make the identifying assumption that fear of militant groups is inversely correlated with support for them. Figure 1 shows the patterns of support for militant groups across all respondents.

Two patterns emerge from figure 1. First, the vast majority of Pakistanis see militant Islamist organizations as a threat. Less than 25 percent think that the askari tanzeems are “not a threat.” Second, patterns of support for the nationalist militias differ substantially from those for Islamist militant organizations, suggesting that Pakistanis discriminate between different types of militant organizations.

Despite this apparent discrimination, a number of demographic factors, including age, education, and gender, might still be expected to influence support for militancy across wide swaths of the Pakistani population. The most efficient way to summarize these relationships across a number of militant groups is through the use of multivariate regression tables. Table 1 reports the results of ordered-probit regressions showing the relationship between respondents’ support for militant groups and background demographic variables. Here, higher values on the dependent variable indicate less perceived threat and therefore greater levels of support. Through the analysis, we treat ordinal independent variables—level of education, income quartile, opinion on a four-point scale, and the like—as continuous only when doing so does not substantively change the results.

Table 1 shows that there is no consistent relationship between demographic characteristics and respondents’ support for specific militant organizations. Although greater levels of education correlate with lower levels of support for

55. “Askari tanzeems” are commonly understood by Pakistanis to be groups fighting in Indian-controlled Kashmir and attacking Indian targets over the Kashmir issue. We cannot rule out the possibility that some respondents understand the term “askari tanzeem” as including sectarian militias.
Mohajir nationalists, the Taliban, and al-Qaida, they have no statistically significant relationship to support for the askari tanzeems or the other two nationalist groups. As with figure 1, this second pass through the data suggests that there is a great deal of heterogeneity in patterns of support across groups. The next section seeks to explain this heterogeneity.

Results

This section begins by assessing the evidence for and against each of the four powerful conventional wisdoms outlined above. In each case, the evidence appears to falsify hypotheses that should be supported if the conventional wisdom is correct. We then turn to an assessment of hypotheses generated by our alternative theory. The results are broadly supportive of our theory, suggesting several directions for future research.

POVERTY AND RELIGIOSITY AND SUPPORT FOR MILITANT ORGANIZATIONS
The dominant argument in Western policy discourse about the factors that lead people to support Islamist militancy is neatly encapsulated by the 9/11
<table>
<thead>
<tr>
<th></th>
<th>Sindhi Nationalists</th>
<th>Mohajir Nationalists</th>
<th>Baluch Nationalists</th>
<th>Taliban</th>
<th>Al-Qaeda</th>
<th>Askari Tanzeems</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Age</strong></td>
<td>-0.041 (-0.132-0.049)</td>
<td>-0.031 (-0.120-0.058)</td>
<td>0.002 (-0.093-0.097)</td>
<td>-0.038 (-0.135-0.060)</td>
<td>0.000 (-0.092-0.092)</td>
<td>-0.021 (-0.115-0.072)</td>
</tr>
<tr>
<td><strong>Education</strong></td>
<td>0.013 (-0.114-0.141)</td>
<td>-0.133** (-0.260-0.006)</td>
<td>0.100 (-0.037-0.237)</td>
<td>-0.201*** (-0.347-0.055)</td>
<td>-0.212*** (-0.349-0.076)</td>
<td>0.021 (-0.112-0.155)</td>
</tr>
<tr>
<td><strong>Male</strong></td>
<td>0.000 (-0.162-0.163)</td>
<td>-0.138* (-0.295-0.019)</td>
<td>-0.226*** (-0.394-0.058)</td>
<td>-0.049</td>
<td>0.120</td>
<td>-0.026 (-0.196-0.145)</td>
</tr>
<tr>
<td><strong>Tau_1</strong></td>
<td>-0.887*** (-1.026***-0.779***-0.369***-0.509***</td>
<td>-0.043</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Tau_2</strong></td>
<td>0.005 (-0.021</td>
<td>0.098</td>
<td>0.452***</td>
<td>0.401**</td>
<td>0.768***</td>
<td></td>
</tr>
<tr>
<td><strong>Observations</strong></td>
<td>788 790</td>
<td>754</td>
<td>692</td>
<td>711</td>
<td>710</td>
<td></td>
</tr>
<tr>
<td><strong>χ²</strong></td>
<td>0.933 7.846**</td>
<td>8.336**</td>
<td>8.308**</td>
<td>10.55**</td>
<td>0.471</td>
<td></td>
</tr>
</tbody>
</table>

Robust 95 percent confidence intervals in parentheses.

*** p < 0.01, ** p < 0.05, * p < 0.1.

The negative relationship between education and support for al-Qaeda disappears when using sample weights.
Commission Report, which concludes that "Pakistan’s endemic poverty, widespread corruption, and often ineffective government create opportunities for Islamist recruitment. Poor education is a particular concern. Millions of families, especially those with little money, send their children to religious schools, or madrassas. Many of these schools are the only opportunity available for an education, but some have been used as incubators for violent extremism."  

Note the absence of politics from this argument. Instead, background structural factors are described as motivating support for militant organizations. If this view is correct, then our data should offer evidence for H1: support for militant organizations should be highly correlated across groups whose perceived missions and goals differ. The six groups we asked about have fairly well differentiated goals, but they can be roughly divided into nationalistic and Islamist categories with Sindhi, Mohajir, and Baluch militancy falling into the former category and the Islamist militants and local Taliban, al-Qaida, and askari tanzeems into the latter.

Examining patterns of support across groups highlights two factors. First, within categories there is a high degree of correlation between respondents’ support for militant groups. Second, between categories the correlations are much weaker. In all possible pairings of nationalistic and Islamist groups, the correlations were significantly smaller than in any possible within-category pairing. The relatively weak correlation between categories provides initial evidence against the hypothesis that support for militancy is driven by common factors across groups.

To further assess how well support for one militant group predicted support for other militant groups, we conducted a series of simple linear regressions. Treating the response variable as continuous, we found that approximately 43 percent of the variance in support for the Taliban can be explained using expressed support for other militant groups, and 59 percent and 56 percent of the variance in support for al-Qaida and the askari tanzeems can be explained with expressed support for other groups. This finding suggests that underlying factors do drive support across these Islamist militant groups.

The coefficients on responses within categories were uniformly positive and

57. The differences between correlation coefficients across groups were statistically significant at the 95 percent confidence level using Fisher’s Z-transformation, which remains robust when Spearman’s correlation coefficients are used.
58. Because the proper interpretation of various pseudo-$r^2$ measures is debated, we chose to quantify explained variation over our categorical outcome variable using the $r^2$ measure from a linear regression. The respective $r^2$ measures for the Taliban, al-Qaida, and the askari tanzeems are 0.26, 0.39, and 0.35.
statistically significant; the between-category coefficients, however, were not. In a number of cases, expressed support for nationalist militants was negatively conditionally correlated with expressed support for Islamists. In other words, within both the nationalist and Islamist militant groups, support for one group was correlated with support for the others. Support for nationalist groups, however, was not significantly correlated with support for Islamist groups and vice versa. This suggests that whatever the level of support for militancy, it is not an undifferentiated support for violent politics.

The implicit hypothesis in the 9/11 Commission Report quotation above is that Pakistanis’ support for militancy is driven by some combination of religiosity and poverty. We measured poverty several ways. First, we assessed respondents’ perceptions of the economy by asking (1) if the Pakistani economy was on the right track or the wrong track; and (2) how Pakistan’s economy was doing relative to that of India. We assessed objective economic performance by asking respondents who were employed how much cash they earned in the previous year. To capture social pressures that might arise from community economic performance, we used three questions from the 2004–05 Pakistan Social and Living Standards Measurement Survey.\(^{59}\) One question asked respondents to rate whether their household’s economic situation was better or worse than in the previous year. The second asked respondents to rate whether their community’s economic situation was better or worse than in the previous year. The third captured the rates of child immunization by district.

Our examination of the simple bivariate relationships between the six poverty measures and support for different militant groups revealed no strong patterns. Using a standard chi-squared test, for example, we were unable to reject the null hypothesis that there is no relationship between whether respondents feel the Pakistani economy is on the right track and their support for the Taliban, al-Qaida, or the askari tanzeems. Contrary to the conventional wisdom, respondents who felt that the Pakistan economy was doing well with respect to India were more supportive of al-Qaida and the askari tanzeems. When we added variables that address support for other militant groups, perceptions of Pakistan’s economic performance relative to India’s no longer predict support for al-Qaida, but the positive relationship for the askari tanzeems remains statistically significant. This pattern makes sense if respondents are thinking strategically about the groups they support, as the askari tanzeems can harass India with greater impunity when Pakistan’s economy is strong.

We used four questions to assess respondents’ level of religious fervor. The first asked respondents whether they felt that sharia should play a larger role,

\(^{59}\) This is the most recent survey for which district-level data are available.
a smaller role, or about the same role in Pakistani law as it does today. The second asked respondents to rank which of the following categories is most central to their "sense of self or identity": Pakistani, Muslim, individual, citizen of the world, or member of your ethnic group. The third asked respondents to rate their agreement with five statements listing what the goals of schooling should be, with one of the five goals being to "create good Muslims." The fourth asked respondents to rate how important it is for them to "live in a country that is governed according to Islamic principles."

These four questions were designed to tap into different elements of individual religiosity. We recoded all four questions so that higher values correspond to giving greater priority to religion (e.g., ranking being a Muslim as one's most important identity). Interestingly, the correlation between these four measures was fairly weak. Preferences about the role of religion in governance, measured in two different ways, were very weakly correlated with self-identification as a religious individual and with beliefs about the role of religion in education. These results suggest that the concept of "personal religiosity" provides little leverage for explaining policy preferences.

Once we account for both religiosity and poverty in the same regression, we find little support for either H2 or H3. Table 2 summarizes the relationship between poverty, religiosity, and support for the Taliban, al-Qaida, and the askari tanzeems. Including the vector of demographic variables changes none of these results. The table includes only religion and poverty measures that made statistically significant contributions to explained variance using standard nested-model statistics. Specific results aside, only two of four religiosity measures and just three of six poverty measures helped to explain support for at least one group, suggesting serious problems with arguments about a generic link between religion or poverty and support for Islamist militancy.

Two patterns are immediately evident. First, support for the Taliban is not well explained by religiosity. Respondents who favored a greater role for sharia in Pakistani law and those who want sharia to play a smaller role support the Taliban and al-Qaida more than those who feel that the role of sharia is just right. This leads naturally to the Goldilocks conjecture: people who want change support militancy, but the change they want is not necessarily greater religiosity in public life. In fact, the askari tanzeems were the only group for whom the relationship was in the expected direction, such that greater religiosity led to more support. Second, the predictive value of these

60. Specifically, table 2 includes all religiosity and poverty measures that yielded statistically significant Wald and likelihood-ratio statistics for at least one group when compared to a baseline model using only demographic factors.
models is low. The last line of table 2 shows the adjusted percentage predicted correctly. This is the proportion of responses correctly predicted beyond the number predicted by always choosing the most common response. In other words, using measures of religiosity and poverty to predict support yields less than a 5 percent improvement over an intelligent guess.

Our analysis of variables not included in table 2 reveals another key point: religiosity writ large is a poor predictor of support for militant organizations. Respondents who identified producing good Muslims as a crucial goal for schools were not more likely to support the Taliban or askari tanzeems. More interestingly, respondents’ rankings of the importance of using Islamic principles for governing Pakistan never made a significant contribution to our models. This is a significant policy point: support for Islam as a governing principle

<table>
<thead>
<tr>
<th>table2</th>
<th>Religiosity, Poverty, and Support for Islamist Militancy</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Taliban</td>
</tr>
<tr>
<td>Greater role for sharia in Pakistani law</td>
<td>0.713***</td>
</tr>
<tr>
<td></td>
<td>(0.374–1.052)</td>
</tr>
<tr>
<td>Lesser role for sharia in Pakistani law</td>
<td>0.452***</td>
</tr>
<tr>
<td></td>
<td>(0.167–0.736)</td>
</tr>
<tr>
<td>Muslim first(^a)</td>
<td>0.215</td>
</tr>
<tr>
<td></td>
<td>(–0.183–0.614)</td>
</tr>
<tr>
<td>Muslim second(^b)</td>
<td>0.033</td>
</tr>
<tr>
<td></td>
<td>(–0.386–0.452)</td>
</tr>
<tr>
<td>Growth relative to India</td>
<td>0.052</td>
</tr>
<tr>
<td></td>
<td>(–0.030–0.134)</td>
</tr>
<tr>
<td>Percentage of immunized children</td>
<td>0.002</td>
</tr>
<tr>
<td></td>
<td>(–0.004–0.008)</td>
</tr>
<tr>
<td>Community’s economic performance</td>
<td>0.013***</td>
</tr>
<tr>
<td></td>
<td>(0.007–0.018)</td>
</tr>
<tr>
<td>Tau_1</td>
<td>0.789***</td>
</tr>
<tr>
<td></td>
<td>(0.170–1.409)</td>
</tr>
<tr>
<td>Tau_2</td>
<td>1.709***</td>
</tr>
<tr>
<td></td>
<td>(1.078–2.339)</td>
</tr>
<tr>
<td>Observations</td>
<td>563</td>
</tr>
<tr>
<td>Adjusted percentage predicted correctly</td>
<td>0.048</td>
</tr>
</tbody>
</table>

Robust 95 percent confidence intervals in parentheses.
\(^a\)Muslim cited as most important identity out of five possibilities (Pakistani, Muslim, individual, citizen of the world, or member of your ethnic group).
\(^b\)Muslim cited as second most important out of five possibilities.
in Pakistani politics does not predict support for any of the militant groups of concern to Western policymakers.

We also found substantial evidence that religiosity is much less consequential than underlying political factors. Two findings support this statement. First, the explanatory value of support for other militant groups in these models vastly exceeds that of religiosity and poverty. Second, the marginal impact of the religiosity variables is always small, even when statistically significant. For the average respondent, moving from not citing Islam as a key identity to saying it is their most important identity is insufficient to increase the expressed level of support for the Taliban or al-Qaida. Taken together, these results strongly suggest that if there is some common factor driving support for all these militant organizations, it is not religion.

Poverty fares even more poorly than religiosity in explaining support for Islamist militant organizations. Perceptions of Pakistan's economic performance relative to India’s have the opposite relationship predicted by H2. The better a respondent sees Pakistan’s economy performing relative to India’s, the more supportive he or she is of al-Qaida and the askari tanzeems. Once we account for support for other militant organizations, this relationship disappears in the case of al-Qaida and becomes stronger in the case of the askari tanzeems, again suggesting heterogeneity not captured in the conventional wisdom about poverty and support. Perceptions that our respondents are falling behind economically are also not tied to support for militancy. Instead, those who see Pakistan’s economy pulling away from India’s are more likely to support militant activity directed at India. These results remain robust when controlling for all the religiosity variables that we discuss in the following subsection.

Both measures of the economic conditions of respondents’ communities also run in the opposite direction predicted by H2. Respondents from communities who saw their economic conditions improving were more supportive of both the Taliban and the askari tanzeems. Those from communities with high rates of child immunization were more supportive of the askari tanzeems.

In sum, our data provide no evidence for H2, the notion that poverty drives support for Islamist militant organizations in Pakistan. There is at best weak evidence for H3, that religiosity does so. Rather, better economic conditions may be associated with greater support for Islamist militancy in Pakistan.

61. A wide variety of nested model tests and fit statistics show that the amount of variation explained by religiosity and poverty is much smaller than that explained by support for other Islamist groups. Additional summary tables for this and all other results are available from the authors upon request.
ISLAMIST POLITICS AND SUPPORT FOR MILITANCY

If $H4$ is correct, then support for Islamist parties' political goals should correlate with support for specific militant groups. We measured support for Islamist politics in several ways. First, we measured the importance that respondents placed on religion as a source of governing principles for society by assessing the gap between (1) how important Pakistanis felt it was to live in a country governed by Islamic principles; and (2) the extent to which they felt that Pakistan is governed by those principles. The greater this gap, the more supportive $H4$ predicts Pakistanis should be of Islamist militancy.

We then asked two questions that measured respondents’ feelings about issues that were central in the public agendas of Islamist political parties. The first asked respondents whether they supported the 2006 Women’s Protection Act. This act stirred national debate by effectively contravening key portions of the 1979 Hudood Ordinances that had enforced extremely harsh punishments against women for extramarital sex and made it exceedingly hard for women to prove rape charges. The amended law places rape under the civil code, eliminates the evidentiary requirement for four male witnesses, and removes victims’ exposure to prosecution for adultery. Politicians within the Islamist parties vociferously insisted that these changes would encourage moral laxity, and some even threatened to resign from parliament. The second Islamist politics question probed respondents’ levels of support for requiring madrassas to spend more time on math and science. Islamist parties objected to having the state dictate the curriculum at religious schools. $H3$ predicts that opposition to both changes should be positively correlated with support for Islamist militants.

Finally, we assessed whether respondents would like to see the “Talibanization” of daily life in Pakistan continue. “Talibanization,” in this context, meant the imposition of austere Taliban-style social strictures based on a rigid interpretation of sharia law. A few notes about the term “Talibanization” are in order. When our survey was fielded, the term was already in use in the Pakistani press, and it became more common as militants swept the important tourist destination of Swat, an area not previously known for its militancy. The term appears to imply several things. First, Talibanization implies violence and the lethal targeting of security forces (i.e., police, military, and paramilitary), tribal leaders, and other politicians opposing Islamist militants. It also includes the establishment of separate or parallel systems of governance, including courts dispensing extralegal punishments. It is important to keep in mind that respondents may reject Talibanization because it is a restric-

tion on personal choice—to veil, to keep a beard, to watch “sinful” DVDs, to listen to music, to send daughters to school, to allow them to work—even if they do not reject the Afghan Taliban. In other words, Pakistanis may find the Afghan Taliban to have some utility while it operates in Afghanistan, even if they do not relish a Taliban-like presence in their own country. H4 predicts that opposition to Talibanization should be negatively correlated with support for all three groups.

Table 3 summarizes the influence of attitudes toward Islamist parties’ major political issues on support for different militant organizations.63 Once again, we have treated ordinal variables as continuous only where doing so does not substantively affect the results.

Not surprisingly given our earlier results on religious identity, support for Islamist politics did not translate into support for militant organizations in any consistent way across groups. Dislike of the Women’s Protection Act, for example, correlated with greater support for the askari tanzeems, but not with greater support for the Taliban or al-Qaida. A different alignment emerged around the gap between respondents’ desired role for Islam and its actual role in Pakistani governance. The larger respondents felt this gap was, the more supportive they were for all three Islamist militant groups, but the effect was statistically significant only for the Taliban and al-Qaida. Respondents opposed to imposing a math/science requirement on madrassas were more supportive of the askari tanzeems, but they were no more likely than other respondents to support the Taliban or al-Qaida. Table 3 also shows that contrary to H4, support for militant organizations is not positively correlated with support for Talibanization. Those who want to see less Talibanization are less supportive of all three Islamist militant groups than those who think that the level of Talibanization is appropriate. Those who want to see more Talibanization, however, are not more supportive of militant organizations.64

Overall, our results strongly suggest that support for Islamist politics does not predict support for Islamist militant organizations.

**DEMOCRACY AND SUPPORT FOR MILITANCY**

Policymakers and analysts of Pakistan typically argue that democracy exists in opposition to Islamism and militancy, and that it may even correlate with de-

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63. The small number of responses in table 3 is driven by the fact that nonresponse rates for some of these questions approached 25 percent, but the specific nonresponses varied across respondents, which means that few respondents answered all the questions. Removing one or two variables at a time from the models increases the sample size but does not change any core results. We therefore report the full model, despite the small sample size.

64. After controlling for feelings about Islamist politics, the results from table 2 remain the same, casting further doubt on hypotheses linking religion and poverty to militancy.
Table 3. Islamist Politics and Pakistanis’ Support for Islamist Militant Groups

<table>
<thead>
<tr>
<th></th>
<th>Taliban</th>
<th>Al-Qaeda</th>
<th>Askari Tanzems</th>
</tr>
</thead>
<tbody>
<tr>
<td>Islam as governing</td>
<td>-0.033*</td>
<td>0.045**</td>
<td>-0.010</td>
</tr>
<tr>
<td>principle gap</td>
<td>(-0.003–0.069)</td>
<td>(0.008–0.061)</td>
<td>(-0.028–0.046)</td>
</tr>
<tr>
<td>Opposition to Women’s</td>
<td>0.080</td>
<td>0.072</td>
<td>0.275***</td>
</tr>
<tr>
<td>Protection Act</td>
<td>(-0.043–0.202)</td>
<td>(-0.055–0.200)</td>
<td>(0.145–0.406)</td>
</tr>
<tr>
<td>Islam politics</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Opposition to math/</td>
<td>-0.033</td>
<td>0.093</td>
<td>0.183***</td>
</tr>
<tr>
<td>science requirement</td>
<td>(-0.165–0.099)</td>
<td>(-0.036–0.221)</td>
<td>(0.049–0.316)</td>
</tr>
<tr>
<td>More Talibanization</td>
<td>-0.078</td>
<td>0.177</td>
<td>0.168</td>
</tr>
<tr>
<td></td>
<td>(-0.415–0.260)</td>
<td>(-0.184–0.539)</td>
<td>(-0.186–0.523)</td>
</tr>
<tr>
<td>Less Talibanization</td>
<td>-0.511***</td>
<td>-0.566***</td>
<td>-0.329**</td>
</tr>
<tr>
<td></td>
<td>(-0.800–0.222)</td>
<td>(-0.867–0.266)</td>
<td>(-0.625–0.033)</td>
</tr>
<tr>
<td>More sharia</td>
<td>0.626***</td>
<td>0.599***</td>
<td>0.399*</td>
</tr>
<tr>
<td></td>
<td>(0.192–1.059)</td>
<td>(0.179–1.020)</td>
<td>(-0.602–0.800)</td>
</tr>
<tr>
<td>Less sharia</td>
<td>0.421**</td>
<td>0.596***</td>
<td>0.308</td>
</tr>
<tr>
<td></td>
<td>(0.036–0.806)</td>
<td>(0.231–0.962)</td>
<td>(-0.062–0.677)</td>
</tr>
<tr>
<td>Muslim first</td>
<td>-0.001</td>
<td>0.240</td>
<td>0.205</td>
</tr>
<tr>
<td></td>
<td>(-0.522–0.520)</td>
<td>(-0.323–0.803)</td>
<td>(-0.287–0.698)</td>
</tr>
<tr>
<td>Muslim second</td>
<td>-0.068</td>
<td>-0.039</td>
<td>0.199</td>
</tr>
<tr>
<td></td>
<td>(-0.616–0.481)</td>
<td>(-0.629–0.551)</td>
<td>(-0.306–0.703)</td>
</tr>
<tr>
<td>Religion and poverty</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Growth relative to</td>
<td>0.169***</td>
<td>0.170***</td>
<td>0.249***</td>
</tr>
<tr>
<td>India</td>
<td>(0.063–0.276)</td>
<td>(0.055–0.286)</td>
<td>(0.142–0.356)</td>
</tr>
<tr>
<td>Percentage of</td>
<td>0.002</td>
<td>0.008*</td>
<td>0.015***</td>
</tr>
<tr>
<td>immunized children</td>
<td>(-0.007–0.010)</td>
<td>(-0.001–0.018)</td>
<td>(0.006–0.025)</td>
</tr>
<tr>
<td>Community’s economic</td>
<td>0.011***</td>
<td>0.011***</td>
<td>0.014***</td>
</tr>
<tr>
<td>performance</td>
<td>(0.004–0.019)</td>
<td>(0.003–0.020)</td>
<td>(0.005–0.023)</td>
</tr>
<tr>
<td>Tau_1</td>
<td>0.699</td>
<td>1.873***</td>
<td>2.702***</td>
</tr>
<tr>
<td></td>
<td>(-0.160–1.557)</td>
<td>(0.957–2.789)</td>
<td>(1.734–3.670)</td>
</tr>
<tr>
<td>Tau_2</td>
<td>1.715***</td>
<td>2.893***</td>
<td>3.834***</td>
</tr>
<tr>
<td></td>
<td>(0.843–2.587)</td>
<td>(1.943–3.844)</td>
<td>(2.815–4.853)</td>
</tr>
<tr>
<td>Observations</td>
<td>360</td>
<td>346</td>
<td>356</td>
</tr>
<tr>
<td>Adjusted percentage</td>
<td>0.190</td>
<td>0.126</td>
<td>0.296</td>
</tr>
<tr>
<td>predicted correctly</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Robust 95 percent confidence intervals in parentheses.
*** p < 0.01, ** p < 0.05, * p < 0.1.
Reference category for Talibanization is that respondents want the same amount of Talibanization.
mands for secularization, the presumed polar opposite of Islamism and militancy. If this perspective were correct, then support for militancy should be decreasing in respondents' beliefs about the potential for change through democratic institutions, as predicted by H5a. We asked two questions that directly measured respondents' perceptions of the possibility for democratic change. First, we asked respondents how confident they were that if elections were held, they would be “free and fair.” We then asked them to rate the extent to which they think “Pakistan is governed by representatives elected by the people.”

The belief that democracy stands in opposition to militancy also implies that support for militancy should be decreasing in the extent to which respondents' value individual rights and in the extent to which they have confidence in government institutions that can protect these rights, H5b. We measured support for core democratic rights by asking about the importance of three core rights: minority protection, representative government, and independent courts. We measured confidence in representative government by asking about confidence in three key institutions: the national government as a whole, the national assembly, and the respondents' provincial assembly.

Our analysis of respondents' answers to these questions yields little support for H5a or H5b. Table 4 summarizes the results on these variables, controlling for religion and poverty. The table does not include the second set of questions on H5b, because the only statistically significant relationship we could find between expressed confidence in the institutions of government and support for militancy ran in the opposite direction posited by H5b. Respondents who said they had “quite a lot” of confidence in the national government, “not very much,” or “none at all” were actually less supportive of al-Qaida and the askari tanzeems than respondents who expressed “a great deal” of confidence in the national government. In this survey there was no correlation between lack of confidence in the government and support for militancy.

If H5a and H5b were correct, then, table 4 should show a series of negative relationships such that, for example, the more confident people are in upcoming elections, the less they support militant organizations. This turns out to be correct, but it is the only result supporting these hypotheses. Respondents who feel Pakistan is governed by representatives of the people were not less supportive of al-Qaida or the askari tanzeems. Importantly, there was no discern-

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65. The cleanest question measuring support for democracy in the survey asked respondents how important it was that Pakistan be governed by elected representatives. Support for democracy was so high and homogeneous that there was not enough variation on this variable to identify any impact.
<table>
<thead>
<tr>
<th>Potential for democratic change</th>
<th>Taliban</th>
<th>Al-Qaeda</th>
<th>Askari Tanzeem</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidence in elections</td>
<td>-0.115*</td>
<td>-0.138**</td>
<td>-0.195***</td>
</tr>
<tr>
<td>(−0.236−0.006)</td>
<td>(−0.263−0.013)</td>
<td>(−0.321−0.068)</td>
<td></td>
</tr>
<tr>
<td>Elected representatives govern Pakistan</td>
<td>-0.044**</td>
<td>-0.018</td>
<td>0.006</td>
</tr>
<tr>
<td>(−0.087−0.001)</td>
<td>(−0.061−0.025)</td>
<td>(−0.039−0.051)</td>
<td></td>
</tr>
<tr>
<td>Importance of protecting religious minorities</td>
<td>-0.068</td>
<td>-0.002</td>
<td>-0.213***</td>
</tr>
<tr>
<td>(−0.213−0.076)</td>
<td>(−0.146−0.142)</td>
<td>(−0.365−0.061)</td>
<td></td>
</tr>
<tr>
<td>Importance of representative government</td>
<td>0.014</td>
<td>-0.004</td>
<td>0.056**</td>
</tr>
<tr>
<td>(−0.041−0.070)</td>
<td>(−0.067−0.059)</td>
<td>(−0.111−0.001)</td>
<td></td>
</tr>
<tr>
<td>Importance of independent judiciary</td>
<td>0.012</td>
<td>-0.040</td>
<td>0.024</td>
</tr>
<tr>
<td>(−0.058−0.082)</td>
<td>(−0.107−0.027)</td>
<td>(−0.041−0.089)</td>
<td></td>
</tr>
<tr>
<td>More sharia</td>
<td>0.935***</td>
<td>0.863***</td>
<td>0.374*</td>
</tr>
<tr>
<td>(0.536−1.332)</td>
<td>(0.469−1.257)</td>
<td>(−0.000−0.748)</td>
<td></td>
</tr>
<tr>
<td>Less sharia</td>
<td>0.751***</td>
<td>0.700***</td>
<td>0.215</td>
</tr>
<tr>
<td>(0.405−1.098)</td>
<td>(0.362−1.039)</td>
<td>(−0.101−0.531)</td>
<td></td>
</tr>
<tr>
<td>Muslim first</td>
<td>0.109</td>
<td>0.356*</td>
<td>0.585***</td>
</tr>
<tr>
<td>(−0.334−0.552)</td>
<td>(−0.056−0.769)</td>
<td>(0.172−0.998)</td>
<td></td>
</tr>
<tr>
<td>Muslim second</td>
<td>0.005</td>
<td>0.056</td>
<td>0.306</td>
</tr>
<tr>
<td>(−0.456−0.466)</td>
<td>(−0.381−0.492)</td>
<td>(−0.115−0.727)</td>
<td></td>
</tr>
<tr>
<td>Growth relative to India</td>
<td>0.074</td>
<td>0.164***</td>
<td>0.235***</td>
</tr>
<tr>
<td>(−0.025−0.173)</td>
<td>(0.065−0.262)</td>
<td>(0.138−0.332)</td>
<td></td>
</tr>
<tr>
<td>Percentage of immunized children</td>
<td>0.005</td>
<td>0.007*</td>
<td>0.009**</td>
</tr>
<tr>
<td>(−0.003−0.012)</td>
<td>(−0.000−0.015)</td>
<td>(0.002−0.017)</td>
<td></td>
</tr>
<tr>
<td>Community’s economic performance</td>
<td>0.015***</td>
<td>0.008**</td>
<td>0.013***</td>
</tr>
<tr>
<td>(0.008−0.021)</td>
<td>(0.001−0.015)</td>
<td>(0.006−0.019)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Religion and poverty</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tau_1</td>
<td>0.630</td>
<td>1.012*</td>
<td>0.293</td>
</tr>
<tr>
<td>(−0.465−1.726)</td>
<td>(−0.048−2.072)</td>
<td>(−0.796−1.382)</td>
<td></td>
</tr>
<tr>
<td>Tau_2</td>
<td>1.629***</td>
<td>1.941***</td>
<td>1.236**</td>
</tr>
<tr>
<td>(0.522−2.735)</td>
<td>(0.887−2.994)</td>
<td>(0.138−2.334)</td>
<td></td>
</tr>
<tr>
<td>Observations</td>
<td>459</td>
<td>450</td>
<td>463</td>
</tr>
<tr>
<td>Adjusted percentage predicted correctly</td>
<td>0.090</td>
<td>0.005</td>
<td>0.157</td>
</tr>
</tbody>
</table>

Robust 95 percent confidence intervals in parentheses.

*** p < 0.01, ** p < 0.05, * p < 0.1.

The negative relationships between the potential for democratic change variables and support for the Taliban and al-Qaida disappear when using sample weights.
ible relationship between respondents’ support for core democratic rights and their disapproval of either the Taliban or al-Qaida. We do see that those who want minorities protected, or who think representative government is important, are less supportive of the askari tanzeems. These results suggest that the presumption that citizens who favor democracy oppose militancy is incomplete at best.

As an alternative, analysts who are more familiar with the terrain in Pakistan argue that those who want democracy see no requirement for secularization and no obvious disconnect between greater Islamism and democracy. Moreover, supporters of democracy could be more inclined to back militancy because Pakistan’s Islamist parties have historically phrased their appeals in democratic terms. Jamaat-e-Islami, for example, boycotted the 2008 general election, believing that it would be rigged. Key parties of the Islamist political coalition, the Muttahida Majlis-e-Amal, consistently argued in constitutional and democratic terms that President Pervez Musharraf’s simultaneous tenure as chief of army staff and president was illegal. Leaders of the Islamist parties— Jamaat-ul-Ulama-e-Islam and Jamaat-e-Islami—criticized Musharraf’s extralegal dismissal of a supreme court justice in March 2007. Groups seeking to “liberate” Kashmir often use the language of self-determination and azadi (freedom), which reflects a call for some fundamental democracy, as least for Kashmir.

Thus, some Pakistanis are likely to read the consistent Islamists’ democratic critique of Musharraf as evidence of their democratic goals. Similarly, given that the Jamaat-e-Islami-backed militant groups, Deobandi groups, and Lashkar-e-Taiba have mobilized support on the basis of securing freedom and self-determination for Kashmiris, some of their supporters may also impute democratic ideals to these groups. This alternative line of argument suggests that once we control for political grievances, respondents’ feelings about the importance of democracy, or about the potential for change through democratic institutions, should be unrelated to support for militancy.

We test this hypothesis in two ways. First, we asked whether adding the democracy variables discussed above improved model fit over a model that used religion, poverty, and a vector of variables addressing group-specific political concerns. Adding the full vector of democracy variables could be justified only for the askari tanzeems. Breaking the democracy variables down further,

66. Wald and likelihood-ratio tests for nested models suggest that adding support for an independent judiciary never results in a statistically significant increase in explained variance, and that adding support for minority rights and representative government helps explain support only for the askari tanzeems.

67. We present the results for these variables in the next section.
we found that none helped to explain variance in respondents' support for the Taliban after controlling for the political variables. Our respondents' confidence that upcoming elections would be free and fair helped to predict support for al-Qaida and the askari tanzeems after controlling for political grievances. The importance of representative government continued to help explain variance in support for the askari tanzeems after controlling for political grievances. Overall, then, of the fifteen possible relationships between support for a specific group and our five democracy variables, only three helped to explain the variance in support once political grievances are taken into account.

We then assessed whether controlling for political grievances substantially changed the coefficient estimates where democracy does appear to matter. Including political grievances attenuates the coefficient estimates in four of the six cases where democracy appears to matter in table 4. In the Taliban case, the coefficient on elected representatives governing Pakistan drops away, and the coefficient on fair elections is dramatically attenuated in substantive impact and statistical significance. For al-Qaida, controlling for political grievances strengthens the relationship between support and the feeling that elections will not be free and fair. For the askari tanzeems, the coefficient on minority protection drops out, the coefficient on the importance of representative government drops out, and the coefficient on elections becomes stronger.

Overall, controlling for political grievances removes most of the already-tenuous relationship between support for democracy and support for militancy.

ALTERNATIVE VIEW: POLITICAL GRIEVANCES
To test the alternative to views positing a primary role for religious or economic grievances, we asked respondents about several political issues on which the militant organizations of greatest concern express clear objectives. Al-Qaida has espoused a number of transnational Islamist goals (e.g., reestablishing the Caliphate). In recent years, however, the most obvious political goals of al-Qaida in Pakistan have included ousting the United States from Afghanistan, removing President Musharraf from office, and compelling the United States to change its policies in Israel and Iraq. The Afghan Taliban seeks to oust foreign militaries from Afghanistan and to reassert their political dominions. The Pakistani Taliban tends to focus its objectives on Pakistan's tribal areas, where it has sought to oust Pakistani security forces and establish Taliban-like parallel systems of governance in Pakistan. The various askari tanzeems seek to liberate Kashmir from India. We can thus determine whether Pakistanis condition their support on the political goals the militant groups are
serving by assessing how well support is predicted by expressed opinions on these political issues.

To test H6a, we asked respondents three questions that relate to support for the Taliban. The first asked whether they felt that the current Afghan government or the Taliban has the best approach to governing Afghanistan. The second asked their views on how the Pakistani government should deal with local (e.g., Pakistani) Taliban in the FATA. The third asked respondents their feelings about Talibanization in Pakistan.

We asked three questions designed to test H6b (i.e., that those believing U.S. influence has a negative effect on the world will be more supportive of al-Qaida). The first asked respondents whether they agreed that the United States seeks to “weaken and divide the Islamic world.” The second asked respondents how much they trusted the United States to “act responsibly in the world.” The third asked whether they agreed with the statement that “the U.S. is playing the role of world policeman more than it should.”

We asked three questions to test H6c (i.e., that those concerned with Indian treatment of Muslims in Kashmir will be more supportive of the askari tanzeems). We first elicited respondents’ perceptions about the Indian government’s treatment of Muslims both in and out of Kashmir. We then asked whether Pakistan “has a moral obligation to protect Muslims anywhere in South Asia.”

Finally, to test H6d (i.e., that support would be increasing in the belief that groups provide social services), we asked respondents whether the askari tanzeems “provide social and community services.”

Table 5 summarizes the results from our tests on the role of political grievances. We have omitted the control variables for poverty and religiosity from the table to enhance readability and again treat ordered variables as continuous only when doing so does not substantively change the results. We report the Wald statistics for nested models to determine whether asking about other groups’ political goals helps to explain support for each group.

Table 5 reveals three patterns. Most important, the al-Qaida-specific political questions do a poor job of predicting support for that group. Once we controlled for feelings about other groups’ political variables, for example, respondents’ feelings about the U.S. role in world affairs were not useful in predicting support for al-Qaida. Moreover, goals that predict support for both the Taliban and the askari tanzeems—opposition to the Pakistani government’s efforts to impose control over local Taliban in the FATA, for example—did not predict support for al-Qaida. One potential explanation for this null finding is that some intervening variable is conditioning the relationship between respondents’ political beliefs and their support for specific groups.
<table>
<thead>
<tr>
<th>Taliban political goals</th>
<th>Taliban</th>
<th>Taliban</th>
<th>Al-Qaeda</th>
<th>Al-Qaeda</th>
<th>Askari Tanzeems</th>
<th>Askari Tanzeems</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current Karzai government has best approach for Afghanistan</td>
<td>0.064 (-0.316--0.443)</td>
<td>0.193 (-0.273--0.659)</td>
<td>0.256 (-0.270--0.781)</td>
<td>0.384 (-0.102--0.871)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Former Taliban government had best approach for Afghanistan</td>
<td>0.451*** (0.173--0.728)</td>
<td>0.615*** (0.259--0.970)</td>
<td>0.457** (0.069--0.844)</td>
<td>0.652*** (0.271--1.033)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Opposition to government presence in FATA</td>
<td>0.161* (-0.019--0.340)</td>
<td>0.235* (-0.025--0.495)</td>
<td>-0.033 (-0.331--0.264)</td>
<td>0.233* (-0.035--0.502)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Support Talibanization</td>
<td>0.128** (0.017--0.238)</td>
<td>0.110 (-0.051--0.271)</td>
<td>0.124 (-0.030--0.278)</td>
<td>0.070 (-0.079--0.219)</td>
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<th>United States plays world policeman too much</th>
<th>United States cannot be trusted to act responsibly</th>
<th>Indian does not protect Kashmiri Muslims</th>
<th>India does not protect Muslim citizens</th>
<th>Pakistan has obligation to protect Muslims</th>
<th>Askari tanzeems provide social services</th>
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<td>United States seeks to weaken Muslims</td>
<td>0.089 (-0.181--0.359)</td>
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<td>United States plays world policeman too much</td>
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<td>-0.219*** (-0.369--0.070)</td>
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<td>Pakistan has obligation to protect Muslims</td>
<td>0.157* (-0.006--0.320)</td>
<td>0.155* (-0.016--0.326)</td>
<td>0.045 (-0.093--0.182)</td>
<td>0.069 (-0.104--0.242)</td>
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<td>Adjusted percentage predicted correctly</td>
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<td>29.24***</td>
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Robust 95 percent confidence intervals in parentheses.

*** p < 0.01, ** p < 0.05, * p < 0.1

Reference category for Afghan government performance is that "neither" had a good approach.

Wald statistics for baseline models compares to religiosity and poverty-only model.
Second, there were a few political questions that predicted support across groups. Respondents who felt that Pakistan has an obligation to protect Muslims elsewhere were more likely to support the Taliban and al-Qaida but not the askari tanzeems. From the perspective of our alternative to the conventional wisdom, this makes sense. Respondents who believe that the askari tanzeems create insecurity for Muslims in Kashmir (as they often do) should withhold their support.

Third, respondents’ support for the askari tanzeems was not driven by concerns with India’s treatment of its Muslim citizens. Indeed, the more our respondents believed that India fares poorly in protecting Muslims, the less supportive they were of militants conducting attacks in India and Kashmir. This finding is consistent with a relatively sophisticated political calculus by our respondents, one that runs as follows: (1) attacks by askari tanzeems may provoke a backlash against Indian Muslims; (2) if India is already doing a poor job protecting its Muslims, that backlash could be severe and Muslims will suffer; hence (3) I should not support the askari tanzeems.68

At a minimum, the results in table 5 suggest that the mapping between political preferences and support for different militant organizations is much more complex than many Western and Pakistani analysts have presumed. In line with our expectations about the interactions between political goals and the strategic environment, we found that respondents who perceived a threat to Pakistan from U.S. forces in Afghanistan were less supportive of both the Taliban and al-Qaida. We might further expect that the positive relationship between dissatisfaction with the Afghan government and support for the Taliban should be attenuated among respondents perceiving a substantial threat to Pakistan from U.S. forces in Afghanistan. The high level of nonoverlapping missing data in this survey, however, means that we are unable to fully test such conditional relationships.69

Overall, the results in this subsection suggest that specific political grievances are an important, but not a decisive, driver of support for militant organizations. To further test whether political considerations play a key role, we examined how the explanatory power of the political variables compared

68. A similar logic could explain the finding that those who feel that Pakistan is falling behind India economically are less supportive of militant groups. Another explanation for supporting askari tanzeems is a fundamental belief about Kashmiri sovereignty that is independent of how India treats its Muslims generally or Kashmiris in particular. Our survey did not ask about this, however.

69. We are addressing this problem by conducting a follow-on survey with a larger sample size and a quasi-experimental design intended to limit nonresponse rates and explicitly address the interaction of political concerns with the perceived strategic environment.
with that of our base model using religion and poverty. Table 6 reports these results.

The first row of table 6 shows the percentage of responses predicted correctly by a naïve model that assumes all respondents choose the most common answer. The second row shows the percentage improvement on this prediction using poverty and personal religiosity. The third and fourth rows show the same for group-specific political goals and all political goals. The fifth row provides the decisive statistic, the percentage by which improvement over the naïve model using group-specific political goals exceeds improvement for the poverty and religion model. Formal nested model tests, reported at the bottom of table 5, confirm the intuition from table 6. Across all three groups, the political variables do a statistically significantly better job of explaining support than explanations that rely on overly general conceptual categories such as religiosity or poverty. As table 6 shows, the improvement is substantial.

**Conclusion**

The results of this study cast considerable doubt on the conventional wisdoms about support for Islamist militancy in Pakistan. First, support for militant organizations is not correlated across different types of militant groups. This finding suggests that Pakistanis distinguish among providers of political violence.

Second, there is no clear connection between subjective or objective measures of economic strength and lower levels of support for the Taliban and al-Qaida. Contrary to common expectations, we found that respondents who come from economically successful areas or who believe Pakistan is doing well
relative to India economically are more likely to support askari tanzeems. Thus popular prescriptions that Pakistanis will support normalization of relations with India when they feel confident in their country's economic and other measures of national power are not supported by these findings.

Third, religiosity is a poor predictor of support for militant organizations. A preference for more sharia law does not predict support for militant organizations. What does predict such support is a desire for change—positive or negative—in the perceived role of sharia in Pakistan. Similarly, identifying strongly as a Muslim does not predict support for Taliban militants fighting in Afghanistan or for al-Qaida. Although Islamic identity does predict support for askari tanzeems, the correlation disappears once we control for respondents' support for other groups. Whatever the common factor driving support for all these militant organizations is, it is not religion per se. Rather, underlying political considerations appear to be what is driving support.

Fourth, we found no discernible relationship between respondents' faith in democracy or support for core democratic rights and their disapproval of the Taliban or al-Qaida. These findings suggest that the much-heralded call for democratization as a palliative for militancy may be unfounded.

These findings suggest that public support for militant organizations appears to be much more complex than many analysts believe. Respondents in our survey appear to be making rather sophisticated political calculations that are not easily categorized. Although we found evidence that specific political grievances are an important driver of support for militant organizations, they are not decisive. We believe that the source of the ambiguity is that respondents are taking both political incentives and a perception of the strategic environment into account.

The implications that follow from this survey do not translate easily into policy action; rather this effort identifies an empirical agenda to better understand and address the roots of support that militancy enjoys in Pakistan. Foremost, policymakers should develop a more sophisticated understanding of the various militant groups operating in and from Pakistan and a concomitant understanding of what drives demand for their activities. This study, though limited in size and scope, demonstrates that such an exposition is possible with adequate resources. It is clear that commonly suggested palliatives intended to reduce generalized support for militancy—economic development, greater democratization, alternatives to religious education, and so on—are unlikely to be effective. Policymakers should refocus their efforts on developing better analytical tools to formulate more effective interventions. It is likely that any effective policy will have to both address the core political concerns of supporters of specific militant groups and diminish the perceived value of militant violence as a tool to achieve political goals.
Second, this study focused on the demand for militancy in Pakistan—not the supply of militancy. Admittedly, it is the supply of militancy rather than public support for it that concerns policymakers. There is, however, no empirical data that support the presumption—inherent in most surveys of Pakistanis’ views on these and related subjects—that decreases in the demand for support for militancy translates into a reduction of Islamist violence. Measured support for suicide bombing among Pakistanis in public opinion surveys declined only when suicide bombing increased, suggesting the causal effect from violence to expressed support may be the more powerful one.\(^70\)

Third, there is an urgent need for focused analyses of the impacts of policy interventions on both the supply of and demand for violence. U.S., Pakistani, and international agencies are not configured to rigorously evaluate the impacts of their programming. Given the state of knowledge in this area, policy implementers should be building impact evaluation into their programming, and they ought to establish a more robust process for disseminating the lessons learned.

These recommendations may seem onerous at first blush, but without understanding the impact of programming at various levels, policymakers cannot direct limited resources where they will have the greatest impact. More seriously, it is possible that some interventions may actually aggravate the underlying concerns of militant groups’ supporters, or increase the perceived value of violence, especially if the target population believes that the programming will undermine their political objectives. In recent years, for example, many Pakistanis outside of the FATA have expressed considerable dismay at development funding for this region. They believe that Washington is interested in this border area only because of its relationship to the war in Afghanistan, and therefore do not accept this development assistance as anything other than a tool to advance the United States’ political agenda in the region.\(^71\) Thus, not only is the impact of these programs in the FATA empirically unknown, but given that the U.S. political agenda is deeply unpopular with Pakistanis, the programs may adversely affect Pakistani attitudes toward the United States outside of the FATA. Similarly, Pakistanis of many social strata resent U.S. efforts toward madrassa reform and curricula reform of public schools, because they believe these programs seek to “de-Islamize” Pakistan.


\(^71\) See author fieldwork in Pakistan that involved conducting a democracy and governance assessment in April 2008. Interviews were conducted in Lahore, Islamabad, and Quetta.
Such interventions appear to take little cognizance of the fact that Pakistanis generally value Islamic education in combination with other subjects.\textsuperscript{72}

Without replacing common wisdoms about Pakistan with empirically defensible exposition of what drives support for militancy in Pakistan, international (and domestic) interventions are unlikely to be effective and may even exacerbate the underlying problems.

Legal Issues in the War on Terrorism – A Reply to Silja N. U. Vöneky

By John B. Bellinger, III*

I wanted to begin by thanking Dr. Vöneky for her thoughtful contribution to this rapidly developing area of international law.¹ One of the purposes of the ongoing dialogue with my European counterparts on the legal framework for the use of force and detention of combatants in an armed conflict with non-state actors is to spur dialogue to arrive at a common approach on these issues.² I agree with many things in Dr. Vöneky’s article. I am pleased that, unlike many critics of the United States, she recognizes that it is possible to use force in self defense from armed attacks not directly linked to the actions of any state,³ and that the law of armed conflict would govern that use of force.⁴ I also appreciate that she notes that actions against terrorist groups outside a state’s country are not necessarily simply transnational police actions.⁵ I wanted to take this brief opportunity to note three areas where there may be some misunderstandings regarding the views of the United States, and then discuss my thoughts on the way forward.

First, the article lays out a legal framework for armed conflict with terrorist groups that closely resembles the current U.S. framework for our ongoing conflict with al

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³ Vöneky, supra note 1, at 749.

⁴ Id.

⁵ Id.
Qaida and the Taliban. There is no question that armed conflicts between States Parties to the Geneva Conventions, including conflicts with terrorist-sponsoring States Parties, constitute international armed conflicts. The President’s February 2002 order recognized that the armed conflict with the Taliban was at that time an international armed conflict.

Where we disagree with Dr. Voneky is with her suggestion that Taliban members detained in that conflict would have been entitled to prisoner of war (POW) protections. We believe they do not meet the criteria for protection laid out in Article 4 of the Third Geneva Convention. The armed forces of Afghanistan ceased to exist as such with the dissolution of former President Mohammad Najibullah’s armed forces in the mid-nineties, and were replaced by a patchwork of rival armies. Although the Taliban were the most powerful of these rival armies at the time of the U.S. invasion, it is not clear that they ever rose to the level of the official armed forces of Afghanistan entitled to protection under Article 4(A)(1). The Taliban is better conceptualized as a militia belonging to a Party to the conflict, which would be eligible for POW protections under Article 4(A)(2) if they used a command hierarchy; wore a uniform or distinctive sign; carried arms openly; and observed the laws and customs of war. The Taliban, however, fail to meet at least two of these conditions: specifically, the Taliban do not distinguish themselves from the general population, nor do they obey the laws and customs of war. Contemporary news reports from the Allied invasion of Afghanistan indicate that the Taliban dressed like civilians, and in fact used this similar dress to blend into the civilian

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6 I would note that the article misstates Common Article 2’s requirements for international armed conflict. That provision applies the bulk of the Convention’s provisions to “all cases of declared war or of any other armed conflict between two or more High Contracting Parties, even if the state of war is not recognized by one of them,” as well as “all cases of partial or total occupation of the territory of a High Contracting Party.” The United States applied the Geneva Conventions to our armed conflict with and subsequent occupation of Iraq, for example.

7 We are aware that some states and commentators believe that the continuing fighting in Afghanistan evolved into a non-international armed conflict when the new Afghan government, led by President Karzai, was seated. We do not take this position, and ultimately, it is the responsibility of parties to the conflict to determine how it is categorized. Nevertheless, we do not believe that the categorization of the conflict as international or non-international affects our legal authority to continue to detain individuals captured in the conflict. While some groups have suggested we would need to release those individuals we detained in the international armed conflict and then detain them again as part of the non-international armed conflict, such a rule seems an unduly formalistic and impractical interpretation of IHL.

8 Voneky, supra note 1, at 753.

population to evade capture.\textsuperscript{10} Worse still, they have targeted and continue to target civilians as such in violation of the laws of war, having adopted suicide bombing techniques similar to those used by al Qaida.\textsuperscript{11} Given these transgressions, the United States continues to believe that Taliban detainees are not POWs.

With respect to armed conflicts with non-state groups like al Qaida, the U.S. Supreme Court held in \textit{Hamdan v. Rumsfeld}\textsuperscript{12} that such conflicts are by definition non-international, and therefore fall within the rubric of Common Article 3. I have said before that many people would have been less surprised if the Supreme Court in \textit{Hamdan} had based its holding on a determination that Common Article 3 applied as a matter of customary international law rather than treaty law.\textsuperscript{13} In any event, the Administration has been clear that we respect the Supreme Court decision and will proceed in a way that is consistent with its ruling.\textsuperscript{14} I am pleased that Dr. Vöneky’s article recognizes the DoD Detainee Directive and Army Field Manual on interrogation as clear steps taken by the Defense Department to implement Common Article 3 in all aspects of its detention operations.\textsuperscript{15} I would only add that we have been clear that Common Article 3 applies to all branches of the U.S. government, including intelligence agencies, in the detention and interrogation of combatants in the armed conflict with al Qaida. The President’s July 20, 2007 order expressly applies Common Article 3 to the CIA’s interrogation and detention program.\textsuperscript{16}

\textsuperscript{10} Justin Hugler, \textit{Campaign Against Terrorism: Stallholders Selling out of Afghanistan’s New Must-Have Hat}, THE INDEPENDENT-LONDON, November 26, 2001 (stating that the Taliban wore the same basic clothes as Afghan civilians); Jane Perlez, \textit{The Siege: Tenacious Taliban Cling to Power with Tactics, Cunning, and Help from Old Friends}, N.Y. TIMES, October 26, 2001 (noting the Taliban’s use of UN vehicles to hide from US warplanes).

\textsuperscript{11} Perlez, \textit{supra} note 10 (describing threats made by Taliban commander to civilian homes); Joanna Poncavage, \textit{Afghan Suicide Bombers Would Target Civilians, Guardsman Says}, MORNING CALL, Mar. 5, 2007, at A1.

\textsuperscript{12} Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2795-96 (2006).


\textsuperscript{15} Vöneky, \textit{supra} note 1, at 756.

Although we agree on the application of Common Article 3, there appears to be some confusion regarding what application of this article entails. Common Article 3 does not require that detainees held in non-international armed conflict be granted habeas corpus rights or the right to have a “competent tribunal” determine POW status.\textsuperscript{17} The Geneva Conventions did not and do not contemplate wide-scale access of combatants to civilian courts. And there is no category of prisoner of war in non-international armed conflict.

As Dr. Voneky correctly notes,\textsuperscript{18} the Military Commissions Act eliminated habeas jurisdiction over the claims of Guantanamo detainees.\textsuperscript{19} The Congress and the Administration acted together to do so to address the fact that detainees were overloading our courts with claims that were, at best, tangentially related to the central question of whether the U.S. Government was detaining the individuals lawfully. Never in our nation’s history have alien enemy combatants detained overseas been given the right to habeas corpus. Nevertheless, to ensure that we are holding the right people, every detainee in Guantanamo has his case reviewed by a Combatant Status Review Tribunal (CSRT), which determines whether a detainee is properly classified as an enemy combatant.\textsuperscript{20} The detainee has the assistance of a military officer, may present evidence, and has access to the unclassified reasons for his detention.\textsuperscript{21} And most important, the Detainee Treatment Act (DTA) gives every detainee in Guantanamo the right to appeal his CSRT determination to the U.S. Court of Appeals for the D.C. Circuit (and ultimately to the U.S. Supreme Court) for a determination regarding whether the CSRT practices and procedures were followed, and, to the extent applicable, whether those procedures are consistent with the laws and Constitution of the United States.\textsuperscript{22} The D.C. Circuit in \textit{Bismullah v. Gates}\textsuperscript{23} just interpreted quite broadly the record it will review in these cases; the court held that it is entitled to consider all of the reasonably available information in the government’s possession in determining whether all exculpatory evidence was presented to the CSRT, and whether the CSRT decision was supported by a preponderance of the evidence. The Supreme Court has just

\textsuperscript{17} Voneky, \textit{supra} note 1, at 754.

\textsuperscript{18} See id. at 755.


\textsuperscript{20} Id. § 948d(c).

\textsuperscript{21} Id. §§ 948k, 949a(b)(1)(A), 949d(f).


granted certiorari in the Boumediene and al Odah cases to interpret the constitutionality and scope of these review processes.24

Detainees who have not been charged for prosecution by military commission also have their detention reviewed annually by an Administrative Review Board (ARB).25 This ARB determines whether the detainee can be released or transferred without posing a serious threat to the United States or its allies. We are aware of concerns about determining who should be detained and for how long in this new class of conflict, and CSRTs and ARBs attempt to address these concerns through robust administrative procedures. To date, more than 170 detainees have left Guantanamo through these processes.

Although I disagree with Dr. Voneky about whether Common Article 3 requires a state to give a detainee the right to habeas corpus, it is indisputable that Common Article 3 prohibits, “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”26 In response to the Hamdan decision, the Military Commissions Act established rules for a new system of military commissions in which to prosecute alien unlawful enemy combatants; these rules are fully consistent with Common Article 3. These commissions provide the accused a full range of procedural protections, including the right of the accused to be present for the entire trial, the presumption of innocence, the right to cross examine witnesses, right to counsel, and a ban on all evidence obtained through torture.27 The accused may appeal a final military commission conviction to the U.S. Court of Appeals for the D.C. Circuit, and then to the U.S. Supreme Court.28 These tribunals are on hold for the moment while the United States resolves certain technical issues, but I hope that in the near future we will see the tribunals try those who we believe have committed serious war crimes.

Second, the article suggests that the term “unlawful enemy combatant” is misleading, and that all people fall either into the category of prisoner of war or

27 Military Commissions Act §§ 948k, 948r(b), 949a(b)(1)(A), 949a(b)(1)(B), 949l(c)(1).
28 Id. § 950g.
civilians. In fact, the distinction between lawful and unlawful enemy combatants (also referred to as "unprivileged belligerents") has deep roots in international humanitarian law, preceding even the 1949 Geneva Conventions. The Hague Regulations of 1899 and 1907 contemplated distinctions between lawful and unlawful combatants, and this distinction remains to this day. As Professor Adam Roberts told the Brookings Speakers Forum in March 2002, "There is a long record of certain people coming into the category of unlawful combatants—pirates, spies, saboteurs, and so on. It has been absurd that there should have been a debate about whether or not that category exists." Comments from those negotiating the 1949 Geneva Conventions indicate that States did not believe that unlawful combatants would be entitled to protections under the Fourth Convention. For example, the Dutch representative at the 1949 Diplomatic Conference explained, "The Civilians Convention certainly does not protect civilians who are in the battlefield taking up arms against the adverse party." The ICRC representative at the same conference confirmed this understanding, stating, "Although the two conventions might appear to cover all the categories concerned, irregular belligerents were not actually protected." For more on the historical and policy rooting of the term unlawful enemy combatant, I would refer you to my blog entries on www.opiniojuris.org.

Putting this point aside, what are the differences between Dr. Voneky's approach, which acknowledges that terrorists are "offensive civilians" who may lawfully be targeted in military actions, and our approach, which categorizes these individuals as "unlawful enemy combatants"? Under both models, a State can use military force to respond to the threat posed by dangerous terrorists, can detain for the duration of the conflict those individuals who continue to pose a threat, and must treat individuals involved in a non-international armed conflict consistently with Common Article 3. While there may indeed be substantive differences between our approaches, I would suggest that it would be more productive to confront directly the question of how and when terrorists may be targeted and how they should be treated as detainees, rather than engage in theoretical arguments about legal categories. For example, Dr. Voneky's article argues that only terrorists who have a combat mission can be lawfully targeted by military force. But who has a

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29 Vöneky, supra note 1, at 753.


33 Vöneky, supra note 1, at 752, 53.
"combat mission"? Is it just the terrorist who straps on the suicide vest? What about the vest maker? For years, numerous law of war experts have grappled with these issues at a series of expert meetings co-organized by the ICRC and the TMC Asser Institute that has focused on the meaning of "direct participation in hostilities."34 Although the experts’ work is not finished, I am aware that it delves into these difficult questions, and I look forward to reading it.

Third, the article mischaracterizes the U.S. position on the application of human rights law during times of armed conflict. To be clear, the United States does not argue that human rights treaties cease to apply as a categorical matter during time of armed conflict. There will be circumstances in which the two bodies of law are mutually exclusive – as in peacetime, when the law of war is inapplicable – and circumstances in which they may not be – as in an armed conflict occurring in one’s own territory. Thus, whether international human rights law applies to the conduct of a particular state during an armed conflict is a case-by-case inquiry.

But discussion of the boundaries of IHL and human rights law aside, it is the longstanding and clear position of the United States that certain human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR)35 and the Convention against Torture’s non-refoulement provision36 apply only to activities that take place in the territory of a Party. I would refer the reader to recent reports filed by the United States with the Human Rights Committee and Committee Against Torture that explain the legal basis for these views.37 We understand the desires of some in the international community to argue for a broader application of the principles encompassed in these treaties as a policy matter. As a matter policy the United States itself has prohibited the transfer persons in U.S. custody worldwide to countries where it is more likely than not that they will be tortured. But the U.S. view of the legal scope of these treaties is based on the text and history of the documents, and has endured across administrations, suggesting that is likely to remain the U.S. position going forward.

34 To access reports that have come from these meetings, see http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/opendocument.


36 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

Ultimately, my hope is that this conversation will result in the recognition that the threat posed by al Qaida does not neatly fit within existing legal frameworks, contrary to Dr. Voneky’s conclusion. Common Article 3, while containing important baseline protections, does not provide a comprehensive set of rules to govern detention of combatants in non-international armed conflict. More and more, those in the international community are recognizing the limitations of existing law, as reflected in the growing number of international governmental and academic conferences dedicated to discussing this issue. Some governmental officials forthrightly have expressed their agreement that the law in this area needs further development. OSCE Special Rapporteur for Guantanamo Anne Marie Lizin recognized in her report from last July that “there is incontestably some legal haziness” regarding the legal status of members of international terrorist organizations.38 Indeed, she recommended the formation of an international commission of legal experts to examine the question. Likewise, at last year’s U.S.-E.U. summit, then-Austrian Chancellor Wolfgang Schussel acknowledged that we face legal “gray areas” regarding detention of terrorists.39 More recently, the Foreign Affairs Committee of the UK House of Commons wrote that the Geneva Conventions dealt inadequately with the problems posed by international terrorism, and called on the UK government, in connection with States Parties to the Geneva Conventions and the International Committee of the Red Cross, to work on updating these Conventions for modern problems.40 Although we do not – and will not – always see eye to eye with our European allies, I am encouraged that we have reached some degree of common ground, and that there is a growing acknowledgment that international terrorist organizations like al Qaida do not fit neatly into the existing international legal system.


TERRORISM AND CHANGES TO THE LAWS OF WAR

JOHN B. BELLINGER, III*

Thanks, Scott, and it’s nice to be back at Duke again. I was here a number of years ago to open the new Center for International and Comparative Law and again last year. It is great to be back, and I thank the organizers for putting together this panel.

I am going to begin my remarks by placing this discussion in a policy context since I am the person most recently out of the government. First, I will address what has changed in the last year under the Obama administration and what has not changed. Then I will focus within that policy context, more specifically, on the issues for this panel regarding use of force, including where and against whom force may be used.

It is appropriate that we are speaking today, because exactly one year ago President Obama issued his famous three executive orders that made many changes from the Bush administration’s policies. The three orders were: one, to close Guantanamo within one year and review every detainee’s status in order to determine what ought to be done with them; two, to end the CIA interrogation program and to conduct a review of what sort of interrogation program there ought to be; and three, perhaps the most significant and difficult to implement, to review all detainee laws and policies to determine what the appropriate legal framework should be.

I applauded those executive orders when they were issued and still think that they were good decisions. Several of us on these panels worked quite hard during the Bush administration to achieve the results in those executive orders, and it was disappointing that the Bush administration could not resolve some of these same issues sooner. So, as a policy matter, I generally agreed with the orders and believed that they did reflect some change.


1. See infra notes 2-4 and accompanying text.
That said, since that day a year ago, relatively little has happened to implement those three executive orders. First, obviously Guantanamo has not closed, and it looks like it will not close in 2010 because Congress has blocked the President’s ability to move detainees to the United States. Second, the CIA program was officially shut down, but it had really ended years ago. Moreover, as you may have seen in the press just a couple of days ago, the director of national intelligence is already bickering with the director of the FBI about who ought to conduct interrogations and whether the intelligence community should be allowed to do more robust interrogations.

Finally, the third executive order created a task force that was to review detention policy overall, but the task force missed its six-month deadline and extended the deadline to a year. The task force should have reported by now, but has not done so in large part because the issues are so difficult.

So those are the things that have changed. What I would like to focus on now is what has not changed. That is the remarkable thing: that there has been, in fact, more continuity than change between the Bush and Obama administrations.

The main point is that the legal framework that the Obama administration is applying continues to be a law of war framework. The President dropped the label of “a Global War on Terror,” and I think this was a good idea because this label did more harm than good. But he is still pursuing, as a legal matter, a global war on al Qaeda and, most significantly, he is applying the laws of war for detention and for targeting. In his famous Archives speech, he emphasized that the United States is at war with al Qaeda, and under some pressure from Republicans recently, has had to repeatedly say, “We are at war. We are at war against Al Qaeda...” What that means is that he continues to rely on the laws of war as the legal basis for our military and our CIA to kill alleged terrorists around the world. He uses these laws to detain people indefinitely, without trial, and to assert the right to detain people even though they have not been charged with any crime.

Furthermore, he has emphasized that it is not the criminal laws that apply, but the Law of Armed Conflict. He has asserted a right to detain


people not just in Afghanistan, where there are active hostilities taking place, but essentially anywhere in the world.

With respect to the prosecutions of those individuals whom the United States is detaining who can be tried, the administration has said it will try many of them in military commissions. The attorney general announced in November that he will try the 9/11 planners in federal court in New York. I personally think it is a good idea to try the 9/11 planners in federal court—those people had, in fact, clearly committed federal crimes. But to the great consternation of many of the President’s supporters who thought that he was going to immediately jettison the military commissions, the President has said that he is going to retain them. I think he made this decision largely because he has found that many of the Guantanamo detainees cannot be tried in federal court, not because of any way that they have been treated, but because they did not violate our federal criminal laws. The things that many of the detainees had done, to the extent they were violations of law, were violations of the laws of war, not of violations of federal criminal law. Therefore, the President has continued targeting, detaining, and prosecuting members of al Qaeda under the laws of war.

In addition, in a lesser known announcement last summer, the Obama administration said that it will continue the practice of renditions. Not only will it continue the renditions that had historically been practiced back through the Bush and the Clinton administrations of going out and snatching terrorist suspects and bringing them back to the United States for trial, but it will also use renditions to snatch an individual and transfer him from one country to another. That is a controversial concept and something that I think our allies will raise questions about.

Finally, the Obama administration is not giving detainees much more process. The individuals who are being held in Bagram have challenged their detention and have insisted on a right to habeas in U.S. courts, even though they have never been in the United States and are not in Guantanamo. Judge Bates, of the D.C. District Court, granted habeas rights to a limited number of non-Afghan nationals. That case was just argued on

appeal before the D.C. Circuit. The point here is that the Obama administration is opposing habeas rights for anybody outside of Guantanamo.\footnote{Id.}

My point overall is that the legal framework the Obama administration is applying continues to be the laws of war. I think the Obama administration has found that to fight al Qaeda, particularly with hundreds of thousands of our troops around the world, one simply cannot apply exclusively a human rights law or criminal law framework.

What are the implications of this around the world? When I became the State Department Legal Adviser, I began a dialogue with our allies to try to do a better job of explaining the legal rationale for U.S. policies, because our allies obviously felt that many, many mistakes were being made. The Obama administration is going to need to continue this dialogue. There is going to be a honeymoon period during which the allies will be very happy with the initial executive orders and the tone that the administration is adopting. But, as the Administration continues many of the Bush administration’s unpopular policies of indefinite detention without trial, renditions, and military commissions, our allies will then have one of several choices. They can hold their noses and look the other way because they like the new administration. They can say, “Gee, these are the same policies that we didn’t like before,” and get back into the same head-butting with the U.S. administration that existed before. Or, and this is what I hope will happen, they will see that an administration that they like is continuing policies that they do not like, conclude there must be some reason for that, and continue a serious dialogue on these issues. I think this first year there has been a bit of a honeymoon, but as these policies continue, the administration is really going to have to work hard to explain the continuation of these policies.

Finally, I will discuss the rules applicable to the use of force and to targeting. Two issues arise regarding this topic: first, where can you use force, and second, against whom can you use force? Both of these were issues that were extremely difficult for the last administration, and the new administration will find them equally difficult.

First, where can one use force? If the United States is using military force around the world, can it only be—as some of our allies have suggested—in Afghanistan, because that is really the only place where an armed conflict is going on? The position of the last administration, and the policy of this administration, is that while there are active hostilities taking place in Afghanistan, al Qaeda is not containing its operations to Afghanistan. Therefore, both the Bush administration and the Obama administra-
tion are asserting the right to use force in self-defense *anywhere* in the world where the United States is threatened or being attacked by al Qaeda.

Essentially, the Obama administration is continuing, as a legal matter, the idea of a global war on terror. I found in my discussions, particularly with Europeans, that the United States' assertion of the legal right under international law essentially to use force *anywhere* in the world is an extremely upsetting concept. Does that mean the United States believes it is at war with al Qaeda in London and can shoot people on the streets of London? Actually, it does not, because there are two competing international law principles. As the United States, we have the right to use force anywhere to defend ourselves, a right that is reflected in the UN Charter\(^{12}\) and under customary international law. But there also exists the countervailing sovereign right of every other country in the world to be free from the use of force by the United States.\(^{13}\)

In sum, the United States asserts the right to use force in the 194 countries where it might be threatened, but then must immediately subtract from that approximately 190 countries that can contain the problem on their own. The theory has been that the United States has a right to use force against al Qaeda only in those places where a country is unable, or unwilling, to contain the threat itself, which really results in just a couple of countries in the world: Afghanistan, Yemen, and Somalia.\(^{14}\) But the idea that the United States can use force anywhere in the world continues to be controversial, and it is going to require some further discussion.

If that is not difficult enough, the even more difficult question is which individuals may the United States use force against specifically, since the United States is really not attacking these countries, but rather is attacking members of al Qaeda or the Taliban in these countries. The difficult thing is to figure out against whom, and under what set of rules, one can use force—either lethal force or detention, which is a lesser type of force than lethal force.

In a traditional armed conflict, the solution is pretty clear. People wear uniforms; you know that they are part of an enemy army. In a non-traditional conflict, it may still be clear that a state may target the person without the uniform who is coming at its soldiers with a gun, or who is setting off a bomb—they would seem to be combatants. But what about the person who made the gun, made the bomb, delivered the gun, delivered the

\(^{12}\) U.N. Charter art. 51.

\(^{13}\) U.N. Charter art. 2(4).

\(^{14}\) See, e.g., Harvey M. Sapolsky et al., *Restraining Order: For Strategic Modesty*, WORLD AFF. J., Fall 2009, at 84, 89-90 (arguing that the United States should only take military action against terrorist organizations where the "host country" cannot or will not act).
bomb, financed the gun, financed the bomb, or had the safe house? As this person’s connection to the conflict becomes more and more attenuated, the question becomes quite difficult. That is the core the issue: when non-state actors are not representing an individual country, which ones actually can be treated as combatants for targeting or for detention? They are essentially all civilians, but they are civilians who are engaging in combat.

Human rights groups have tended to suggest that they do not believe that a law-of-war framework should be used in a conflict with a group of civilians like members of al Qaeda. However, I think that over the last eight years it has become gradually more accepted that one can be in a state of armed conflict with a non-state actor. Now that we see groups like al Qaeda that can assert force at the same level that countries assert force, a law of war framework is an acceptable one. But this still does not tell a country the proper rules to apply as far as specific people who can be targeted. Neither the Third Geneva Convention nor the Fourth Geneva Convention, nor even Common Article Three, advises a country as to specifically who can be targeted. That leaves a country with a number of possible legal theories. The United States is often told that the applicable international law is clear. But, even after eight years, it is still not clear to the United States or any other country what legal rules apply to targeting and detention issues.

Approximately six years ago, the International Committee of the Red Cross ("ICRC") put together a study on civilian combatants. It is called The Study on Direct Participation In Hostilities, after the international legal rule that the only time that civilians may be targets is when they are directly participating in hostilities. But when is a civilian directly participating in hostilities? If civilians are shooting or bombing by day, but by night they go back home to their houses, are they still combatants? Or can they only be targeted when they are doing the bad things, not when they are home?

The ICRC report spent six years studying this issue; its report is not binding, but reflects some useful guidance. The United States and most other countries agree with some parts of the ICRC report but not other parts.

15. See e.g., Kenneth Roth, Human Rights Watch, 83 FOREIGN AFF. 2, 3 (2004) (arguing that the category of combatant under the law of war is difficult to apply to terrorist activities where “roles and activities are clandestine and a person’s relationship to specific violent acts is often unclear.”).

16. See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL LAW (2009), available at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/1bf0990/$File/ICRC_002_0990.PDF (noting that direct participation in hostilities will suspend a civilian’s right to protection, but that “neither the Conventions nor their Additional Protocols provide a definition of direct participation in hostilities”).

17. Id.
of it, but I would note that it took some of the best experts in the world six years to come to a consensus as to who is directly participating in hostilities. However, the ICRC guidance is still not very clear.

Therefore, inside the United States, these issues have been left to our courts to try to sort out. There have been a number of decisions over the last couple of years to clarify who is a combatant that can be detained. In May 2009, Judge Bates in the D.C. District Court concluded that it is permissible under U.S. law—The Authorization to Use Military Force—and international law to detain individuals who are members or part of al Qaeda or the Taliban but not those who are substantially supporting al Qaeda or the Taliban.19

Just ten days before this panel discussion, the D.C. Circuit, in a rather surprising opinion in the Bihani case, rejected this conclusion and decided instead that individuals can be detained if they are members or part of al Qaeda or the Taliban or if they are substantially supporting them.20 Moreover, in what was perhaps the most surprising part of the ruling, the D.C. Circuit held that international law is irrelevant and that the only law the Court would look at in determining who can be detained is United States domestic law.21 This issue will likely have to be resolved by the Supreme Court, which in the next year or two will probably issue the fourth in its series of detention decisions to clarify who can be detained.

In conclusion, the United States is regularly told that there are no problems with the law or gaps in the law with respect to detention and targeting. The problem is only a question of implementation, implying that if the United States would just do a better job of applying the law, it would all be very easy. I think the answer is that this is not an easy area, that there are not clear rules, and that it is quite difficult to accuse someone of violating the law with respect to targeting and detention. One can appropriately say that the United States has adopted a number of bad policies, but we are going to be debating for a very long time what the applicable rules are or ought to be.

21. See id. at 871 (finding that reference to international law is “unapposite and inadvisable when courts seek to determine the limits of the President’s war powers,” and that courts must look instead to “the text of relevant statutes and controlling domestic caselaw”).

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POLICY ADDRESS: “LEGAL FRAMEWORK FOR THE
U.S. USE OF MILITARY FORCE SINCE 9/11”

This policy address was given at 5:00 p.m., Friday, April 10. The speaker was Stephen
Preston of the U.S. Department of Defense.

REMARKS BY STEPHEN PRESTON

Thank you, Professor Damrosch, for that kind introduction and for the invitation to be
here this afternoon. As a leader in ASIL, a professor of international law, and for many
years editor of the American Journal of International Law, you have played a central role
in shaping our understanding of international law. And you have done so with an eye to the
practical realities faced by the government lawyer, which has made your contributions all
the more meaningful. I also want to thank Mark Agrast and Wes Rist, who have done so
much to make this event, and my participation in it, possible.

I am grateful, as well, to my colleagues in government, who have contributed to my
remarks today in many ways—not least through the wisdom, learning, and hard work they
have brought to bear in answering the difficult questions we regularly face together. Finally,
I want to thank all of you—the members of the American Society of International Law
assembled here this afternoon—for the warm reception I have received and, more important,
for your keen interest in the legal issues affecting the national security of our country. I am
very pleased to have the opportunity to speak with you today. Indeed, I am greatly honored.

The Department of Defense has a long history of engagement with the American Society
of International Law. The first and longest-serving president of the Society, Elihu Root,
served as Secretary of War under two presidents before founding the Society in 1906. He
saw this organization as a place where the hard issues of the day could be discussed and
debated. And he believed that by educating the American public about international law,
the rush to war could be slowed. As he once put it, “[i]n the great business of settling international
controversies without war . . . essential conditions are reasonableness and good temper, a
willingness to recognize facts and to weigh arguments which make against one’s own country
as well as those which make for one’s own country.” I could not agree more.

The theme of this year’s annual meeting, “Adapting to a Rapidly Changing World,” is
a pretty good description of our day-to-day job at the Defense Department. The conflicts
and threats we face are constantly shifting and evolving. Today, I will discuss how the U.S.
government has responded to this rapidly changing world and, specifically, how the legal
framework for our military operations has developed since the attacks of 9/11.

INTRODUCTION

President Obama has made clear from the beginning of his presidency that he is deeply
committed to transparency in government because it strengthens our democracy and promotes
accountability. Although a certain degree of secrecy is of course required to protect our

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Cutler Pickering Hale and Dorr LLP. He wishes to acknowledge the assistance of Professor Oona Hathaway of
Yale Law School in the preparation of these remarks while she was serving as Special Counsel to the General
Counsel for National Security Law. No copyright is claimed in the content of these remarks, which were delivered
by a federal official in his official capacity.

1 Elihu Root, The Need of Popular Understanding of International Law, 1 AJIL 1, 2 (1907).
country, the administration has demonstrated its commitment to greater transparency in matters of national security and, specifically, in explaining the bases, under domestic and international law, for the United States’ use of military force abroad. We have seen this in the president’s own speeches, for example, at the National Archives in May 2009, at National Defense University (NDU) in May 2013, and at West Point in May 2014.

Among senior administration lawyers, we saw this early on, in a speech by the State Department’s Legal Adviser at ASIL in March 2010—this same meeting, five years ago—and in later speeches by the Attorney General at Northwestern in March 2012, and by my predecessor as Department of Defense General Counsel at Yale and at Oxford, both in 2012. There was even a very modest contribution by the CIA General Counsel in remarks at Harvard Law School in April 2012. My remarks here today are the latest in the series—an update of sorts—addressing the legal authority for U.S. military operations as the mission has evolved over the past year or so.

This talk will proceed in four parts. First, I want to review the legal framework for the use of military force developed in the aftermath of the 9/11 attacks. Second, I will explain the legal basis for current military operations against the so-called Islamic State of Iraq and the Levant, or ISIL. Third, I will discuss the end of the U.S. combat mission in Afghanistan and its impact on the legal basis for the continuing use of military force under the 2001 AUMF. Fourth, and finally, I will look ahead to the legal framework for counterterrorism operations in the future.

LEGAL FRAMEWORK DEVELOPED IN THE AFTERMATH OF THE ATTACKS

Let us begin with a bit of history. It is only by seeing where we have been over the past decade and a half that we can understand where we are today.

Return to the first days after the attacks on September 11, 2001, for it is in that time that our government began to articulate the legal framework that we still rely on today. As many of you know, it was only days after the 9/11 attacks that Congress passed, and the president signed, an authorization for the use of military force, or AUMF, authorizing the president to take action to protect the United States against those who had attacked us. Even though it was only days later, we already knew that the attacks were the work of Al Qaeda, a terrorist organization operating out of Afghanistan, led by a man named Usama bin Laden.

The authorization that was enacted into law—which came to be known as the 2001 AUMF—was not a traditional declaration of war against a state. We had been attacked, instead, by a terrorist organization. Yes, the Taliban had allowed bin Laden and his organization to operate with impunity within Afghanistan. But it was not Afghanistan that had launched the attack. It was bin Laden and his terrorist organization.

The authorization for the use of military force that Congress passed aimed to give the president all the statutory authority he needed to fight back against bin Laden, his organization, and those who supported him, including the Taliban. At the same time, the 2001 AUMF was not without limits. It authorized the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

With this statutory authorization, the United States commenced military operations against Al Qaeda and the Taliban in Afghanistan on October 7, 2001, notifying the UN Security Council consistent with Article 51 of the UN Charter that the United States was taking action in the exercise of its right of self-defense in response to the 9/11 attacks.

Although the 2001 AUMF was not unlimited, enacted as it was just a short time after the attacks, it was necessarily drafted in broad terms. Shortly after President Obama came into office, his administration filed a memorandum in Guantánamo habeas corpus litigation offering the new president’s interpretation of his statutory authority to detain enemy forces as an aspect of his authority to use force under the 2001 AUMF. That memorandum explained that the statute authorized the detention of “persons who were part of, or substantially supported, Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.”

Moreover, it stated that “[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized” under the AUMF.

This interpretation of the 2001 AUMF was adopted by the D.C. Circuit and, in 2011, it was expressly endorsed by Congress in the context of detention. The National Defense Authorization Act for Fiscal Year 2012 reaffirmed the authority to detain “[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”

It also reaffirmed that dispositions of such individuals are made “under the law of war.” Thus, a decade after the conflict began, all three branches of the government weighed in to affirm the ongoing relevance of the 2001 AUMF and its application not only to those groups that perpetrated the 9/11 attacks or provided them safe haven, but also to certain others who were associated with them.

My predecessor, Jeh Johnson, later elaborated on the concept of associated forces. In a speech at Yale Law School in February 2012, he explained that the concept of associated forces is not open-ended. He pointed out that, consistent with international law principles, an associated force must be both (1) an organized, armed group that has entered the fight alongside Al Qaeda, and (2) a co-belligerent with Al Qaeda in hostilities against the United States or its coalition partners. This means that not every group that commits terrorist acts is an associated force. Nor is a group an associated force simply because it aligns with Al Qaeda. Rather, a group must have also entered Al Qaeda’s fight against the United States or its coalition partners.

More recently, during a public hearing before the Senate Foreign Relations Committee in May 2014, I discussed at some length the executive branch’s interpretation of the 2001 AUMF and its application by the Department of Defense in armed conflict. In my testimony, I described in detail the groups and individuals against which the U.S. military was taking direct action (that is, capture or lethal operations) under the authority of the 2001 AUMF, including associated forces. Those groups and individuals are: Al Qaeda, the Taliban, and

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1 See re Guantánamo Bay Detainee Litigation, Misc. No. 06-0442, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, 2 (O.D.C. Mar. 13, 2009).

2 Id. at 1.

certain other terrorist or insurgent groups in Afghanistan; Al Qaeda in the Arabian Peninsula (AQAP) in Yemen; and individuals who are part of Al Qaeda in Somalia and Libya. In addition, over the past year, we have conducted military operations under the 2001 AUMF against the Nusrah Front and, specifically, those members of Al Qaeda referred to as the Khorasan Group in Syria. We have also resumed such operations against the group we fought in Iraq when it was known as Al Qaeda in Iraq, which is now known as ISIL.

The concept of associated forces under the 2001 AUMF does not provide the president with unlimited flexibility to define the scope of his statutory authority. Our government monitors the threats posed to the United States and maintains the capacity to target (or stop targeting) groups covered by the statute as necessary and appropriate. But identifying a new group as an associated force is not done lightly. The determination that a particular group is an associated force is made at the most senior levels of the U.S. Government, following reviews by senior government lawyers and informed by departments and agencies with relevant expertise and institutional roles, including all-source intelligence from the U.S. intelligence community. In addition, military operations against these groups are regularly briefed to Congress. There are no other groups—other than those publicly identified, as I have just described—against which the U.S. military is currently taking direct action under the authority of the 2001 AUMF.

LEGAL BASIS FOR CURRENT MILITARY OPERATIONS AGAINST ISIL

That brings me to my second topic: the legal authority applicable to today’s fight against ISIL. The military operations conducted by the United States against ISIL in Iraq and Syria are consistent with both domestic and international law.

First, a word about this group we call ISIL, referred to variously as ISIS, the Islamic State or Daesh (its acronym in Arabic). In 2003, a terrorist group founded by Abu Mu'sab al-Zarqawi—whose ties to bin Laden dated from al-Zarqawi's time in Afghanistan and Pakistan before 9/11—conducted a series of sensational terrorist attacks in Iraq. These attacks prompted bin Laden to ask al-Zarqawi to merge his group with Al Qaeda. In 2004, al-Zarqawi publicly pledged his group's allegiance to bin Laden, and bin Laden publicly endorsed al-Zarqawi as Al Qaeda's leader in Iraq. For years afterwards, al-Zarqawi's group, often referred to as Al Qaeda in Iraq, or AQI for short, conducted numerous deadly terrorist attacks against U.S. and coalition forces, as well as Iraqi civilians, using suicide bombers, car bombs, and executions. In response to these attacks, U.S. forces engaged in combat—at times, near daily combat—with the group from 2004 until U.S. and coalition forces left Iraq in 2011. Even since the departure of U.S. forces from Iraq, the group has continued to plot attacks against U.S. persons and interests in Iraq and the region—including the brutal murder of kidnapped American citizens in Syria and threats to U.S. military personnel in Iraq.

The 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004, when bin Laden and al-Zarqawi brought their groups together. The recent split between ISIL and current Al Qaeda leadership does not remove ISIL from coverage under the 2001 AUMF, because ISIL continues to wage the conflict against the United States that it entered into when, in 2004, it joined bin Laden's Al Qaeda organization in its conflict against the United States. As AQI, ISIL had a direct relationship with bin Laden himself and waged that conflict in allegiance to him while he was alive. ISIL now claims that it, not Al Qaeda's current leadership, is the true executor of bin Laden's legacy. There are rifts between ISIL and parts of the network bin Laden assembled, but some members and factions of Al Qaeda-aligned groups have publicly declared allegiance to ISIL. At the same time,
ISIL continues to denounce the United States as its enemy and to target U.S. citizens and interests.

In these circumstances, the president is not divested of the previously available authority under the 2001 AUMF to continue protecting the country from ISIL—a group that has been subject to that statute for close to a decade—simply because of disagreements between the group and Al Qaeda’s current leadership. A contrary interpretation of the statute would allow the enemy—rather than the president and Congress—to control the scope of the AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States.

Some initially greeted with skepticism the president’s reliance on the 2001 AUMF for authority to renew military operations against ISIL last year. To be sure, we would be having a different conversation if ISIL had emerged out of nowhere a year ago, having no history with bin Laden and no more connection to current Al Qaeda leadership than it has today, or if the group once known as AQI had, for example, renounced terrorist violence against the United States at some point along the way. But ISIL did not spring fully formed from the head of Zeus a year ago, and the group certainly has never laid down its arms in its conflict against the United States.

The name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004. A power struggle may have broken out within bin Laden’s jihadist movement, but this same enemy of the United States continues to plot and carry out violent attacks against us to this day. Viewed in this light, reliance on the AUMF for counter-ISIL operations is hardly an expansion of authority. After all, how many new terrorist groups have, by virtue of this reading of the statute, been determined to be among the groups against which military force may be used? The answer is zero.

The president’s authority to fight ISIL is further reinforced by the 2002 authorization for the use of military force against Iraq (referred to as the 2002 AUMF). That AUMF authorized the use of force to, among other things, “defend the national security of the United States against the continuing threat posed by Iraq.” Although the threat posed by Saddam Hussein’s regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has long been understood to authorize the use of force for the related purposes of helping to establish a stable, democratic Iraq and addressing terrorist threats emanating from Iraq. After Saddam Hussein’s regime fell in 2003, the United States, with its coalition partners, continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against AQI, which then, as now, posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Accordingly, the 2002 AUMF authorizes military operations against ISIL in Iraq and, to the extent necessary to achieve these purposes, in Syria.

Beyond the domestic legal authorities, our military operations against ISIL have a firm foundation in international law, as well. The U.S. government remains deeply committed to abiding by our obligations under the applicable international law governing the resort to force and the conduct of hostilities. In Iraq, of course, the United States is operating against ISIL at the request and with the consent of the government of Iraq, which has sought U.S. and coalition support in its defense of the country against ISIL. In Syria, the United States

is using force against ISIL in the collective self-defense of Iraq and U.S. national self-defense, and it has notified the UN Security Council that it is taking these actions in Syria consistent with Article 51 of the UN Charter. Under international law, states may defend themselves, in accordance with the inherent right of individual and collective self-defense, when they face armed attacks or the imminent threat of armed attacks and the use of force is necessary because the government of the state where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.

The inherent right of self-defense is not restricted to threats posed by states, and over the past two centuries states have repeatedly invoked the right of self-defense in response to attacks by non-state actors. Iraq has been clear, including in letters it has submitted to the UN Security Council, that it is facing a serious threat of continuing armed attacks from ISIL coming out of safe havens in Syria, and it has asked the United States to lead international efforts to strike ISIL sites and strongholds in Syria in order to end the continuing armed attacks on Iraq, to protect Iraqi citizens and ultimately enable Iraqi forces to regain control of Iraqi borders. ISIL is a threat not only to Iraq and our partners in the region, but also to the United States. Finally, the Syrian government has shown that it cannot and will not confront these terrorist groups effectively itself.

THE END OF THE U.S. COMBAT MISSION IN AFGHANISTAN

Let us turn now to my third topic: the end of the U.S. combat mission in Afghanistan and its impact on the legal basis for the continuing use of military force under the 2001 AUMF.

At the outset, I pause to observe, as Clemenceau put it, "It is far easier to make war than to make peace." That remains as true today as it was a hundred years ago. Indeed, in an armed conflict between a state and a terrorist organization like Al Qaeda or ISIL, it is highly unlikely that there will ever be an agreement to end the conflict. Unlike at the close of the World Wars, there will not be any instruments of surrender or peace treaties.

The situation is further complicated by the fact that the U.S. Constitution says nothing directly about how wars are to be ended. The closest it comes is the Treaty Clause, which gives the president and the Senate the power, together, to join treaties—which were, at the time the Constitution was written, the main way that wars were brought to an end. But, again, for a variety of reasons, the current conflict is unlikely to end in that way.

How, then, are we to know when the armed conflict has come to an end? The Supreme Court has not directly addressed this question, but it has offered important guidance. In Hamdi v. Rumsfeld, the plurality interpreted the 2001 AUMF as informed by the international law of war. Citing Article 118 of the Third Geneva Convention, it explained, "[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States."7 Consistent with the Court's approach, the Obama administration has interpreted the AUMF as informed by these international law principles, and this interpretation has been embraced by the federal courts. Hence, where the armed conflict remains ongoing and active hostilities have not ceased, it is clear that congressional authorization to detain and use military force under the 2001 AUMF continues.

8 Id.
Now what does this mean for U.S. military operations in Afghanistan after 2014? Although our presence in that country has been reduced and our mission there is more limited, the fact is that active hostilities continue. As a matter of international law, the United States remains in a state of armed conflict against the Taliban, Al Qaeda, and associated forces, and the 2001 AUMF continues to stand as statutory authority to use military force.

At the end of last year, the president made clear that “our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion.” As a part of this transition, we have drawn down our forces to roughly 10,000—the fewest U.S. forces in Afghanistan in more than a decade. The U.S. military now has two missions in Afghanistan. First, the United States is participating in the NATO non-combat mission of training, advising, and assisting the Afghan National Security Forces. Second, the United States continues to engage in counterterrorism activity in Afghanistan to target the remnants of Al Qaeda and prevent an Al Qaeda resurgence or external plotting against the homeland or U.S. targets abroad. With respect to the Taliban, U.S. forces will take appropriate measures against Taliban members who directly threaten U.S. and coalition forces in Afghanistan, or provide direct support to Al Qaeda. The use of force by the U.S. military in Afghanistan is now limited to circumstances in which using force is necessary to execute those two missions or to protect our personnel.

At the same time, our military operations in Afghanistan remain substantial. Indeed, the president recently announced that U.S. force levels in Afghanistan will draw down more slowly than originally planned because Afghanistan remains a dangerous place. It is sometimes said that the enemy gets a vote. Taliban members continue to actively and directly threaten U.S. and coalition forces in Afghanistan, provide direct support to Al Qaeda, and pose a strategic threat to the Afghan National Security Forces. In response to these threats, U.S. forces are taking necessary and appropriate measures to keep the United States and U.S. forces safe and assist the Afghans. In short, the enemy has not relented, and significant armed violence continues.

The United States’ armed conflict against Al Qaeda and associated forces in Afghanistan and elsewhere also continues. As my predecessor explained at the Oxford Union in 2012, there will come a time when so many of the leaders and operatives of Al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that Al Qaeda as we know it has been effectively destroyed. Unfortunately, that day has not yet come. To be sure, progress has been made in disrupting and degrading Al Qaeda, particularly its core, senior leadership in the tribal areas along the Afghanistan-Pakistan border. But Al Qaeda and its militant adherents—including AQAP, that most virulent strain of Al Qaeda in Yemen—still pose a real and profound threat to U.S. national security—one that we cannot and will not ignore.

Because the Taliban continues to threaten U.S. and coalition forces in Afghanistan, and because Al Qaeda and associated forces continue to target U.S. persons and interests actively, the United States will use military force against them as necessary. Active hostilities will continue in Afghanistan (and elsewhere) at least through 2015 and perhaps beyond. There is no doubt that we remain in a state of armed conflict against the Taliban, Al Qaeda, and associated forces as a matter of international law. And the 2001 AUMF continues to provide the president with domestic legal authority to defend against these ongoing threats.

LEGAL FRAMEWORK FOR FUTURE COUNTERTERRORISM OPERATIONS

Finally, we have come to my fourth topic: the future of the legal framework governing the United States' use of military force. I have described for you how we arrived where we are over the course of nearly fourteen years. The 2001 AUMF continues to provide authority for our ongoing military operations against Al Qaeda, ISIL, and others, even though the conditions of the fight have changed since that authorization was first enacted.

In his 2013 NDU speech, the president anticipated "engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate."\textsuperscript{10} While, today, the administration's immediate focus is to work with Congress on a bipartisan, ISIL-specific AUMF, the president's position on the 2001 statute has not changed. When transmitting to Congress his draft AUMF against ISIL, he stated, "Although my proposed AUMF does not address the 2001 AUMF, I remain committed to working with Congress and the American people to refine, and ultimately repeal, the 2001 AUMF,"\textsuperscript{11} that is, to tailor the authorities granted by the AUMF to better fit the current fight and the strategy going forward. Our democracy is at its best when we openly debate matters of national security, and our nation is strongest when the president and Congress are in agreement on the employment of military force in its defense. The president has made clear that he stands ready to work with Congress to refine the 2001 AUMF after enactment of an ISIL-specific AUMF.

In February of this year, President Obama submitted to Congress draft legislation authorizing use of "the Armed Forces of the United States as the president determines to be necessary and appropriate against ISIL or associated persons or forces." This raises the question: if the president already has the authority needed to take action against ISIL, why is he seeking a new authorization?

Most obviously and importantly, as the president has said, the world needs to know we are united behind the effort against ISIL, and the men and women of our military deserve our clear and unified support. Enacting the president's proposed AUMF will show our fighting forces, the American people, our foreign partners, and the enemy that the president and Congress are united in their resolve to degrade and defeat ISIL.

But the value of having a new authorization expressly directed against ISIL and associated forces of ISIL extends beyond its expression of the political branches' unified support for our counter-ISIL efforts. The 2001 and 2002 AUMFs authorize the current military operations against ISIL, but they were enacted more than a decade ago. The last fourteen years have taught us that the threats we face tomorrow will not be the same as the threats we faced yesterday or face today. This confrontation with ISIL will not be over quickly, and now is an appropriate time for the president, Congress, and the American people to define the scope of the conflict and make sure we have the appropriate authorities in place for the counter-ISIL fight.

To that end, the president has made clear that as part of the counter-ISIL mission he will not deploy U.S. forces to engage in long-term, large-scale ground combat operations like those our nation conducted in Iraq and Afghanistan. With its proposed AUMF, the administration has

\textsuperscript{10} Remarks by the President at the National Defense University, Fort McNair, Washington D.C. (May 23, 2013), available at https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-

sought to strike a balance, putting in place reasonable limitations that would, as the president said at NDU, "discipline our thinking, our definition, [and] our actions," while continuing to provide the authority and flexibility needed to accomplish the mission and preserve the Commander in Chief's authority to respond to unforeseen circumstances. And by working with Congress and the American people to come up with appropriate authorizing legislation for the fight against ISIL, we might also create a model to guide future efforts to refine the 2001 AUMF or otherwise authorize the use of force against some new threat we may not yet foresee.

A central question as we look ahead is what follow-on legal framework will provide the authorities necessary in order for our government to meet the terrorist threat to our country, but will not greatly exceed what is needed to meet that threat. Drawing again from the president's NDU speech, the answer is not legislation granting the Executive "unbound powers more suited for traditional armed conflicts between nations." Rather, the objective is a framework that will support "a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America." The challenge is to ensure that the authorities for U.S. counterterrorism operations are both adequate and appropriately tailored to the present and foreseeable threat.

Of course, in conducting military operations under the authority of existing AUMFs, a new, ISIL-specific AUMF, or a follow-on framework designed to replace the 2001 AUMF, we will remain committed to acting in accordance with our international obligations. As I have already described, our actions against ISIL in Iraq and Syria are justified as a matter of international law, and our military operations are being carried out in accordance with the law of armed conflict. This will continue to be the case under any new domestic authorizations.

CONCLUSION

As a law partner of mine used to say, I go out the door I came in: I would like to close with a few words about transparency in matters of law and national security.

At the time I returned to government, in 2009, I could not pick up a newspaper or turn on a news broadcast without seeing erroneous references to "illegal" U.S. government counterterrorism operations overseas. Not fringe media, but mainstream press. Not isolated or occasional instances, but quite routine—as if it were conventional wisdom that the United States' use of lethal force in the armed conflict against Al Qaeda was "unlawful." For me, and others in the administration, this was deeply disturbing, and something had to be done about it. The something that was done about it was the series of speeches that I mentioned at the outset of my remarks. It all began at this very meeting in 2010, with Harold Koh's defense of U.S. counterterrorism operations in which he identified the international and domestic legal bases for lethal operations, including the use of remotely piloted aircraft. And it continued with the speeches that followed, including Eric Holder's 2012 Northwestern speech, again noting the domestic and international legal authorities for U.S. counterterrorism operations and carefully explaining how citizenship does not confer immunity on one who takes up arms against our country. Repeatedly, in court filings as well as these speeches, the administration has sought to explain the legal rationale for the actions it has taken.

12 Presidential Remarks at NDU, supra note 10.
13 Id.
14 Id.
One result: You no longer find, in the popular press or in professional discourse, the same routine references to the U.S. government’s counterterrorism operations as being “illegal.” Not that the administration has persuaded everyone or will ever satisfy all of its critics. But the lawfulness of our government’s efforts to counter foreign terrorist threats is now better understood, and more widely accepted, at home and abroad.

Transparency to the extent possible in matters of law and national security is sound policy and just plain good government. As noted earlier, it strengthens our democracy and promotes accountability. Moreover, from the perspective of a government lawyer, transparency, including clarity in articulating the legal bases for U.S. military operations, is essential to ensure the lawfulness of our government’s actions and to explain the legal framework on which we rely to the American public and our partners abroad. Finally, I firmly believe transparency is important to help inoculate, against legal exposure or misguided recriminations, the fine men and women the government puts at risk in order to defend our country. We agency counsel all serve the same client, the United States of America, and each of us answers to the head of our respective agencies. But our highest calling, in my personal view, is to serve those who serve us.

Ladies and gentlemen: If my remarks this afternoon, like the speeches in past years, go any distance towards furthering public understanding and protecting those in uniform who are protecting us, I will have done what I set out to do. I thank you for listening. And I want to thank for your continued support of the men and women serving us in the United States Armed Forces.
ENDING THE "DRONE WAR" OR EXPANDING IT? ASSESSING THE LEGAL AUTHORITY FOR CONTINUED U.S. MILITARY OPERATIONS AGAINST AL-QA’IDA AFTER AFGHANISTAN

Ryan J. Vogel*

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INTRODUCTION

The Obama Administration has long struggled with an inherent contradiction at the core of its national security and defense policy. On the one hand, the Administration has always aspired to bring an end to America's post-9/11 armed conflicts; President Barack Obama has even asserted that he “was elected to end [America’s] wars ....”¹ In a 2013 speech at the National Defense University, President Obama clarified his intentions with regard to the current conflicts:

The [Authorization for Use of Military Force (AUMF)] is now nearly [twelve] years old. The Afghan War is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don’t need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states.

So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. That’s what our democracy demands.²

And yet, the Obama Administration “surged” in Afghanistan,³ dramatically escalated the “drone war” in Pakistan and Yemen,⁴

³ See Rajiv Chandrasekaran, The Afghan Surge is Over, FOREIGN POL’Y (Sept. 25, 2012), http://www.foreignpolicy.com/articles/2012/09/25/the_afghan_surge_is_over (Between January 2010 and September 2012, the United States added 33,000 troops to the 68,000 in Afghanistan. The objective of this “surge” was to halt Taliban advances in the south and east, defend Kabul from insurgent penetration, train and equip Afghan forces, and build critical infrastructure to allow for a subsequent withdrawal of U.S. forces).
and used force in Libya against the Qaddafi regime.\textsuperscript{5} Most recently, the Obama Administration began a new campaign in Iraq and Syria against the Islamic State in the Levant (ISIL),\textsuperscript{6} apparently as an extension of the war against al-Qa'ida.\textsuperscript{7}

President Obama himself has pointed to this paradox, including in his Nobel Peace Prize lecture where he acknowledged the controversy of receiving a peace prize while presiding over multiple armed conflicts.\textsuperscript{8} Indeed, while aiming to end America's wars, the Obama Administration has during its time in office in fact increased the number and expanded the scope of armed conflicts to which the United States is or has been a party.\textsuperscript{9} Three of those conflicts were inherited from the previous administration: in Afghanistan; in Iraq; and, more controversially, against al-Qa'ida "occurring in Afghanistan and elsewhere[,]\textsuperscript{10} But the current administration has also fought in


\textsuperscript{8} Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), available at http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize (President Obama addressed this controversy with a vigorous defense of using force to obtain peace when the circumstances demanded it: "But perhaps the most profound issue surrounding my receipt of this prize is the fact that I am the Commander-in-Chief of the military of a nation in the midst of two wars. . . . [W]e are at war, and I am responsible for the deployment of thousands of young Americans to battle in a distant land. Some will kill, and some will be killed. And so I come here with an acute sense of the costs of armed conflict -- filled with difficult questions about the relationship between war and peace, and our effort to replace one with the other. . . . There will be times when nations -- acting individually or in concert -- will find the use of force not only necessary but morally justified. . . . I face the world as it is, and cannot stand idle in the face of threats to the American people. For make no mistake: Evil does exist in the world. . . . To say that force may sometimes be necessary is not a call to cynicism -- it is a recognition of history; the imperfections of man and the limits of reason.").


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Libya\textsuperscript{11} and has expanded regular military operations against al-Qa'ida—including its affiliates, associated forces, and "successors"\textsuperscript{12}—to Yemen, Somalia, Iraq, and Syria.\textsuperscript{13}

To be sure, the Obama Administration has succeeded in ending the wars in Iraq\textsuperscript{14} and Libya,\textsuperscript{15} conflicts that had relatively conventional temporal markers, with identifiable end dates.\textsuperscript{16} And the Administration is working to end the United States' other more conventional armed conflict in Afghanistan by the end of its second term.\textsuperscript{17} But an end to the broader war with al-Qa'ida will likely be more difficult to identify, let alone complete.

The United States' war with al-Qa'ida began in Afghanistan and has long been understood to have Afghanistan as its center of

\textsuperscript{12}See infra Section II.C. for an explanation on the Administration's designation of ISIL as a "successor" to the group that perpetrated the 9/11 attacks.
\textsuperscript{13}See Obama, supra note 6.
\textsuperscript{14}Barack Obama, Remarks by the President on Ending the War in Iraq (Oct. 21, 2011), available at http://www.whitehouse.gov/the-press-office/2011/10/21/remarks-president-ending-war-iraq. But see Charlie Savage, Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says, N.Y. Times, Sept. 13, 2014, at A8 (It should be noted that while the United States withdrew its forces from Iraq in December 2011, it never repealed the 2002 Iraq AUMF. Moreover, because the government is now relying in part on the 2002 Iraq AUMF to conduct air strikes against ISIL in Iraq and Syria, the war in Iraq has arguably resumed).
\textsuperscript{17}David Hudson, Bringing the War in Afghanistan to a Responsible End, White House Blog (May 27, 2014, 4:20 PM), http://www.whitehouse.gov/blog/2014/05/27/bringing-war-afghanistan-responsible-end; see Two Years Since the End of the US-NATO War in Libya, World Socialist (Oct. 31, 2013), http://www.wsws.org/en/articles/20131031/pers-031.html. The United States' war in Afghanistan began shortly after the 9/11 attacks and will likely conclude by the end of 2016 when U.S. combat forces withdraw.
hostilities. Yet there is uncertainty as to whether the war against al-Qa‘ida must end when the conventional war in Afghanistan concludes. That seems unlikely to be the U.S. government’s position, given its legal positions involving the war with al-Qa‘ida and its dependence on law of war authority to conduct drone strikes to kill terrorists in countries around the world. Certainly, the resurgence of al-Qa‘ida and other terrorist groups (including ISIL) throughout the Middle East should give Administration officials pause over “ending” wars before the enemy is either lastingly defeated or in agreement that the conflict is over. Yet, some commentators have already argued that an end to the war in Afghanistan will end all of America’s current conflicts, and that the United States will then lack legal authority to use force against al-Qa‘ida under the AUMF.

Moreover, if the United States adopts a new AUMF for the war against ISIL, thereby eliminating for that separate conflict the

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18 See id.
19 See Barack Obama, Statement by the President on Afghanistan (May 27, 2014), available at http://www.whitehouse.gov/the-press-office/2014/05/27/statement-president-afghanistan; see also Obama, supra note 2 (The Obama Administration has encouraged some of the uncertainty surrounding the end of the war with al-Qa‘ida. President Obama’s May 2014 announcement regarding his plan for the United States to withdraw from Afghanistan came nearly one year to the day after the President famously told an audience at the National Defense University that “[t]he Afghan war is coming to an end[]” and that the war in Afghanistan “like all wars, must end.” In that same 2013 NDU speech, the President called on Congress “to refine, and ultimately repeal, the AUMF’s mandate[,]” asserting, “the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat. . . . Our troops will come home. Our combat mission will come to an end.”).
20 See, e.g., Savage, supra note 14 (explaining that President Obama is relying in part on Congress’ 2002 authorization of the Iraq war and the 2001 authorization to fight Al Qaeda as justification to fight ISIL).
22 See generally Jennifer C. Daskal & Stephen I. Vladeck, After the AUMF, 5 HARV. NAT’L SECURITY J. 115, 116, 128–29 (2014) (stating that the AUMF is outdated because the circumstances in Afghanistan and the Middle East at large have changed dramatically since 9/11, when the AUMF was developed).
strained dependence for authority on the 2001 AUMF, the war against al-Qa’ida could fall away with the end of the Afghanistan conflict without affecting ongoing operations against ISIL in Iraq and Syria. In addition, the Administration could further its claim that ISIL is the “true successor” of the group that perpetrated the attacks of 9/11 by dropping its armed conflict with al-Qa’ida completely and focusing its efforts on ISIL.24

Either way, if the United States withdraws from Afghanistan in 2016, as President Obama has pledged it will,25 there is a legitimate question as to whether the United States may lawfully continue its war against al-Qa’ida, or whether the war against al-Qa’ida, always a contested concept in and of itself,26 is inexorably tied to the war in Afghanistan. And if a conflict against al-Qa’ida may continue after the close of the conventional conflict in Afghanistan, questions remain regarding whether al-Qa’ida’s affiliates, associated forces, and “successors” may be part of the continuing conflict and where that conflict may take place. The answers to these questions are fraught with significant operational effects—consider, for example, the effects on detention authority at Guantanamo Bay (GTMO) or drone strikes in Pakistan or Yemen—each based on the existence of an armed conflict with al-Qa’ida and conducted under the law of war. This article addresses each of these issues in turn.

I. LEGAL BASES FOR A CONTINUED ARMED CONFLICT

In order to answer the first question of whether the United States’ conflict with al-Qa’ida can continue after the United States withdraws from Afghanistan, this section assesses legal bases the United States might assert to demonstrate the existence of a continued armed conflict. This section first considers the initial international and domestic reactions to the

24 This is not the position of this author, but the Administration has allowed this option with the legal positions it has taken related to the campaign against ISIL.
25 Obama, supra note 19.
26 See, e.g., Mary Ellen O’Connell, The Choice of Law Against Terrorism, 4 J. OF NAT’L SECURITY L. & POL’Y 343, 368 (2010) (“On 9/11, the United States made a radical change in its choice of law in defending against terrorism. After a century of pursuing terrorists using criminal law and police methods, the United States invoked the law of armed conflict and military means. This article has presented evidence that the change was not—and is not—supported by international law. ... Peacetime criminal law, not the law of armed conflict, is the right choice against sporadic acts of terrorist violence.”).
9/11 attacks as well as the consistent positions of the parties to the conflict throughout the past thirteen years. This section then turns to objective criteria from international law to determine whether a conflict with al-Qa'ida will continue to meet the threshold for a state of armed conflict after the end of the "hot" war in Afghanistan. Lastly, this section briefly examines potential alternative legal bases the United States could use to justify continued hostilities against al-Qa'ida after Afghanistan.

A. Acts of War and Self-Defense

Not many in the international law community took notice when Usama bin Laden and his fledgling terrorist organization, al-Qa'ida, "declared war" against the United States in 1996 and again in 1998. States had typically approached terrorist groups as criminals to be dealt with through law enforcement means. Even after al-Qa'ida attacked U.S. embassies in Kenya and Tanzania in 1998 and the U.S.S. Cole in 2000, most did not think of the increasing violence as significant enough to constitute acts of war and trigger a state of armed conflict between the United States and al-Qa'ida. The attacks in New York, Washington,
D.C., and Pennsylvania on September 11, 2001, however, started to change that thinking.\(^{31}\)

By targeting civilian and military targets within the territory of the United States, and causing extreme damage to property and massive loss of life, al-Qa'ida's attacks on 9/11 prompted an unparalleled international response. On September 12, 2001, the United Nations Security Council (UNSC) unanimously condemned the "horrifying terrorist attacks" of 9/11 and recognized the "inherent right of individual or collective self-defence in accordance with the [UN] Charter.[]"\(^{32}\) The North Atlantic Treaty Organization (NATO) also recognized a right of self-defense\(^{33}\) and for the first time in its history invoked the mutual defense pact from Article 5 of the Washington Treaty.\(^{34}\) Countries and organizations across the world responded similarly.\(^{35}\) In recognizing the United States' right of self-defense


\(^{33}\) *What Is Article 5?*, NATO OTAN, http://www.nato.int/terrorism/five.htm (last updated Feb. 18, 2005) (Article 5 of the Washington Treaty recognizes the right of a NATO member to exercise "the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations . . .").


after 9/11 under international law, the international community endorsed the United States’ right to use military force against the non-state armed group responsible—al-Qa’ida.

For the United States, too, 9/11 was a paradigm-shifting event. The severity of the attacks—massive casualty events carried out against powerful symbols of American economic and military power—and the common belief that more attacks were imminent, prompted the United States to change its primary approach with al-Qa’ida from a law enforcement framework to a wartime legal framework.36 On September 18, 2001, the Congress passed the AUMF, which provides the president with authority to

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.37

Notably, the AUMF does not impose temporal or geographical limitations on the application of force.38 Instead, it gives the president a significant amount of discretion in identifying and fighting the enemy, with the key constraint being a required nexus between the opposing parties and the 9/11 attacks.39 Two months after 9/11, President George W. Bush issued a Military Order wherein he formally identified al-Qa’ida as the responsible party for the attacks and clarified that the scale of al-Qa’ida’s attacks on U.S. “diplomatic and military personnel and facilities abroad and on citizens and property within the United States” had indeed “created a state of armed conflict that requires the use

September 21, 2001, the OAS, recognized the 9/11 attacks as an “attack against all the states of the Americas as well.”.

36 See George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html. It should be noted, however, that the United States has continued to use a bifurcated approach to terrorism generally, preferring law enforcement methods where the subject is a U.S. citizen or inside the United States. In fact, the military approach has been used primarily against non-U.S. citizens in the Middle East, East Africa, and Southwest Asia, even though terrorists have operated within the United States and throughout Europe. See NATIONAL STRATEGY FOR COUNTERTERRORISM 11–15 (2011), available at http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.


38 Id.

39 Id.
of the United States Armed Forces.\footnote{Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).} Throughout the following seven years, the Bush Administration consistently maintained that the United States was legally "at war" with al-Qa'ida—a conflict begun in self-defense and centered in Afghanistan, but global in reach.\footnote{See, e.g., Exec. Order No. 13234, 66 Fed. Reg. 57355 (Nov. 9, 2001); Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001); Exec. Order No. 13239, 66 Fed. Reg. 64907 (Dec. 12, 2001); Bush, supra note 36.} To the surprise of many, the Obama Administration adopted the same paradigmatic approach to the conflict with al-Qa'ida as the Bush Administration had, including the broader scope of that conflict in relation to the conflict in Afghanistan.\footnote{See, e.g., Barack Obama, supra note 2; Barack Obama, Remarks by The President on National Security (May 21, 2009), available at http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09 ("We are indeed at war with Al Qaeda and its affiliates."); Eric Holder, U.S. Attorney General, Remarks at Northwestern University School of Law (Mar. 5, 2012), available at http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law ("In response to the attacks perpetrated – and the continuing threat posed – by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law."); Koh, supra note 10 ("In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda . . . ").} In addition, Congress and the courts have accepted the Executive's treatment of the situation with al-Qa'ida as a war throughout the past thirteen years.\footnote{See, e.g., National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, \$ 1021, 125 Stat. 1298, 1562 (2011); Boumediene v. Bush, 553 U.S. 723, 771 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 628–29 (2006).} Indeed, the parties to this conflict unquestionably agree that a war exists and that the conflict is not contingent upon the continuation of the conventional war in Afghanistan. There is no question that al-Qa'ida considers itself at war with the United States and has no intention of ending that war even if the United States withdraws from Afghanistan.\footnote{See Ellie Buchdahl, Al-Qaeda Calls for Fresh Wave of Terror Attacks Inside U.S. to 'Bleed America Economically', DAILY MAIL (Sept. 13, 2013, 12:24 PM), http://www.dailymail.co.uk/news/article-2419911/Ayman-Al-Zawahiri-Al-Qaeda-leader-calls-terror-attacks-America-boycott-US-goods-bleed-America-economically.html.} Likewise, the U.S. government—in all three branches and across party lines—has
repeatedly insisted that the United States is at war with al-Qa'ida.\textsuperscript{45} Although the President has recently suggested that the political branches should revisit the AUMF and the state of war with al-Qa'ida that it authorizes,\textsuperscript{46} it has not yet done so and the government continues to treat the situation as a war. Furthermore, with the recent expansion of the AUMF conflict to Iraq and Syria against ISIL, the United States has likely demonstrated its view that the war against al-Qa'ida is likely to continue after and outside of Afghanistan.

\section*{B. Meeting the Threshold of an Armed Conflict}

The Charter of the United Nations prohibits member states from using or threatening to use force in their international relations with other member states.\textsuperscript{47} Although the UN Charter is silent on the subject of use of force by non-state actors, the presumption under international law is that states have a monopoly on the lawful use of force,\textsuperscript{48} with certain narrow exceptions to the rule when a non-state actor is acting as the rightful sovereign authority.\textsuperscript{49} However, the UN Charter affirms that states always retain the inherent right to use force in individual or collective self-defense\textsuperscript{50} or when authorized by the


\textsuperscript{46} Obama, \textit{supra} note 2.

\textsuperscript{47} U.N. Charter art. 2, para. 4.

\textsuperscript{48} See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 13, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (recognizing as "privileged" state armed forces and groups that operate under state authority, e.g., militias and volunteer corps, but accord no such status to non-state actors).


\textsuperscript{50} See U.N. Charter, \textit{supra} note 47, at art. 51.
UN Security Council. Hence, once force is employed, the law of armed conflict governs the hostilities. However, even after a violent event has triggered a state's right of self-defense, the situation must meet certain objective criteria in order to constitute an armed conflict. Indeed, the law of armed conflict does not govern "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature...." Such events or activities fall below the threshold of armed conflict and are governed by the normal peacetime legal framework, including human rights law. In order to rise to the level of an armed conflict, a situation must exhibit a certain "intensity" and the

51 Id. at art. 39.
52 See Int'l Comm. of the Red Cross, How is the Term "Armed Conflict" Defined in International Humanitarian Law? 1, 3, 5 (2008), available at https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf. International law recognizes two types of armed conflict: international armed conflicts (IACs) and non-international armed conflicts (NIACs). IACs are described in Common Article 2 of the 1949 Geneva Conventions and are those fought between or among states. International law, including the law of armed conflict, was developed primarily with IACs in mind. And yet, NIACs make up the vast majority of modern armed conflicts -- including the United States' war with al-Qa'ida. NIACs are described in Common Article 3 of the 1949 Geneva Conventions and are those fought between or among states and non-state actors or between or among multiple non-state actors. Of course, the character of a conflict can change if the circumstances change, such as if a state or non-state party enters the conflict or if the parties' status changes during the armed conflict. Characterization can also be complicated if non-state actors fight as proxies for states.
56 Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). For a detailed analysis of this criteria, see Prosecutor v. Limaj, IT-03- 66-T, Judgment, ¶¶ 135–70 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); see also Online Interview with Kathleen Lawand, supra note 53 (according to Kathleen Lawand, the ICRC’s former head of the ICRC unit that counsels on the law applying in the armed conflicts and other situations of violence in which the ICRC conducts its humanitarian activities, “[t]he level of intensity of the violence is determined in light of indicators such as the duration and gravity of the armed clashes, the type of government forces involved, the number of fighters and troops involved, the types of weapons used,
parties must be sufficiently “organized.”

But the Commentary to the Geneva Conventions indicates that the law governing non-international armed conflicts (NIACs), or armed conflicts with at least one side represented by a non-state actor, was intended to be liberally applied, and courts have adhered to that intent by lowering these threshold requirements for recognizing the existence of an armed conflict. For example, the International Criminal Court for the Former Yugoslavia (ICTY) found in Prosecutor v. Fatmir Limaj that:

some degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation . . . . [but may take] into account factors including the existence of headquarters, designated zones of operation, and the

the number of casualties and the extent of the damage caused by the fighting.

57 Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70. For a detailed analysis of this criteria see Limaj, IT-03-66-T, Judgment, at ¶¶ 94–134; see also Online Interview with Kathleen Lawand, supra note 53 (according to Kathleen Lawand, “[t]he level of organization of the armed group is assessed by looking at factors such as the existence of a chain of command, the capacity to transmit and enforce orders, the ability to plan and launch coordinated military operations, and the capacity to recruit, train and equip new fighters.”).

58 INT’L COMM. OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (Jean S. Pictet ed., 1960), available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf (“[T]he scope of application of [this] Article must be as wide as possible.”); see also Message from the President of the United States Transmitting the Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977 (Jan. 29, 1987) (“The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence).”).

ability to procure, transport, and distribute arms.\textsuperscript{60}

The ICTY further held that intensity could be established by considering factors such as:

the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.\textsuperscript{61}

Thus, according to the \textit{Limaj} criteria, in order to meet the threshold of an armed conflict, a situation only requires parties to have \textit{some} degree of organization and some combination of serious and increased attacks, clashes, mobilization and distribution of weapons, and Security Council attention.\textsuperscript{62} Notably, these “objective criteria” have typically been used to determine whether an armed conflict has begun—an initial assessment of whether the violence is protracted and severe enough to differ from lesser situations of violence and whether the parties are organized enough to conduct adequate command and control—and not to determine whether a conflict, once decided to have begun, has been suspended or terminated for lack of intensity or organization.\textsuperscript{63}

The International Committee of the Red Cross (ICRC) uses these objective criteria to determine the existence of an armed conflict, and then assesses whether groups or states are sufficiently involved in the conflict to be considered parties.\textsuperscript{64} Under this methodology, the ICRC has recognized that the United States and al-Qa'ida are engaged in not one, but a number of discrete non-international armed conflicts.\textsuperscript{65} The ICRC opposes the “transnational NIAC” construct,\textsuperscript{66} but likely considers the

\textsuperscript{60} \textit{Limaj}, IT-03- 66-T, Judgment, at ¶ 89–90 (emphasis added).
\textsuperscript{61} \textit{Id}. at ¶ 90.
\textsuperscript{62} \textit{Id}. at ¶¶ 89–90.
\textsuperscript{64} INT'L COMM. OF THE RED CROSS, supra note 52, at 3.
\textsuperscript{65} See \textit{id}. at 10.
\textsuperscript{66} \textit{Id}..
United States and al-Qa’ida to be parties to the NIACs occurring in Afghanistan-Pakistan, Yemen, and Iraq-Syria.67

Of course, no one, including the ICRC, knows what the conflict with al-Qa’ida will look like in two years. Hostilities could be so intermittent that the intensity element might not be met, particularly when the Afghan theater of war is closed. Members of al-Qa’ida may choose to join or be forcibly subsumed by other more active groups, such as ISIL, or regionally focused organizations, such as al-Qa’ida in the Arabian Peninsula (AQAP) or al-Qa’ida in the Islamic Maghreb (AQIM). Al-Qa’ida’s core leadership might also continue to be decimated by drone strikes, resulting in diminishment of the organization element. Homeland Security Secretary, then the General Counsel of the Department of Defense, Jeh Johnson, addressed this issue in a 2012 speech at Oxford University, referring to a “tipping point” at which al-Qa’ida would be sufficiently diminished to allow for an end to the war against al-Qa’ida and a return to the law enforcement framework.68

On the other hand, al-Qa’ida might return to Afghanistan and flourish after the United States leaves the country, and ISIL might continue its rampage through Iraq, Syria, and the surrounding region. Either way, under the lenient Limaj criteria, the United States’ war with al-Qa’ida will likely continue, at least for the near term, to meet both the organization and intensity requirements needed to establish the existence of an armed conflict even after U.S. forces withdraw from Afghanistan.

Both the United States and al-Qa’ida will likely continue to

67 See id at 9–10.

68 Jeh Johnson, Gen. Counsel of the U.S. Dept of Def., Oxford University: The Conflict Against Al Qaeda and its Affiliates: How Will it End? (Nov. 30, 2012), available at http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/. (Secretary Johnson commented, “I do believe that on the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed. At that point, we must be able to say to ourselves that our efforts should no longer be considered an ‘armed conflict’ against al Qaeda and its associated forces; rather, a counterterrorism effort against individuals who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community – with our military assets available in reserve to address continuing and imminent terrorist threats.”).
satisfy the organization test. The United States inarguably meets and will continue to meet the organization requirement, regardless of whether regular armed forces are used or Special Forces or even CIA personnel. In addition, al-Qa’ida also currently meets the non-cumulative criteria of organization: (1) al-Qa’ida maintains “headquarters” in Pakistan and Yemen from which it coordinates activities;69 (2) al-Qa’ida operates within designated zones in Afghanistan, Pakistan, Yemen, and elsewhere;70 and (3) al-Qa’ida has demonstrated a persistent ability to procure, transport, and distribute arms to countries across the globe.71 Politicians, policy-makers, and commentators have been quick to predict the imminent demise of al-Qa’ida,72 and the terrorist organization may eventually experience incapacitating defeat, dysfunction, and defection. But al-Qa’ida has been surprisingly resilient through the past two decades and will likely continue to meet Limaj’s less than demanding criteria required to be a party to a continuing armed conflict with the United States.73

The question of whether hostilities will remain sufficiently “protracted” once U.S. forces leave Afghanistan is the more difficult one. By ending the war in Afghanistan, the primary battleground in the greater war with al-Qa’ida will be gone. As a result, attacks on al-Qa’ida members in Afghanistan and Pakistan will likely greatly decline—if not halt altogether. As a result, acts of violence between the parties to the conflict may not reach a level normally associated with an active armed conflict. And yet, much like the criteria required to establish the organizational element, the criteria needed to establish the intensity of the conflict are ambiguous and permissive. While it

70 Id.
71 See id.
73 See, e.g., Panetta, supra note 72 ("[T]he threat from al-Qaeda has not been eliminated. We have slowed a primary cancer, but we know that the cancer has also metastasized to other parts of the global body."); U.S. DEP’T OF STATE, supra note 69 (identifying regions where al-Qa’ida was still active in 2011 and 2012).
is unclear how many of the non-cumulative criteria must be met in order to satisfy the intensity requirement, it seems likely that the conflict with al-Qa'ida will at least satisfy a majority of them—i.e., that both sides will continue to regularly conduct or attempt serious attacks from and in multiple states' territories, that government forces will continue to be involved, and that the parties will continue to mobilize and distribute weapons. Additionally, the UNSC has passed resolutions pertaining to the conflict already, and as at least one permanent member of the UN Security Council will continue to be a party to the conflict, the UNSC will likely remain interested in the conflict.\textsuperscript{74}

\textbf{C. Alternative Legal Bases for Continued Hostilities Against al-Qa'ida}

While the United States' NIAC with al-Qa'ida will likely continue, at least for the near term, to meet the objective criteria for the existence of an armed conflict even after U.S. forces leave Afghanistan, the United States may have at least two additional legal bases at its disposal for continued military operations against al-Qa'ida. First, the United States could choose to abandon the wartime legal framework altogether but continue to conduct military operations against al-Qa'ida on a case-by-case basis using a pre-9/11 approach to terrorism.\textsuperscript{75}

The Obama Administration has already laid some of the groundwork for this legal approach.\textsuperscript{76} In essence, this option would require the U.S. government to make a self-defense claim under Article 51 of the UN Charter for each and every attack against an al-Qa'ida member, as opposed to using self-defense once as an initial trigger to initiate a state of armed conflict.\textsuperscript{77} This option could be appealing since the administration is able to "end the war" and still conduct lethal strikes against dangerous militants. However, law of war detention would not be


\textsuperscript{75} See BENJAMIN WITTEN, LAW AND THE LONG WAR 21 (2008); see also O'Connell, supra note 26, at 347.

\textsuperscript{76} See, e.g., John Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), http://www.lawfareblog.com/2012/04/brennanspeech.

\textsuperscript{77} See U.N. Charter, supra note 47, at art. 51; see also Koh, supra note 10 (describing the war in Afghanistan as one of self-defense arising from one single event, 9/11).
permissible under this framework. And with the consequent reduction in access to intelligence, the United States would arguably have less successful targeting operations, and would likely receive greater scrutiny from the international community and civil society.

Alternatively, the United States might also consider adopting a liberally applied version of the ICRC's approach to recognizing an armed conflict as a more palatable option for the international community. Under this approach, the United States could continue to wage war against al-Qa'ida outside of its territory as long as hostilities were attached to another existing conflict, such as the NIACs in Afghanistan/Pakistan, Somalia, Yemen, and Iraq/Syria. In practice, this is almost always how the United States has engaged with al-Qa'ida anyway, while approaching al-Qa'ida primarily through law enforcement means in non-warzone states. But this method of determining the existence of an

78 See INT'L COMM. OF THE RED CROSS, supra note 52, at 7–8.
79 See generally Afghanistan – Applicable International Law, GENEVA ACAD., http://www.geneva- academy.ch/RULAC/applicable_international_law.php?id_state=1 (last updated June 14, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Afghanistan); Iraq – Applicable International Law, GENEVA ACAD., http://www.geneva- academy.ch/RULAC/applicable_international_law.php?id_state=110 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Iraq); Pakistan – Applicable International Law, GENEVA ACAD., http://www.geneva- academy.ch/RULAC/applicable_international_law.php?id_state=166 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Pakistan); Somalia – Applicable International Law, GENEVA ACAD., http://www.geneva- academy.ch/RULAC/applicable_international_law.php?id_state=204 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Somalia); Syria – Applicable International Law, GENEVA ACAD., http://www.geneva- academy.ch/RULAC/applicable_international_law.php?id_state=211 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Syria); Yemen – Applicable International Law, GENEVA ACAD., http://www.geneva- academy.ch/RULAC/applicable_international_law.php?id_state=234 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Yemen).
80 See generally Glenn Greenwald, Chilling Legal Memo from Obama DOJ Justifies Assassination of US Citizens, GUARDIAN (Feb. 5, 2013), http://www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-
armed conflict would have to be conditioned on a liberal application of the objective criteria—finding an armed conflict whenever possible—as international courts have traditionally applied Common Article 3 [hereinafter CA3]. 81

II. POTENTIAL PARTIES TO THE CONTINUING ARMED CONFLICT

As long as the United States' war against al-Qa'ida continues to satisfy the objective criteria required to establish an armed conflict, the United States will have to identify which groups are party to the conflict. 82 The U.S. government has long asserted that it is at war against three groups under the AUMF: the Taliban, al-Qa'ida, and associated forces. 83 An end to the war in Afghanistan will have different effects on the conflict with each of these groups.

A. The Taliban

After the 9/11 attacks, the United States gave the Taliban regime in Afghanistan an ultimatum: turn over all senior al-Qa'ida members, including Usama bin Laden, shut down and give the United States access to all training camps in Afghanistan, and expel al-Qa'ida members from its territory, or share their fate. 84 The Taliban, which had given al-Qa'ida safe haven and allowed it to administer training camps in its territory since

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82 Id.


In 2001, the Taliban fell under the "harbor" prong of the AUMF, as they were not the group or individuals that perpetrated the attacks of 9/11, but those that gave them safe haven. Since October 2001, the United States has fought the Taliban in Afghanistan and Pakistan alongside its Afghan and International Security Assistance Forces (ISAF) partners and under a UNSC resolution. However, around 2009 the Taliban began to show renewed interest in the political process and indicated its intent to participate in Afghanistan's government again after the United States and ISAF forces leave the country. The Taliban has even pledged to end any and all relations with terrorist groups.

Whether or not the Taliban keeps its word—because the United States' war with the Taliban was always tied to the war in Afghanistan—the war with the Taliban will most likely end when

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87 AUMF, 115 Stat. 224.
90 See Gareth Porter, *US Silent on Taliban’s Al-Qaeda Offer*, ASIA TIMES (Dec. 17, 2009), http://www.atimes.com/atimes/South_Asia/KL17Df02.html ("[T]he Taliban were interested in negotiating an agreement with the United States involving a public Taliban renunciation of ties with al-Qaeda . . . .").
the United States withdraws its forces from Afghanistan.\footnote{See generally Trofimov, supra note 89 (expressing the reluctance of the Taliban to participate in reformation efforts when such efforts are “being planned under foreign occupation.”).} The Taliban has not conducted attacks against the United States outside of Afghanistan and that does not appear to be its intent.\footnote{The Taliban, MAPPING MILITANT ORGANIZATIONS, http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/367 (last updated Nov. 28, 2012) (stating the geographical locations of the Taliban’s military operations and their targets and tactics).} The Taliban’s war with the United States has been primarily about control of Afghan territory, and not global ideological ambitions.\footnote{Hamdullah Mohib & Omar Mansoor Ansari, The Taliban, ISLAMIC MONTHLY (June 17, 2012), http://www.theislamicmonthly.com/the-taliban/ (stating that the goals of the Taliban are to bring freedom to Afghanistan and to establish an Islamic government).} Therefore, of the three parties covered by the AUMF, the Taliban is the most likely to fall off of a continued conflict after the war in Afghanistan ends.

\textbf{B. Al-Qa’ida, its Affiliates, and Associated Forces}

This is not the case for al-Qa’ida. The focus of the AUMF and the U.S. government’s “global war on terror”\footnote{The Bush Administration used the term “global war on terror” throughout its time in office to describe the transnational conflict with terrorist groups al-Qa’ida, the Taliban, and associated forces. Although the term was never meant to imply that the United States was at war with any terrorist group anywhere in the world, the Obama Administration wisely discontinued its use. The term now used—the war against al-Qa’ida—identifies the enemy specifically by name. However, even though the Obama Administration dropped the adjective “global” from the name of the conflict, it has continued to conduct a war in multiple non-contiguous states across the Middle East, Southwest Asia, and East Africa. See Ari Shapiro, Obama Team Stops Saying ‘Global War On Terror’ But Doesn’t Stop Waging It, NPR (Mar. 11, 2013, 4:38 PM), http://www.npr.org/blogs/itsallpolitics/2013/03/11/174034634/obama-team-stops-saying-global-war-on-terror-but-doesnt-stop-waging-it.} is and always has been al-Qa’ida.\footnote{See Brian Whitaker, Bin Laden Voice on Video, says TV Channel, GUARDIAN (Sept. 9, 2002, 9:31 PM), http://www.theguardian.com/media/2002/sep/10/alqaida.september11200 (acknowledging al-Qa’ida’s claim of responsibility for the attacks).} Usama bin Laden’s terrorist organization planned and executed the 9/11 attacks and has persistently fought the United States in the years since.\footnote{See Memorandum from Audrey Kurth Cronin, Specialist in Terrorism, Foreign Affairs, Def. and Trade Div. to the H. Gov’t Reform Comm. (Mar. 31, 2004), available at http://fas.org/irp/cs/033104.pdf.} But al-Qa’ida looks far different as an organization than it did in 2001 and this may
have some effect on whether it or some of its affiliates may be part of a continued armed conflict with the United States.

Most of “core” al-Qa’ida’s senior leadership has been killed or captured in the years since 9/11. Most notably, the United States killed Usama bin Laden in a May 2, 2011 raid on his compound in Abbottabad, Pakistan, and has captured scores of senior leaders, including Khalid Sheik Mohammed, Ramzi Bin al Shibh, Abd al Rahim al Nashiri, Walid Bin Attash, Abu Zubaydah, and Abu Faraj al Libi. These successes have led many to predict the imminent demise of al-Qa’ida—or at least its diminished ability to stage attacks against the territory of the United States.

Yet, in spite of these successes, as noted above, “core” al-Qa’ida has been frustratingly resilient. In fact, one of the remarkable revelations from the intelligence obtained at the bin Laden compound and made public was the surprising degree of command-and-control still coming from AQ Headquarters in Pakistan. While Ayman al-Zawahiri has encountered more resistance than bin Laden did as leader of al-Qa’ida, he has helped al-Qa’ida continue to exercise this central organizational role. Thus, if the United States chooses to continue its war against al-Qa’ida, it will have a solid basis to do so as “core” al-Qa’ida is still the party that perpetrated 9/11, it remains

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sufficiently organized and intent on fighting the United States, and its leaders continue to exercise a considerable degree of command-and-control over the vast network of terror groups allegiant to the al-Qa’ida flag.

That said, al-Qa’ida has also become increasingly splintered and diffuse—with a growing constellation of al-Qa’ida affiliates and associated forces, including AQAP, AQIM, al-Qa’ida in Iraq (AQI), al-Qa’ida in the Indian Subcontinent (AQIS), al Shabab, and the al Nusra Front. Zawahiri continues to lead “core” al-Qa’ida located in Afghanistan and Pakistan, but these affiliates and associated forces have exhibited distinct territorial, political, and ideological ambitions and missions. AQAP has attracted particular attention because of its attempted attack on an American airliner in 2009, its attempt to send explosive packages to the United States through the mail in 2010, and its persistent calls for attacks on Western targets in its online English language magazine, “Inspire.” AQI also attempted attacks on U.S. targets, including one attempt within U.S. territory in 2011, and it appears that the group may now have completely merged with ISIL. And al Shabaab and the al Nusra Front have been very public in their support and allegiance to “core” al-Qa’ida, including its war against the United States. Other affiliates, including AQIM and the newly

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101 Al-Qa’ida, supra note 100 (“Despite continued leadership losses, al-Qa’ida remains committed to conducting attacks in the United States and against American interests abroad.”). But see J.M. Berger, The Islamic State vs. Al Qaeda, FOREIGN POL’Y, (Sept. 2, 2014), http://www.foreignpolicy.com/articles/2014/09/02/islamic_state_vs_al_qaeda_next_jihadi_super_power (noting that “there have been signs for many months that al Qaeda’s command-and-control infrastructure is inadequate to respond to several internal problems . . . .”).

102 See Berger, supra note 101.

103 Id.

104 Id. See generally JOHN ROLLINS, CONG. RESEARCH SERV., R41070, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY (2011) (providing a summary of missions of Al Qaeda and its affiliates).


106 Id.

107 Id.


created AQIS, seem to have focused their hostilities on regional objectives and not (yet) on American targets.\footnote{See Christopher S. Chivvis & Andrew Liepman, North Africa’s Menace: AQIM’s Evolution and the U.S. Policy Response 1 (2013); Split with ISIL Not the Reason for Creation of Al Qaeda in India: US, F. World (Sept. 18, 2014), http://www.firstpost.com/world/split-isil-reason-creation-al-qaeda-india-us-1717725.html (AQIS has stated objectives that include attacks on the U.S., but has made no step beyond mere verbal threats and its leader has recognized the “intense international backlash” such an attack would have).}

However, the terms “affiliate” and “associated forces” have been the source of confusion and controversy for years.\footnote{See Daskal & Vladeck, supra note 22, at 122–25; Cora Currier, Who Are We at War With? That’s Classified, PROPUBLICA (July 26, 2013, 10:13 AM), http://www.propublica.org/article/who-are-we-at-war-with-thats-classified (discussing the difficulties lawmakers have had with defining the term).} Jeh Johnson attempted to clarify how the United States approached this concept in a 2012 speech at Yale Law School:

An ‘associated force,’ as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners.\footnote{Jeh Charles Johnson, Gen. Counsel of Dept. of Defense, National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), available at http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/}

Thus, the question of whether an associated force or an affiliate is or may be part of an armed conflict with the United States turns on whether that group fights with al-Qa’ida against the United States or its coalition partners, and not whether they are ideologically linked against the West or allied with al-Qa’ida against regional non-partner enemies. Of course, this is still an ambiguous definition and it is not clear how the United States would characterize groups such as Lashkar-e-Tayyiba or the Tehrik-e Taliban in Pakistan—which seem to be co-belligerents with al-Qa’ida and the Taliban against the United States in that region primarily due to the United States’ presence there—after U.S. forces leave Afghanistan.\footnote{See Laurie R. Blank & Benjamin R. Farley, Characterizing US Operations in Pakistan: Is the United States Engaged In An Armed Conflict?, 34 FORDHAM} But it makes sense that to be at

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war with the United States, an associated force must continue to be engaged in or actively planning actual hostilities with the United States, and not merely ideologically supportive of al-Qa'ida's war with the United States.

Johnson's explanation also makes clear that other ideologically aligned but non-allied terrorists (such as the Boston bombers) and terrorist groups (such as Boko Haram) are not included within the Administration's definition. Johnson explains,

Nor is the concept of an 'associated force' an open-ended one, as some suggest. This concept, too, has been upheld by the courts in the detention context, and it is based on the well-established concept of co-belligerency in the law of war. The concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more de-centralized, and relies more on associates to carry out its terrorist aims.

. . . [A]n 'associated force' is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.

President Obama agreed, asserting, "I think there is a distinction between the capacity and reach of a bin Laden and a network that is actively planning major terrorist plots against the homeland versus jihadists who are engaged in various local power struggles and disputes, often sectarian." In other words, the United States does not and, after U.S. forces leave Afghanistan, likely will not lump all Islamist terror groups together under the broad "affiliate" or "associated force" label. Instead, the United States will likely continue to treat as co-belligerents with al-Qa'ida only those groups that directly fight the United States.

[114] INT'L L.J. 151, 154, 159 (2011) (discussing the status of the Tehrik-e-Taliban and the group's conflict with the United States); see also Protecting the Homeland Against Mumbai-Style Attacks and the Threat from Lashkar-e-Taiba: Hearing Before the Subcomm. On Counterterrorism and Intelligence of the H. Comm. on the Homeland Security, 113th Cong. 5 (2013) (statement of Christine Fair, Assistant Professor, Georgetown University) (opining that an attack by the Lashkar-e-Tayyiba in the United States would ultimately be devastating to the organization).


[116] Johnson, supra note 112.

This will probably include AQAP and al Shabab, and it may include the al Nusra Front in Syria if the group focuses more of its efforts on striking U.S. citizens or territory.

C. Al-Qa'ida's "Successors"

In a truly unexpected development, the Obama Administration began arguing in September 2014 that the 2001 AUMF authorized force against ISIL because ISIL was the "true successor" of Usama bin Laden's al-Qa'ida.\textsuperscript{117} The administration later clarified that it considers the AUMF to cover both ISIL and al-Qa'ida, as equal "successors" to the group that perpetrated the 9/11 attacks.\textsuperscript{118} In fact, ISIL emerged in part from the AQI affiliate and, as a result, has been classified by the UNSC as an "associated force" of al-Qa'ida.\textsuperscript{119} However, in a very public dispute in February 2014,\textsuperscript{120} ISIL and "core" al-Qa'ida separated and ISIL has since used force in Syria against al-Qa'ida's Syrian branch, the al Nusra Front.\textsuperscript{121}

\textsuperscript{117} As noted earlier, the Administration is also relying on the 2002 Iraq AUMF. See Savage, supra note 14. According to senior Administration officials, in relying on the 2001 AUMF, the President is arguing that ISIL is the "true successor" to Usama bin Laden's al-Qa'ida. See Marty Lederman, The Legal Theory Behind the President's New Military Initiative Against ISIL, JUST SECURITY (Sept. 10, 2014, 9:12 PM), http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/. Of course, if we took to its logical end the Administration's argument that ISIL is the true successor to bin Laden's al-Qa'ida, there might be a legitimate question as to whether the AUMF no longer covers Zawahiri's "core" al-Qa'ida because it is not the true successor? The use of the term "true" here seems significant because it could denote exclusivity. And if al-Qa'ida is no longer the "true successor" to the al-Qa'ida contemplated by the AUMF, what effect would that determination have on "core" al-Qa'ida's loyal affiliates (e.g., AQAP, AQIM, AQIS) and associated groups (e.g., al-Shabab, al Nusra Front)? Subsequent statements from the White House clarified that ISIL and al-Qa'ida are at least for now) both the true successors to bin Laden's al-Qa'ida. See Marty Lederman, Tentative First Reactions to the 2001 AUMF Theory, JUST SECURITY (Sept. 11, 2014, 10:42 AM), http://justsecurity.org/14804/first-reactions-2001-aumf-theory/.


\textsuperscript{121} See ISIL Says It Faces War with Nusra in Syria, ALJAZEERA, http://www.aljazeera.com/news/middleeast/2014/03/isil-says-it-faces-war-with-
Thus, ISIL cannot be co-belligerents with al-Qa’ida in its war against the United States, as long as they fight against al-Qa’ida and the United States, and not alongside al-Qa’ida against the United States. 122 Consequently, even if one accepts the argument that ISIL is an AUMF successor to al-Qa’ida, ISIL must be characterized as a separate al-Qa’ida party to the conflict and not a “core” al-Qa’ida affiliate or associated force. 123 In addition, any affiliates or associated groups that ISIL has or will have that fight alongside ISIL against the United States will presumably be party to the conflict with al-Qa’ida.

Whatever ISIL’s relation to al-Qa’ida in the conflict against the United States, the warfront with ISIL should have no dependence at all on the war in Afghanistan. If anything, ISIL’s inclusion in the war, particularly under the authority of the AUMF, negates the effect that ending the war in Afghanistan has on the greater conflict with al-Qa’ida. ISIL’s participation demonstrates the truly transnational character, since it adds a regular battlefield in Iraq and Syria to those already in existence in Afghanistan, Pakistan, Yemen, and Somalia. 124 By recognizing ISIL as the (or “a”) successor to al-Qa’ida, including any co-belligerent affiliates and associated forces, the Administration has dramatically expanded the broader war against al-Qa’ida.

III. POTENTIAL LOCATION OF THE CONTINUING ARMED CONFLICT

If the United States determines that it may continue to legally wage war against al-Qa’ida and its co-belligerent affiliates, associated forces, and successors after it withdraws its forces from Afghanistan, the thorniest issue may still be where that conflict may be fought. With the military out of Afghanistan, the

122 Id. (indicating that ISIL is considered to be an adversary of al-Qa’ida as opposed to an ally). But see Martin Chulov, Isis Reconciles with Al-Qaida Group as Syria Air Strikes Continue, GUARDIAN (Sep. 28, 2014, 12:56 PM), http://www.theguardian.com/world/2014/sep/28/isis-al-qaida-air-strikes-syria (reporting that segments of Nusra (al-Qa’ida’s Syrian affiliate) have agreed with ISIL to cease fighting against each other to allow both parties to focus on other enemies, including the United States).


primary battlefield in the war with al-Qa’ida will be gone. Of course, al-Qa’ida will probably find Afghanistan and Pakistan to be more hospitable once the United States leaves and may attempt to re-establish new camps and headquarters in those countries from which to stage operations against the United States. The United States might then again use force against al-Qa’ida in those countries, likely relying on drones, conventional air strikes, and Special Forces. And, depending on how long the United States conducts air strikes against ISIL, there may continue to be a more traditional battlefield for the war against al-Qa’ida in Iraq and Syria. Still, ending major combat operations in Afghanistan will place, front and center, the transnational nature of the conflict with al-Qa’ida.

As noted above, the AUMF does not prescribe geographical limitations on the war against al-Qa’ida and the United States has consistently argued that the war may take place wherever al-Qa’ida operates. When the United States began its war with al-Qa’ida, it concluded that CA3 did not apply because “the relevant conflicts are international in scope[,]” and are not the traditional internal civil wars contemplated by CA3. In 2006

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128 Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel on Application of Laws and Treaties to al Qaeda and Taliban Detainees, to William J. Haynes II, General Counsel, Department of Defense 7 (Jan. 9, 2002), available at http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf (describing
however, the Supreme Court disagreed with the government’s characterization of the conflict and decided in Hamdan v. Rumsfeld that CA3 applied to the war with al-Qa’ida because it was non-international in character. The Hamdan court correctly dismissed the notion that non-international armed conflicts must be internal.

Indeed, international law does not require NIACs to be "confined within the borders of a single state"—instead, the key feature of NIACs is the non-state identity of at least one side to the conflict. Countless examples exist of NIACs that have crossed borders and bled into surrounding states’ territories. It is already largely accepted that the United States is at war with al-Qa’ida in Afghanistan, with a spillover of that conflict into Pakistan. In its 2011 IHL Challenges Report, the ICRC

the internal wars contemplated by CA 3).


See id. at 631–35; see also Sandesh Sivakumar, The Law of Non-International Armed Conflict 229 (2012) ("The law of non-international armed conflict does not require that the violence be of a purely internal character, that is to say confined within the borders of a single state.").

Sivakumar, supra note 130, at 229–30 (asserting that "[s]uch a conclusion is reached through a consideration of the drafting history of the provisions. The 1946 Preliminary Conference of National Red Cross Societies proposed the application of the Conventions 'in the case of armed conflict within the borders of a State', and the accompanying report likewise referred to civil wars 'within the frontiers of a State'. The rules were thus considered to apply to conflicts that were wholly internal in character. However, that scope of application was rejected . . . . [T]he fact that a civil war may cross an international border was expressly considered at the relevant time and it was not simply presumed that civil wars would be confined to the territory of a single state. . . . Importantly, the treaty rules do not refer to armed conflicts within a single High Contracting Party or within the territory of one High Contracting Party alone, both of which would suggest territorial limits.") (footnotes omitted).

Id. at 234 (explaining that the "key feature" of these conflicts is the nature and identity of a group, not the territory where they come from).


See, e.g., Sivakumar, supra note 130, at 234 (The United States’ “armed conflict with al-Qa’ida,” occurring in non-adjacent states, has a “different degree of geographical proximity to the typical cross-border non-international armed conflict but it is not of a different type as to necessitate it being treated in an altogether different manner.”). But see Michael N. Schmitt, Classification in Future Conflict, in International Law and the Classification of Conflict 455, 465 (Elizabeth Wilmshurst ed., 2012) (noting that "Common Article 3 contains no such [geographical] restriction, but its mention of conflicts 'occurring
recognized this new reality, identifying six distinct types of
NIACs—four of which had some external character. Typically,
the state involved in the NIAC will have its territory as the base
of the conflict, but this is not deemed essential.

Thus, the question under the law is a factual one, based on the
united character of the parties. As Sandesh Sivakumaran
explains:

In such a situation, what needs to be established is whether Al-
Qaeda in its various locations—Afghanistan, the Arabian
Peninsula, and the like—constitutes different groups or whether
they are parts of the same group. If it is the same group, then it is
submitted that a single conflict exists, albeit the actor is located in
different states, as there is a nexus between the violence in the
different places.

While this seems like a prudent approach, it may make even
more sense to approach a group like al-Qa'ida, which directs
affiliates and associated forces in the far-flung reaches of the
Middle East, Asia, and Africa, as a single group only to the extent
that they are actually at war with the same enemy—in this case,
the United States. For the present case, this would mean that a
single conflict exists between the United States and the elements
of al-Qa'ida that are co-belligerents against the United States,
such as “core” al-Qa'ida and AQAP, but not AQIM or AQIS. If the
conflict with ISIL becomes a long-term fixture in the war against
al-Qa'ida, that conflict might be separated for these purposes
because the parties are not a single group and do not fight (at
least not yet) in cooperation with another against the common
enemy. Thus, one front of the conflict against al-Qa'ida would
exist against “core” al-Qa'ida, its affiliates, and associated forces
and be centered in Afghanistan, Pakistan, and Yemen, although
it could take place wherever the participants operated; and

in the territory of a party to the 1949 Geneva Conventions can be interpreted as
excluding conflicts that cross national borders.

\[135\] \textit{Int'l Comm. of the Red Cross, supra} note 52, at 9–10. Notably, the ICRC
indicated that some states recognized the existence of a seventh NIAC—“an
armed conflict taking place across multiple states between Al Qaeda and its
‘affiliates’ and ‘adherents’ and the United States (‘transnational’)—but that
the ICRC did not accept this as a different type. \textit{Id.} at 10.

\[136\] \textit{See generally id.} (explaining that of the six types of NIAC’s recognized by
the ICRC, most involve the host state fighting armed groups exclusively on their
own territory while others involve the host state fighting armed groups in
neighboring states).

\[137\] \textit{Sivakumaran, supra} note 130, at 233 (footnote omitted).
another front in the conflict would exist against ISIL and its affiliates and associated forces and be centered in Iraq and Syria, but could likewise take place wherever the participants operated.

Certainly, there is nothing in the law of armed conflict that proscribes the United States from conducting operations against enemy forces wherever the parties to the conflict operate against the United States. Yet, many have expressed concern with a truly "global" or "transnational" NIAC with a non-state terrorist group. In a hearing before the Senate Armed Services Committee on the law of armed conflict, Department of Defense Deputy General Counsel Robert Taylor addressed this issue:

Some have also questioned the geographic scope of this conflict. The enemy in this conflict has not confined itself to the geographic boundaries of any one country. U.S. military operations on the territory of another state must comply with international law rules, including respect for another state's sovereignty. This does not prevent us from using force against our enemies outside an active battlefield, at least when the country involved consents or is unable or unwilling to take action against a serious threat.

Taylor's statement is consistent with previous positions from senior officials in the U.S. government. The United States has certainly not used force in every state where al-Qa'ida operates.

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138 Id. at 234 ("[A] conflict must have a territorial base whether a single territory, a core territory plus overspill onto different territory, or multiple territories; a global non-international armed conflict does not exist, at least as a matter of law."); see Mary Ellen O'Connell, Defining Armed Conflict, 13 J. CONFLICT & SEC. L. 393, 399–400 (2009).


140 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) ("The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan."); Johnson, supra note 112 ("[T]here is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the 'hot' battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11th attacks — al Qaeda and the Taliban — without a geographic limitation. The legal point is important because, in fact, over the last 10 years al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.").
Rather, the United States has used military force primarily in ungoverned spaces, such as the tribal regions of Pakistan or the remote villages of Yemen and Somalia.\textsuperscript{141} Yet, as Taylor noted,\textsuperscript{142} even if the law of armed conflict permits the United States to use force wherever al-Qa'ida operates, the United States is still obligated to respect a state's sovereignty and territorial inviolability.\textsuperscript{143} A state's consent to use force within their territory can resolve this issue.\textsuperscript{144} So, too, can a self-defense claim under Article 51 of the UN Charter, including where a state is "unable or unwilling" to prevent its territory from being used by a third party to conduct hostilities against another state.\textsuperscript{145} But, the United States must request that state's assistance, seek consent to use force within its territory, or make the case that its right of self-defense has been triggered by the state's inability or unwillingness to take action itself.\textsuperscript{146}

What this means for the United States' war against al-Qa'ida is that the United States may continue to conduct lethal operations against al-Qa'ida and its co-belligerent affiliates and associated groups as well as its successors after 2016 in the territories where these groups operate, so long as it is done with the cooperation or consent of the home state, or in its absence, out of self-defense. More than likely, this means that most U.S. operations against al-Qa'ida will still take place in Afghanistan, Pakistan, Yemen, Somalia, Iraq, Syria, and other unstable and ungoverned spaces from which al-Qa'ida operates.

CONCLUSION

President Obama has long talked about ending the war in Afghanistan, ending the war against al-Qa'ida, and not


\textsuperscript{142} Taylor, supra note 139.

\textsuperscript{143} See U.N. Charter, supra note 47.

\textsuperscript{144} See Robert Ago, \textit{Eighty Report on State Responsibility, 1979} 2 Y.B. Int'l L. Comm'n 3, 35, U.N. Doc. A/CN.4/318 (discussing the actions of foreign states that required the consent of the sovereign in which the actions were to occur).

\textsuperscript{145} See U.N. Charter, supra note 47, at art. 51; Taylor, supra note 139, at 7.

expanding the scope of the AUMF.\textsuperscript{147} Yet, the United States may need to use force against terrorists after that time. When the United States withdraws from Afghanistan in 2016, critics may argue that the war with al-Qa’ida was always a subset of the war in Afghanistan and cannot be sustained without regular hostilities in Afghanistan.\textsuperscript{148} Others may argue that even if a separate conflict did exist, it does not anymore because it lacks the requisite organization and intensity.\textsuperscript{149} But the United States finds itself in a conflict with a relentless and capable enemy that, although weakened in many respects, appears to have no intention of ending the war it declared in 1996.\textsuperscript{150}

It appears that the war in Afghanistan will close, but that the war against al-Qa’ida will continue. In addition, the war against al-Qa’ida may have a new front and conventional battlefield against ISIL in Iraq and Syria. To the extent that al-Qa’ida is capable of conducting viable attacks, the United States will continue to be in a position to lawfully defend itself under the UN Charter.\textsuperscript{151} Moreover, even without Afghanistan as a center of hostilities, the conflict between the United States and al-Qa’ida will likely continue to meet the Limaj criteria for establishing “intensity” and “organization.”\textsuperscript{152} As a legal matter, if the parties to the conflict continue to approach the situation as a war; and if the objective criteria continue to reflect the existence of a war, then the United States may choose to continue its campaign against al-Qa’ida and its co-belligerent affiliates and associated forces, as well as its successors, under a wartime framework. That conflict may also continue to take place in the territories where the parties to the conflict operate, subject to the limitations imposed by international law.

\textsuperscript{149} See supra Part I.B.
\textsuperscript{150} Newsdesk, \textit{supra} note 27.
\textsuperscript{151} See U.N. Charter, \textit{supra} note 47, at art. 51.
\textsuperscript{152} See \textit{supra} Part I.B.
Armed Conflict in Syria: Overview and U.S. Response

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Summary

The rise of the insurgent terrorist group known as the Islamic State (IS, aka the Islamic State of Iraq and the Levant or ISIL/ISIS) and Russia’s military intervention on behalf of the Syrian government have reshaped debates over U.S. policy toward the ongoing civil conflict in Syria, now in its sixth year. The Islamic State controls large areas of northeastern and central Syria, from which it continues to launch assaults on forces opposed to and aligned with the government of President Bashar al Asad. Meanwhile, fighting elsewhere pits government forces and their foreign allies against a range of anti-government insurgents, some of whom have received limited U.S. assistance. Russian military intervention in support of Asad poses a direct challenge to U.S. goals in Syria, and is raising new questions about the future of the conflict and U.S. strategy.

Since March 2011, the conflict has driven more than 4.8 million Syrians into neighboring countries as refugees (out of a total population of more than 22 million). More than 6.1 million other Syrians are internally displaced and are among more than 13.5 million Syrians in need of humanitarian assistance. The United States remains the largest bilateral provider of such assistance, with more than $5.5 billion in U.S. funding identified to date. The United States also has allocated more than $500 million to date for assistance programs in Syria, including the provision of nonlethal equipment to select opposition groups. President Obama requested $238.5 million in FY2017 funding for such assistance. The Administration also requested $250 million in FY2017 defense funds for its Syria Train and Equip program.

Syrian officials and their Russian and Iranian backers have stated their conditional willingness to serve as “counterterrorism” partners of the United States in Syria, provided that U.S. officials accept a role for the Asad government as a bulwark against Sunni Islamist extremism. Whereas in the past Administration officials have described a “fundamental strategic disagreement” with Russia over Syria and Asad’s future, in 2016 the Administration has explored the possibility of cooperation with Russia against terrorist groups in Syria in conjunction with efforts to obtain a lasting cessation of hostilities between pro-Asad forces and armed opposition groups. Some Members of Congress and observers have argued that the United States should seek to compel Asad to negotiate or act militarily to protect Syrian civilians. Others have expressed concern that disorderly regime change could further empower extremists or that civilian protection missions could prolong the conflict or involve the United States too deeply in long-term stabilization.

U.S. officials and Members of Congress continue to debate how best to pursue U.S. regional security and counterterrorism goals in Syria without inadvertently strengthening Asad, the Islamic State, or other anti-U.S. armed Islamist groups. Anti-Asad armed forces and their activist counterparts have improved their coordination in some cases and share antipathy toward Russian and Iranian intervention, but they remain divided over tactics, strategy, and their long-term political goals. Powerful Sunni Islamist forces seek outcomes that are contrary in significant ways to stated U.S. preferences for Syria’s political future. The United Nations Security Council has endorsed new efforts at negotiation and has created an investigative body empowered to assign responsibility for the use of chemicals as a weapon of war in Syria.

The 114th Congress is now considering proposed appropriations (H.R. 5293, S. 3000, S. 3117 and H.R. 5912) and authorization legislation (H.R. 4909 and S. 2943) related to Syria. For more information, see CRS Report R43612, The Islamic State and U.S. Policy, by Christopher M. Blanchard and Carla E. Humud.
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Overview

The resilience of the Islamic State (IS, also known as ISIS/ISIL or by the Arabic acronym Da'esh) and Russia's ongoing military intervention on behalf of President Bashar al Asad's government have reshaped debates over U.S. policy toward the ongoing civil conflict, which has driven more than 4.8 million Syrians into neighboring countries as refugees. The Islamic State controls large areas of northeastern and central Syria, from which it continues to launch assaults on forces aligned with the Asad government as well as other armed groups, including some who oppose the government. Fighting elsewhere pits government forces and their foreign allies (chiefly Russia, Iran, Lebanese Hezbollah, and Iraqi Shia militia groups) against a range of anti-government insurgents, some of whom have received limited U.S. assistance. U.S. and Turkish military operations in northwest Syria have severed the group's remaining access to the Turkish border. While progress has been made in reducing the amount of territory held by IS fighters in both Syria and Iraq, competition and discord between and among local actors in both countries continue to create complications for U.S. officials, as does intervention by and competition among regional and extra-regional actors, including Russia, Iran, Turkey, and Arab Gulf states.

In Congress, Members are weighing the relative risks and rewards of action in Syria against the Islamic State and the Asad government while conducting oversight of U.S. lethal and nonlethal assistance to vetted members of select opposition groups, including the provision of military training, arms, and defensive protection. President Obama's FY2017 budget requests for foreign operations and defense seek more than $4 billion in Syria- and Iraq-related assistance funding for programs in those two countries and the surrounding region. The 114th Congress also has considered proposals to authorize the use of military force against the Islamic State organization.

The negative effects of the humanitarian and regional security crises emanating from Syria appear to be beyond the power of any single actor, including the United States, to independently contain or fully address. The region-wide flood of Syrian refugees, the growth of armed extremist groups in Syria, and the spread of conflict to neighboring Lebanon and Iraq have negatively affected overall regional stability. To date, U.S. policymakers and their counterparts have appeared to feel both compelled to respond to these crises and cautious in considering potentially risky options for doing so, such as the commitment of military combat forces or the provision of large-scale material assistance to armed elements of the opposition. Russia's forceful entrance into the conflict in 2015 bolstered flagging pro-Asad forces, but may not fundamentally change the ability of the Asad government to reassert control over all of Syria. In light of these conditions and trends, Congress may face tough choices about U.S. policy toward Syria and related U.S. relief and security assistance programs for years to come.

FY2017 Legislation and Issues for Congress

The 114th Congress has considered FY2017 appropriations (H.R. 5293, S. 3000, S. 3117 and H.R. 5912) and defense authorization legislation (H.R. 4909 and S. 2943) related to Syria, and has debated proposals to authorize the use of military force against the Islamic State. Key issues under consideration in relation to legislation in the 114th Congress include:

• What is the United States' overall strategy toward the Syria conflict in general and toward the Islamic State in Syria and the Asad government in particular? Members of Congress continue to express a range of views concerning U.S. strategy toward the conflict in Syria, combatting the Islamic State, and coordinating responses to the crises in Iraq and Syria. Several
legislative proposals call on the Administration to provide Congress with new or updated strategy reports on these topics.

- **What authority and funding should be provided for U.S. assistance to Syrians, including assistance to opposition elements?** While some proposals to rescind funding and authority for the Syria Train and Equip program have thus far failed to garner sufficient congressional support for enactment, Members continue to debate the proper scope, pace, and goals of the program, especially in light of reports of past program setbacks. The overarching authority for the program provided in the FY2015 NDAA (NDAA, P.L. 113-291) expires after December 31, 2016, although some activities envisioned under the redesigned program could arguably proceed pursuant to other authorities. Legislative proposals under consideration for FY2017 would extend the duration of the program's authority and alter existing funding arrangements for the program.

- **How if at all should the United States respond to calls for a no-fly zone or safe zones for the protection of civilians in areas of Syria?** The terms of the cessation of hostilities negotiated by the United States and Russia call for the end of Syrian combat operations over opposition-held areas. If Syrian forces do not abide by these terms, there may be renewed calls for the establishment of areas safe from air attack. Secretary of Defense Ashton Carter has stated that the establishment of a humanitarian safe zone would be "a major combat mission."^1

- **What responsibility does the United States have to protect U.S.-backed forces that come under attack?** The Obama Administration has committed to protecting forces receiving U.S. training and assistance, including train and equip program participants and select Kurdish and non-Kurdish forces. To date, various Syrian forces trained or equipped by the United States have come under attack by the Syrian government, Russia, the Nusra Front (now known as Jabhat Fatah al Sham), the Islamic State, and Turkey—with varied U.S. responses.

- **Can the United States exert additional pressure on the Syrian government?** Members continue to debate additional measures that might be effective in reducing Syrian government violence. H.R. 5732 (known as the Caesar Syria Civilian Protection Act of 2016) would require the President to impose sanctions on foreign persons and entities that finance, do business with, support, or act on behalf of the Syrian government or government-controlled entities. Although the Administration has many of these authorities under existing executive orders, implementation has been at the discretion of the executive branch.

- **To what extent should the United States seek cooperation with Russia in order to promote a political settlement and reduce levels of violence?** U.S. officials have encouraged Russia to use its leverage with the Syrian government to reduce strikes against civilian targets, but to date U.S. attempts to cooperate with Russia on this effort have not resulted in significant reductions in Syrian government strikes. At the same time, Russian military operations in Syria have created new operational considerations for the ongoing coalition air campaign against the Islamic State as well as for proposals for other types of intervention, including the establishment of safe zones or no-fly zones.

These issues are discussed in more detail below (see “U.S. Policy and Assistance”).

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^1 Secretary of Defense Ashton Carter before the Senate Appropriations Subcommittee on Defense, May 6, 2015.
Debating Measures to Protect Civilians in Syria’s Civil War

During the course of the Syrian civil war, debates have continued concerning various proposals for the protection of civilians inside Syria and the delivery of humanitarian assistance to populations in need. In particular, debates have focused on additional measures involving the use of military force to establish areas safe for civilians or to allow for the unimpeded delivery of humanitarian assistance. Opponents of such measures have raised concerns about unintended consequences, the potential for operational success, and the implications of potentially violating Syrian sovereignty through such actions.

Consideration of proposals over time has been complicated by the fluid and violent nature of the conflict, the number and variety of distinct armed forces on the ground, and geopolitical competition among outside actors. These factors further complicate efforts to define the potential scope, costs, risks, and rewards of various proposals.

As a consequence, proposals to enhance civilian protection vary greatly. In considering current and future proposals for the protection of civilians in Syria, relevant questions include:

- What specific measures are being proposed? What alternatives exist?
- On what international and domestic authority would such measures proceed? What implications might unilateral measures have for international law and relations among international powers?
- In what geographic areas would such measures apply? From what geographic areas would such measures be implemented? Which governments’ and groups’ interests would be implicated?
- Which actors have the capabilities and willingness to implement such measures?
- Who might oppose such measures? How and at what potential risk to implementers?
- What unintended consequences might result? How, if at all, might the protection provided under international humanitarian law be undermined?
- What might be the impact on humanitarian operations, access, and security?
- How long would such measures last? At what cost? To whom?
- What might be the costs of rejecting the proposed measures or inaction?
Conflict Synopsis

2011: Protests Emerge. In March 2011, protests broke out in the southern province of Dar’a. The unrest was sparked by the arrest of a group of school children, but reflected long-standing political and socioeconomic grievances. Largely peaceful protesters called for political and economic reforms rather than the removal of the Asad government. At the same time, a small armed element was also present within some of the protests. As security forces responded with mass arrests and occasionally opened fire on demonstrators, protests became larger and spread to other towns and provinces.

The opposition movement eventually coalesced into two umbrella groups—one political, one armed—and both based primarily in exile. Political groups merged to form the Syrian National Council (SNC), although members struggled to establish trust and develop shared goals. A small number of junior military defectors formed the Free Syrian Army (FSA), which claimed
leadership over the armed opposition but whose authority was generally unrecognized by local armed groups. Ongoing violence, primarily but not exclusively on the part of the Syrian government, prompted President Obama in August 2011 to call for Syrian President Asad to step aside. Meanwhile Al Qaeda’s affiliate in Iraq tasked some of its members to commence operations in Syria under the banner of a new group known as Jabhat al Nusra (aka the Nusra Front). In December 2011, the first Nusra Front suicide attacks hit government buildings in downtown Damascus.

2012: Insurgency. In 2012, the conflict became increasingly violent, as the government began to use artillery and fixed wing aircraft against opposition targets. Extremist attacks became more frequent—between November 2011 and December 2012, the Nusra Front claimed responsibility for nearly 600 attacks in Syria, ranging from more than 40 suicide attacks to small arms and improvised explosive device operations. In February 2012, the United States closed its embassy in Damascus, citing security concerns. Local armed groups began to seize pockets of territory around the country, primarily in rural areas. A July bombing in downtown Damascus killed several senior regime officials, including the then-Minister of Defense. Concerns about regime tactics became more acute, and President Obama in August declared that

> We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized.... We have communicated in no uncertain terms with every player in the region that that’s a red line for us and that there would be enormous consequences if we start seeing movement on the chemical weapons front or the use of chemical weapons.

The international community also increased efforts to seek a negotiated solution to the conflict. In June, the United States and Russia signed the Geneva Communiqué, which called for the establishment of a transitional governing body with full executive powers. The document, which became the basis of future negotiations between the government and the opposition, did not clarify the role of Asad in any future government. Meanwhile, Syria’s political opposition remained divided and in flux. In November, the SNC became part of a larger umbrella group known as the National Coalition of Syrian Revolutionary and Opposition Forces (aka the Syrian Opposition Coalition, SOC), a move which some described as an effort to dilute the influence of Islamist members.

2013: Proxy War and Chemical Weapons. In March 2013, rebels seized the city of Raqqah, which became the first provincial capital to fall out of government control. A series of other opposition victories in the area led the government to effectively concede control of Syria’s rural northeast to the opposition. At the same time, the Asad government received military and intelligence support from Iran and Lebanese Hezbollah, as well as political backing from Russia. In turn, the United States, Turkey, and some European and Arab Gulf states increased their support to the Syrian opposition—each prioritizing their own interests and at times working at cross purposes.

In April, the United Kingdom and France reported to the United Nations that there was evidence that the Syrian government had used chemical weapons (CW) on multiple occasions since

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3 President Barack Obama, Remarks by the President to the White House Press Corps, August 20, 2012.

December 2012. In August, the United States attributed a large-scale CW attack on the Damascus suburb of Ghouta to the Syrian government. President Obama requested congressional approval of a limited authorization for the use of military force to respond. The following month, Russia negotiated an agreement for the Syrian government to dispose of its CW stockpiles and destroy associated facilities in exchange for staving off a U.S. military response.

2014: Caliphate and Operation Inherent Resolve. In February 2014, Al Qaeda formally disavowed the Islamic State (IS, then known as the Islamic State of Iraq and Al Sham, aka ISIL/ISIS) because of the Islamic State’s interference in Syria and its demands that the Nusra Front recognize IS leadership. After the Nusra Front and other opposition groups forced IS fighters from some areas of northwestern Syria, IS fighters seized vast stretches of territory in central and northeast Syria from local armed groups and in June declared the establishment of a caliphate spanning areas of both Syria and Iraq. Thousands of foreign fighters traveled to Syria and Iraq to join the Islamic State.

In August, the United States began airstrikes in neighboring Iraq to stop the group’s territorial advance and reduce the threat to U.S. personnel in Iraq. U.S. forces also airdropped humanitarian supplies to Yazidis trapped on Mount Sinjar in Iraq. In September, the United States expanded airstrikes to Syria, with the goal of preventing the Islamic State from using Syria as a base for its operations in Iraq. A subsequent air campaign to lift the IS siege on the Syrian Kurdish town of Kobane brought the United States into partnership with the Kurdish People’s Protection Units (YPG), which U.S. officials have come to view as among the United States’ most effective partners in the anti-IS campaign. In September 2014, Congress authorized the Administration to begin a train and equip program for select Syrian forces.

2015: Train & Equip Begins, Russia Enters the Fray. In 2015, the Syrian government faced a number of additional territorial losses. Opposition forces captured the provincial capital of Idlib in northwestern Syria and surrounding areas with the support of Al Qaeda-linked fighters. Islamic State fighters seized territory in central Homs province, and Kurdish fighters expanded their control over areas along the Turkish border. In May, the United States began training the first batch of recruits for the Syria Train and Equip Program. The program was designed to build a local force capable of fighting the Islamic State, protecting opposition-held areas, and “promoting the conditions for a negotiated settlement to end the conflict in Syria.”

Over the summer of 2015, Russia began a gradual buildup of Russian personnel, combat aircraft, and military equipment inside Syria, and began airstrikes in September. The following month, the

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7 President Barack Obama, Remarks by the President Before Meeting with Members of Congress on the Situation in Syria, September 3, 2013.

8 The FY2015 Continuing Resolution (P.L. 113-164, "the FY2015 CR") contained temporary authorization for the training and equipping of vetted Syrians that differed from the Administration's requests and expired on December 11, 2014. The FY2015 NDAA (Sections 1209, 1510, and 1534 of Division A of P.L. 113-291) and the Consolidated and Further Continuing Appropriations Act, 2015 (‘Counteringterrorism Partnership Fund’ and Section 9016 of P.L. 113-235) provided further authority and funding guidance for the program.
United States and Russia signed a memorandum of understanding to establish a safety-of-flight protocol for aircraft operating in the same airspace. Also in October, challenges in implementation led the Administration to modify the Syria Train and Equip program to focus on equipping existing units commanded by vetted leaders. Kurdish YPG forces that had received U.S. support in operations at Kobane merged with a small number of non-Kurdish groups to form the Syrian Democratic Forces (SDF), which began to receive U.S. support.

### Implications of Russia's Military Intervention

Russian strikes initially focused on Syrian opposition targets, including some groups reportedly backed by the United States. In 2016, Russia expanded its targeting to include Islamic State forces, although it continued to occasionally target U.S.-backed rebel groups. Russia also continues to resupply Syrian military forces, although Russian officials have stated that they are merely fulfilling existing bilateral contracts.

The series of losses suffered by Syrian government forces in 2015 may have contributed to Russia’s decision to enter the conflict directly when it did. Russian concerns about U.S. and other third party security assistance to Syrian opposition groups, and the potential for broader U.S.-led coalition military operations in Syria, also may have been motivating factors. Russian leaders have blocked action in the U.N. Security Council that would have increased pressure on the Asad regime for its conduct, and Russia remains an outspoken critic of what it describes as unwarranted external interference aimed at regime change in Syria and elsewhere.

Russian involvement has enabled pro-Asad forces to reverse opposition gains, particularly around Aleppo. Russia’s introduction of advanced air defense systems in Syria (reportedly including the S-400) also constrains the ability of other aircraft to operate freely in the area—complicating proposals calling for the establishment of a no-fly zone. At the same time, Russia has used its involvement in Syria to push for cooperation between U.S. and Russian military forces in Syria against terrorist groups—which in Russia’s view includes any group fighting the Asad government.

### 2016: Cessation of Hostilities and Increased Dialogue with Russia

In February 2016, the United States and Russia negotiated a cessation of hostilities (CoH) between pro-government and opposition forces, and agreed to use their respective influence with the warring sides to implement the agreement. The CoH excluded the Islamic State and the Nusra Front, which remained legitimate targets for attack by all parties. The CoH was widely violated by all sides and was criticized for lacking enforcement and accountability mechanisms. Nonetheless, U.S. officials stated that it led to a decrease in violence in some areas. In summer 2016, reports began to emerge suggesting that the United States was considering cooperation with Russia to target groups such as the Nusra Front. Possibly driven in part by these reports, the Nusra Front in July 2016 announced that it was reconstituting itself as an independent group and changing its name to Jabhat Fatah al Sham (Levant Conquest Front). U.S. officials downplayed the announcement as a rebranding effort, noting the continued role and presence of Al Qaeda operatives within the Front.

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11 “Russia S-400 Syria missile deployment sends robust signal,” *BBC*, December 1, 2015.
Recent Developments

Military

U.S.-Backed Forces Retake Manbij

U.S. and coalition military operations against the Islamic State in northwest Syria have long sought to sever the group’s access to the Turkish border and gradually move toward the group’s declared capital at Raqqa. Islamic State control over the so-called “Manbij pocket”—the area bound by Azaz in the west, the Turkish border in the north, Al Bab to the south, and the Euphrates River to the east (see Figure 2) served as the remaining connection point for the Islamic State to the outside world and provided a key supply and foreign fighter transit route.

In late May 2016, predominantly Arab SDF forces referred to as the Syrian Arab Coalition launched a new offensive to retake the area, backed by Kurdish fighters. U.S. and coalition forces provided ISR (intelligence, surveillance, reconnaissance) support for the Manbij operation, and maintain advisors with the SDF on the ground.13 Efforts to take the town were challenged by heavy IS resistance, as well as the continued presence of what military officials estimated to be thousands of civilians, some of which IS fighters have used as human shields.14 In July, reports emerged that U.S. strikes had killed dozens of civilians around Manbij. At least two allegations of civilian deaths resulting from U.S. strikes are under formal investigation.15 In August, SDF forces captured the town of Manbij. A convoy of a “hundred to a couple hundred” IS fighters was permitted to exit the city because fighters in each vehicle were reportedly intermingled with civilians.16

Aleppo

Aleppo, Syria’s most populous city, has been divided into regime and opposition-held areas since 2012. The Syrian government has been working to cut off access to opposition areas of the city, and in July 2016 was able to sever Castello Road north of the city, cutting off the last remaining access point into opposition-held eastern Aleppo. An objective years in the making, the offensive reportedly involved not only Syrian government troops but also Lebanese Hezbollah, Iraqi militias, and Iranian ground forces units. The U.N. has estimated that approximately 275,000 civilians remain trapped inside the eastern half of the city. In August, opposition groups led by Jabhat Fatah al Sham (JFS, formerly the Nusra Front) temporarily created an access point to besieged eastern Aleppo by retaking territory to the southwest of the city, but they have been unable to secure the area, which does not have infrastructure that would allow the wide-scale passage of aid.

The agreement announced by the United States and Russia in early September (discussed below) contained some provisions regarding securing civilian and humanitarian access to Aleppo, and also calls on opposition groups to distance themselves from JFS. Following the collapse of the ceasefire agreement, Syrian and Russian forces began an intense aerial bombardment of opposition-held areas of eastern Aleppo. The operation reportedly has also included a ground

16 Department of Defense Press Briefing by Colonel Garver via Teleconference from Baghdad, Iraq, August 16, 2016.
assault by Syrian military and pro-government forces to capture areas of eastern Aleppo. U.S. and European officials have accused Russia of using bunker-buster bombs and incendiary munitions against civilians in Aleppo. On September 25, U.S. Permanent Representative to the United Nations Ambassador Samantha Power described the actions of the Syrian government and Russian forces as "an all-out air and ground offensive" that is "apocalyptic" in nature, arguing "there can be no peace in Syria if Russia is determined to keep fighting this war."

Syrian Air Force Targets U.S.-backed Forces

In mid-August, the United States scrambled aircraft in response to Syrian airstrikes against Kurdish fighters in the eastern province of Al-Hasakah. U.S. officials stated that the Syrian airstrikes occurred in "close proximity" to where U.S. personnel were operating. Following the attack, additional U.S. combat air patrols were sent to the area to protect personnel on the ground. U.S. officials emphasized that the area was "not a no-fly zone," but added that Syrian forces "would be wise to avoid areas where coalition forces have been operating." U.S. officials have since faced questions about what some characterize as a willingness by the United States to protect Syrian Kurdish allies from attack by Syrian forces but not from attack by Turkish forces.

Syria-Iraq-Jordan Tri-border Area

U.S.-backed forces have established a base of operation at the At-Tanf garrison in southeastern Syria, near to where Syria, Jordan, and Iraq intersect—known as the tri-border area. In late June, U.S.-backed opposition forces based at At-Tanf—some of whom were trained during the initial phase of the Defense Department’s Syria Train and Equip program—conducted an offensive against the Syrian town of Abu Kamal, along the Iraqi border. The Syrian forces, known as the New Syrian Army (NSA), were routed by Islamic State fighters, who seized U.S. equipment and displayed their acquisitions on social media. U.S. officials described the operation as "not an overwhelming defeat because the New Syrian Army is still in the fight." In August, Islamic State forces again attacked NSA forces at At-Tanf. The base was previously struck twice by

17 "Syrian forces launch mass ground assault on rebel-held Aleppo," Middle East Eye, September 27, 2016.
18 "Bunker-buster bomb" is a term commonly used to refer to munitions dropped from aircraft that are designed to penetrate hardened targets or targets buried deep underground. Such munitions are usually characterized by relatively large explosive charges, specially reinforced detonating mechanisms, an precision guidance systems in order to maximize the probability of destroying particularly difficult targets. A Russian-made example of such a device is KAB-1500L-Pr, a weapon weighing 3,300 pounds (the normal general-purpose bomb weighs approximately 500 pounds) that is believed capable of penetrating up to 20 meters of packed earth or 2 meters of reinforced concrete before exploding. A comparable U.S. weapon is the GBU-28, which weighs 4,700 pounds. Both can be fitted with precision guidance systems. Incendiary munitions are designed to inflict damage primarily through burning rather than by impact or explosion. Examples of incendiary munitions could be those whose primary destructive agents are white phosphorous or napalm (jellied gasoline).
19 "Russia accused of war crimes in Syria at UN security council session," Guardian, September 26, 2016.
21 State Department press briefing by Deputy Spokesperson Mark C. Toner, August 23, 2016.
23 Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room, August 22, 2016.
25 Ibid.
Russian airstrikes. These Russian strikes, as well as the Syrian airstrikes against Kurdish forces in Al Hasakah, highlight one of the key issues in the policy debate on Syria—that of how the United States should respond to strikes against U.S.-backed forces.

Figure 2. Syrian-Turkish Border

Turkish Forces Cross into Northern Syria

In August 2016, U.S. and Turkish aircraft supported an incursion by Turkish special forces and armored vehicles into the Syrian border town of Jarabulus. The operation, which also involved some Syrian rebels, was nominally intended to clear Jarabulus of IS fighters. However, a Turkish presidential spokesman stated that the operation was aimed at neutralizing threats that Turkey perceives from both the Islamic State and the YPG,27 which had advanced northward toward Jarabulus after clearing the city of Manbij. Turkey has previously expressed concern that the YPG could create a contiguous area of Kurdish control along the Turkish border by unifying its eastern and western cantons (shaded yellow in Figure 2). Kurdish forces—predominantly YPG fighters—already control the majority of the Syrian border to the east of the Euphrates river. Turkey considers the YPG to be the Syrian arm of the Kurdistan Workers Party (PKK), which both Turkey and the United States have designated as a terrorist group. The United States does

27 Amberin Zaman, “Turkish Troops Enter Syria to Fight ISIS, May also Target U.S.-Backed Kurdish Militia,” Woodrow Wilson Center, August 24, 2016.
not view the YPG as a terrorist organization, though there is some evidence to support Turkish claims of ties between the two groups.\textsuperscript{28}

In early September, U.S. military officials reported that the Turkish military had sealed off the border area, and that interaction between the Turkish military and the SDF was “relatively peaceful.”\textsuperscript{29} In mid-September, U.S. military officials announced that U.S. special forces would partner with the Turkish military and Syrian opposition forces in northern Syria in a train, advise, and assist capacity.


\textbf{U.S. Strike on Syrian Military Forces}

On September 17, U.S. military officials stated that they had halted a strike in eastern Syria after being informed by Russia that the vehicles and personnel targeted were possibly part of the Syrian military.\textsuperscript{30} Syrian and Russian officials stated that 62 Syrian troops were killed in the strikes, and approximately 100 injured. Russia called an emergency meeting of the Security Council to discuss the incident, which represents the first time U.S. forces have engaged the Syrian military since kinetic operations began in Syria in September 2014. In a statement, Pentagon officials stated that coalition forces believed they were striking Islamic State militants near Dayr az Zawr, and that Russian officials notified of the operation earlier that day had voiced no concerns.\textsuperscript{31} U.S. officials expressed regret for any mistaken coalition airstrike, and stated that “coalition forces would not intentionally strike a known Syrian military unit.”\textsuperscript{32} Britain, Denmark, and Australia have also acknowledged that their aircraft participated in the strike.

\textbf{Political}

\textbf{September 2016 Cessation of Hostilities}

The Syrian government has separately negotiated a series of local cease-fires in some opposition-held towns. These are generally viewed as primarily favoring the Syrian government, both by freeing up soldiers for other battles and by allowing the government to resolve individual trouble spots while avoiding a broader political settlement. In late August, the Syrian government and rebel fighters came to agreement in the Damascus-area town of Daraya, which had been under government siege since 2012. Rebel fighters and civilians were transferred to Idlib province, while Daraya was reclaimed by government forces.

On September 9, Secretary of State John Kerry and Russian Foreign Minister Sergei Lavrov announced a new agreement designed to reduce violence and resume progress toward a political settlement. Secretary Kerry framed the agreement as one that, if implemented, would eventually result in the cessation of Syrian combat operations over opposition-held areas. According to Kerry, the agreement would begin with “seven days of a genuine reduction in violence” and

\textsuperscript{28} Aaron Stein and Michelle Foley, “The YPG-PKK Connection,” Atlantic Council, January 26, 2016.

\textsuperscript{29} Department of Defense Press Briefing by Col. Dorrian via Teleconference from Baghdad, Iraq, September 8, 2016.

\textsuperscript{30} Coalition halts airstrike in progress against possible Syrian military position, September 17, 2016.

\textsuperscript{31} Statement by Pentagon Press Secretary Peter Cook on Coalition Airstrike in Syria, September 17, 2016.

\textsuperscript{32} Coalition halts airstrike in progress against possible Syrian military position, September 17, 2016.
unrestricted humanitarian access to besieged areas, effective sundown local time on September 12. After seven days of continuous adherence to the cessation of hostilities and humanitarian access, the United States and Russia would establish a Joint Implementation Center (JIC) to target the Islamic State and the Nusra Front (now known as Jabhat Fatah al Sham/the Levant Conquest Front). Such cooperation would be predicated on Russia's ability to prevent Syrian government forces from conducting airstrikes on opposition-controlled areas. Kerry also stated that U.S.-backed opposition groups would need to distance themselves from the Nusra Front in order to preserve their legitimacy.

According to Kerry, the agreement also included some specific provisions in designated geographic areas—such as requiring all sides to pull back from Castello Road in Aleppo, and the creation of a demilitarized zone around the area that would permit the resumption of humanitarian and civilian traffic. The full text of the agreement was released by the Associated Press in late September. While Foreign Minister Lavrov stated that the Syrian government had accepted the agreement, Syrian President Asad declared that the Syrian government is determined to recover all areas of the country from "the terrorists." While the agreement resulted in a brief reduction in violence, the United Nations stated that the Syrian government had not allowed full humanitarian access. On September 19, the Syrian military declared the ceasefire over, while the United States and Russia continued to discuss the possibility of extending the agreement. In late September, Syrian and Russian forces launched a major aerial assault on opposition-held areas of eastern Aleppo. Secretary Kerry has threatened to suspend talks with Russia regarding Syria if the Aleppo offensive is not halted.

Prospects for Peace Negotiations

Since 2012, the Syrian government and opposition have participated in U.N.-brokered negotiations under the framework of the Geneva Communiqué. Endorsed by both the United States and Russia, the Geneva Communiqué calls for the establishment of a transitional governing body with full executive powers. According to the document, such a government "could include members of the present government and the opposition and other groups and shall be formed on the basis of mutual consent." The document does not discuss the future of Asad.

Subsequent negotiations have made little progress, as both sides have adopted differing interpretations of the agreement. The opposition has said that any transitional government must exclude Asad. The Syrian government maintains that Asad was reelected (by referendum) in 2014, and notes that the Geneva Communiqué does not explicitly require him to step down. In the Syrian government's view, a transitional government can be achieved by simply expanding the existing government to include members of the opposition. Asad has also stated that a political transition cannot occur until "terrorism" has been defeated.

33 Remarks by Secretary of State John Kerry with Russian Foreign Minister Sergey Lavrov and UN Special Envoy Staffan de Mistura in Geneva, Switzerland, September 9, 2016.
35 "Assad vows to retake Syria, calling into question impending cease-fire," Washington Post, September 12, 2016
In late 2015, Syria’s various international backers met in Vienna, resulting in the dissemination of two documents: the Vienna Communiqué on Syria (issued October 30) and the Statement of the International Syria Support Group of November 14, 2015. Referred to collectively as the “Vienna Statements,” they affirmed the unity, independence, territorial integrity, and secular character of Syria. They stated that Syria’s state institutions would remain intact, and that the rights of all ethnic and religious minorities would be protected. Reaffirming their commitment to a political transition based on the Geneva Communiqué, they called for a new constitution and elections. They also set a target date of January 1, 2016, for the resumption of formal negotiations between the government and the opposition, and called upon the Syrian opposition to select negotiating representatives. The opposition did so during a December 2015 meeting in Riyadh, which established the opposition High Negotiations Committee (HNC).

In addition, the Vienna Statements expressed support for a Syrian-led political process that would, “within a target date of six months, establish credible, inclusive, and nonsectarian governance and set a schedule and process for drafting a new constitution. Free and fair elections would be held pursuant to the new constitution within 18 months.” On December 18, the U.N. Security Council unanimously passed UNSCR 2254, which endorsed the Vienna Statements.

In January 2016, the HNC participated in indirect talks with the Syrian government, but these soon dissolved amid ongoing government violence. The CoH signed in February was strongly backed by U.S. officials, who recognized that the U.S. goal of bringing the Syrian opposition back to the negotiating table would be challenging without a reduction in violence and improved humanitarian access. Despite some progress on both fronts, the last round of U.N.-brokered peace negotiations between the Syrian government and members of the opposition closed in April 2016 without achieving significant results. The agreement announced in early September by the United States and Russia was ostensibly designed to create the conditions for the resumption of negotiations, and its failure suggests that the resumption of broader peace talks is unlikely in the near-term.

**Humanitarian**

Violence, insecurity, government and opposition interference, the closure of key border points, bureaucratic procedures, and resource shortfalls continued to hinder aid delivery, particularly to an estimated 5.5 million people in besieged and hard-to-reach areas. These included areas controlled by government forces or under opposition control, and eastern provinces under Islamic State control. Armed conflict has affected millions of Syrians, most recently in the city of Aleppo, in which an estimated 275,000 people in the eastern part were almost cut off amid heavy

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42 The Kurdish PYD—which controls much of northern Syria via its YPG militia forces—has been excluded from the above negotiations, reportedly at the behest of Turkey and members of the Sunni Arab opposition.
44 State Department Press Briefing by Mark C. Toner, Deputy Spokesperson, February 16, 2016.
45 Prepared by Rhoda Margesson, Specialist in International Humanitarian Policy.
fighting and aerial bombardments, while in the western part of the city, where humanitarian organizations were able to operate, a further 1.5 million people were difficult to reach.

As of mid-September 2016, the security situation remained precarious. Despite some reduction in violence, the United Nations stated that it had not yet received sufficient security guarantees to be able to deliver aid to eastern Aleppo. In addition to the security situation for aid convoys, the United Nations also has reported on the challenges of procuring the necessary permits from the Syrian government to deliver aid to several areas it is otherwise ready to reach. As humanitarian access is critical to the cease-fire as well as movement toward a political solution, the pressure on humanitarian actors remained high to deliver assistance. On September 19, aid trucks operated by the Syrian Arab Red Crescent were reportedly hit by airstrikes outside Aleppo.

During the Syria conflict, systematic violations of human rights and international humanitarian law (IHL) have been widespread by all parties, including the Islamic State.\(^{47}\) Civilian protection concerns include mass executions, systematic rape and sexual violence, torture, and appalling treatment of those in detention. Lack of access, food insecurity, health concerns (injuries, disease outbreaks, serious medical conditions and disabilities), inadequate shelter, and an economic recession coupled with growing poverty contribute to the vulnerability of millions of civilians.

As of September 2016, an estimated 13.5 million people inside Syria, more than half the population, were in need of humanitarian and protection assistance, including 6 million children.\(^{48}\) There were estimated to be more than 6.1 million Internally Displaced Persons (IDPs) in Syria, but this number is imprecise and very fluid. Many Syrians, some of whom have been displaced multiple times, leave their homes to escape violence and then return when conflict in their area decreases. It is not clear how many IDPs are affected by repeat displacements, nor if, or how often, they are included in IDP counts.

In addition, more than 4.8 million Syrians have registered as refugees abroad, with most fleeing to countries in the immediate surrounding region as well as Europe.\(^{49}\) Experts recognize that some fleeing Syrians have not registered as refugees, presumably from fear or other reasons, and have chosen instead to blend in with the local population, living in rented accommodations and makeshift shelters, particularly in towns and cities. The U.N. Office for the Coordination of Humanitarian Affairs (UNOCHA) estimates that more than 90% of Syrian refugees are living outside camps in mostly urban settings, where refugees may be difficult to identify and assist.

Interagency cross-line convoys and cross-border operations from Turkey and Jordan provided humanitarian assistance and protection services to millions of people across the country each

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48 U.N. Office for the Coordination of Humanitarian Affairs (UNOCHA), “Syria Crisis Bi-Weekly Situation Report No. 12, September 2, 2016; UNOCHA, Global Humanitarian Appeal 2016 (Syria). The figures include an estimated 5.47 million Syrians living in besieged or hard-to-reach locations, half of whom were in central and eastern areas of the country controlled by the Islamic State organization.

See also, International Organization for Migration, “Irregular Migrant, Refugee Arrivals in Europe Top One Million in 2015,” December 22, 2015. In 2015, Europe was impacted by what many consider to be its worst refugee and migration crisis since World War II, as more than a million people fled conflict and poverty in neighboring regions. The U.N. High Commissioner for Refugees has asserted that more than 85% of those recently arriving in Europe are from refugee-producing countries, with many from Syria and Iraq.
month. In 2016, all 18 besieged locations were reached at least once. In addition to the many assistance and protection concerns, by August, preparations for winter were well underway.

In December 2015, the United Nations, along with humanitarian partners, launched several appeals: the Syria Regional Refugee and Resilience Plan (3RP) appeal for $4.6 billion; and the Humanitarian Response Plan (HRP) for Syria for $3.1 billion. Since 2011, U.N. appeals have remained significantly underfunded, which in 2015 resulted in cuts to food aid and cash assistance. As of September 2016, taken together, the 2016 appeals for Syria and the region were 43% funded. At a February 2016 pledging conference in London, donors pledged $11.3 billion, of which $5.9 billion is for 2016 and $5.4 billion is for 2017-2020.

The United States is the largest donor of humanitarian assistance to the Syria crisis. Since FY2012, it has allocated nearly $5.6 billion to meet humanitarian needs using existing funding from global humanitarian accounts and some reprogrammed funding. The Administration’s FY2017 budget request seeks nearly $6.2 billion in global humanitarian assistance. This includes $2.1 billion for Syria in Overseas Contingency Operations (OCO) funds provided through the Migration & Refugee Assistance (MRA) and International Disaster Assistance (IDA) accounts.

U.S. Policy and Assistance

Debating U.S. Strategy and Policy

After initially calling for Bashar al Asad to step down, the Obama Administration has actively engaged since 2012 in multilateral efforts to reach a negotiated settlement between the Asad government and many of the opposition groups arrayed against it. This approach has been combined with nonlethal U.S. support to select opposition groups, reported covert assistance to some armed groups, overt training and assistance to vetted Syrian opposition forces for select purposes, and the often-stated assertion by Administration officials that “there is no military solution to the conflict.” This assertion has appeared to reflect U.S. assessments of the balance of forces, their shifting fortunes, and the ebb and flow of the conflict over time. It also reflects the stated U.S. preference for some preservation of elements of the Syrian state apparatus over military developments that lead to state collapse. Some recent reports have raised questions about the extent of remaining Syrian state institutional capacity, particularly in the security sector.

Over time, some observers have viewed U.S. assertions that there is “no military solution” as an implicit indication that the U.S. government views options that could support certain military objectives (such as a limited civilian protection mission or the forcible overthrow of Asad) as unacceptable in strategic, diplomatic, material, financial, humanitarian, or moral terms. U.S. officials also may judge that various proposals for more robust U.S. or other external military intervention would do little to resolve Syria’s underlying political disputes. Given the range of actors and interests at play in Syria, it is debatable whether some proposed military courses of

51 In order to help maximize efficiency, reduce duplication and ensure greater accountability, effectiveness and reach of humanitarian programming, the humanitarian community takes a whole-of-country approach in Syria.
52 USAID, Syria Complex Emergency Fact Sheet #4, Fiscal Year (FY) 2016, July 13, 2016 (most recent fact sheet available).
53 See Tobias Schneider, “The Decay of the Syrian Regime is Much Worse Than You Think,” War on the Rocks (online), August 31, 2016.
action would deliver greater stability or whether they would set the stage for further conflict, particularly with conflict in neighboring Iraq ongoing and tensions between regional and extra-regional actors running high.

Changes in battlefield dynamics over time—particularly the rise and success of the Islamic State organization and other Salafist-jihadist insurgent groups, the weakening of pro-Assad forces, and Russia's military intervention—have been accompanied by some shifts in U.S. policy and rhetoric about the conflict. While continuing to refer to a negotiated settlement as the aim of U.S. policy and stating that Asad has lost legitimacy, the Obama Administration has since mid-2014 publicly embraced limited overt intervention in the conflict in Syria. It requested and received congressional authority and funding for the training and equipping of vetted Syrians to counter terrorism and to contribute to conditions intended to lead to a negotiated settlement of the conflict. It also launched U.S. military operations against Islamic State and other extremist targets, and these operations have undermined extremist control in some areas of the country.

Prior to Russia's intervention, leading U.S. policymakers described an overall approach that remained engaged in the "political track," but U.S. statements tended to be circumspect about the prospects for political arrangements to bring about a durable settlement of the conflict. In this regard, U.S. defense officials described both desirable and likely scenarios for near-term evolution in the conflict. Secretary of Defense Carter described the "best" scenario for the Syrian people as one that would entail an agreed or managed removal of Asad and the coalescence of opposition forces with elements of the remaining Syrian state apparatus as U.S. partners in opposition to the Islamic State and other extremists. In July 2015, Secretary Carter told the Senate Armed Services Committee that

the outcome that we are aiming for is one in which Bashar al-Assad and those who have been associated with his atrocities in Syria are removed and -- but the structures of government in Damascus and in Iraq [sic] that remain continue on our -- in an inclusively governed way that is multisectional to get -- to include Alawites and others and that can then turn to the task of regaining its sovereign territory from ISIL to the east in a project that would look like what we are working with Baghdad to accomplish to its west in Iraq. That is the post-Asad transition that will be the best for the Syrian people and the best for our counter-ISIL strategy.

Secretary Carter also warned that "further conflict, further civil war, and ethnic cleansing" could follow in a scenario in which the Asad regime collapsed, making a political transition "much to be preferred."

Since late 2015, U.S. policy has reflected the Administration's desire to bring an end to the wider conflict while promoting multilateral cooperation against select groups, where possible.

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54 On June 16, 2015, Secretary of State Kerry said, "we are engaged in a number of efforts right now diplomatically and otherwise to see whether or not there might be some life in the political track, and it's too early to answer that question, but we are not simply sitting here and allowing this to happen without any efforts to see if there's a way to stop it." Secretary of State John Kerry, Press Availability, June 16, 2015.

55 On June 18, Secretary of Defense Carter said, "...the best way for the Syrian people for this to go would be for him to remove himself from the scene and there to be created, difficult as that will be, a new government of Syria based on the moderate opposition that we have been trying to build and support and then helping them strengthen themselves and to retake all of Syrian territory. That would be a desirable path if he did remove -- was removed from the scene or removed himself from the scene." Secretary of Defense Ashton Carter, Testimony before the House Armed Services Committee, June 17, 2015.

56 Secretary of Defense Ashton Carter, Testimony before the Senate Armed Services Committee, July 7, 2015.

57 Ibid.
Developments that may have shaped evolution in U.S. policy include Russia’s 2015 military intervention, the corresponding shift by pro-Asad forces from defense to offense in some areas, the weakening of the Islamic State, and shared U.S.-Russian concerns about the strength of other extremist groups. Administration officials and Members of Congress have expressed confidence about the course of the campaign against the Islamic State, but continue to debate measures that could place greater economic or military pressure on the Asad government or provide more or different levels of support to various U.S. partner forces.

Whether or not state preservation scenarios described as desirable by U.S. officials are feasible in the longer term is debatable. While U.S. officials and their counterparts in other governments may wish for some element of Syria’s state apparatus and security services to be salvageable as a hedge against total state collapse, the true capacity and durability of Syria’s state institutions is largely unknown. Some analysts doubt that the Syrian government has the capacity to defend and administer areas under its current control, much less reassert its control and administrative authority over areas of the country that have slipped from its grasp. Many armed and unarmed opposition groups have called for the removal and prosecution of all officials with “blood on their hands,” including Asad, while calling for the preservation and reform of key security institutions. Others seek more fundamental change and have made hostile sectarian statements about the collective culpability of Syrian Alawites for the Asad government’s conduct during the war.

Even if a transitional Syrian state acceptable to a sufficient segment of armed opposition forces were achieved, it may not prove to be capable of administering state services, dedicated to impartially providing justice according to the rule of law, or willing to partner with the United States and others against extremist groups. It is furthermore unclear whether the balance of power, in such a scenario, would lie with nonextremist opposition forces and the remnants of the Syrian state, even if somehow they were induced to work together. The prospect of Syria’s dissolution into smaller de facto jurisdictions might allow for deeper U.S. partnership with individual groups or regions but might also provoke strong, self-interested, and disparate reactions from Syria’s neighbors and outsiders like Iran and Russia. A more likely scenario than either a formal division of the country or reunification under moderate opposition forces may be one in which a de facto division of Syria prevails and the United States, its partners, and its adversaries must manage the negative consequences of an ambiguous, lasting conflict that is beyond their ability to resolve.

To date, Members of Congress have not reached a degree of consensus on the Syrian conflict that would allow Congress to offer its own detailed plan for responding to Russia’s intervention, bringing the crisis to a close, supporting a political transition and reconstruction, or combatting the Islamic State and other extremists in Syria. Congress has acted to provide the Administration with new authorities and contingency funds to address the Syrian conflict, but has placed limits on newly authorized efforts and requires the Administration to use contingency authorities and funds to provide nonlethal support to armed opposition groups outside of the specially authorized Train and Equip program. Congress debated but did not grant President Obama authority to use military force in response to the Asad government’s alleged use of chemical weapons in August 2013. Congress has yet to grant specific authorization for the use of military force against the Islamic State or new and specific authorization for the use of military force to defend U.S.-backed Syrian opposition forces from attacks by pro-Asad forces.

Over time, some voices in Congress have called for different forms of U.S. military intervention to protect civilians in select areas of the country or to weaken extremist groups. Some also favor an expansion of U.S. training and equipping of moderate opposition groups. Others in Congress have warned against the possible unintended consequences of deeper U.S. involvement. However, Congress also has not reached consensus on whether or how any reduction in involvement by the
United States and its allies might better manage the negative consequences of ongoing, unmitigated conflict.

**FY2017 Budget Requests for Syria**

The FY2017 foreign assistance request for Syria reflects the two main elements of the Obama Administration's policy response: (1) humanitarian assistance to meet the needs of internally displaced Syrians and refugees in neighboring countries, and (2) continued political, economic, and nonlethal military support for national and local opposition groups. In addition to more than $238 million in foreign assistance funded programs, the Administration has requested $250 million in FY2017 defense funding to continue the Train and Equip program for vetted Syrians authorized by Congress in 2014.

The Administration’s FY2017 request of more than $4 billion for Syria-Iraq-Islamic State-related funding does not draw clear distinctions in purpose between funds intended for enduring programs, funds to counter the Islamic State specifically, funds to respond to the crises in Syria and Iraq, and funds for related humanitarian responses. Funding requests are presented as mutually reinforcing. The request calls for $238.5 million to support U.S. efforts to achieve a political solution in Syria and counter the Islamic State and other extremist threats, including $50 million in the Peacekeeping Operations account to provide nonlethal assistance to moderate, armed Syrian opposition groups.

The Administration also describes enduring foreign assistance programs for Jordan ($1.0 billion) and Lebanon ($234 million) as contributions toward the overall U.S. effort against the Islamic State and a response to the Syria crisis. Assistance to these countries would address not only the security challenges, but also economic and humanitarian needs of communities hosting Syrian refugees. Funds allocated to State Department Counterterrorism Partnerships Fund programs and for countering violent extremism also contribute to counter-IS efforts.

**Combatting the Islamic State in Syria**

President Obama said in September 2014 that U.S. engagement in Syria would remain focused “narrowly” on assisting Syrians in combating the Islamic State, while continuing “to look for opportunities” to support a political resolution to Syria’s conflict. As discussed above, U.S. and coalition airstrikes continue to target IS forces in some areas of Syria, which have assisted anti-IS forces in retaking some territory. The United States also provides assistance to a range of anti-IS forces, including Kurdish and non-Kurdish members of the Syrian Democratic Forces (SDF) coalition and individuals from eastern Syria based near At-Tanf. In parallel, U.S. diplomatic officials have sought to more closely link the campaign against the Islamic State and other extremists to efforts to find a solution to the broader conflict.

Previously, the Administration had reiterated its view that any effort to defeat the Islamic State in Syria must be complemented by an effort to bring an end to the broader Syrian conflict that would result in a transition away from Bashar al Asad’s rule. President Obama and senior U.S. officials identified Asad’s presence as an aggravating factor and a contributor to the appeal of extremist groups—a view rejected by Russian and Syrian officials. However, increased U.S.

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58 The President said, “our attitude towards Asad continues to be that you know, through his actions, through using chemical weapons on his own people, dropping barrel bombs that killed innocent children that he—he has foregone legitimacy. But when it comes to our policy and the coalition that we’re putting together, our focus specifically is on ISIL. It’s narrowly on ISIL.” President Obama interview with NBC News Meet the Press, September 6, 2014.
dialogue with Russia about potential counterterrorism cooperation has led some observers to question whether U.S. commitment to Asad’s immediate departure has waned.

To date, challenges to the U.S. counter-IS campaign in Syria have included:

**Finding effective partners.** Some U.S. critics of the Obama Administration’s approach to the conflict and terrorism threats in Syria have argued that U.S. strategy has lacked effective Syrian partners willing or able to advance against Islamic State- and/or Al Qaeda-affiliate-held territory on the ground or to durably administer recaptured areas once extremists are defeated. The former concerns have been addressed to a certain degree by the evident military success of some U.S. partner forces in operations against the Islamic State, but the latter concerns about long-term administration and political repercussions remain. This is particularly true with regard to U.S.-backed Kurdish forces in Syria, whose military successes have raised concerns among other U.S. partners, principally the Turkish government. At times, various U.S. critics have suggested that the United States should either abandon its efforts to support vetted partner forces in Syria or drastically expand the size and scope of those efforts to create more formidable or inclusive partner forces.

**Partner expectations.** Syrian opposition forces who have been fighting the Islamic State welcome U.S. and coalition assistance in their campaign, but question why the United States does not take military action against the Asad government or take more robust direct action to degrade IS capabilities in Syria. Some Syrian political and military opposition forces appear to resent what they see as the United States’ narrow focus on fighting Sunni extremists in Syria and some have indicated that they may insist on broader support for their anti-Asad goals as a condition of working with the U.S.-backed coalition against the Islamic State. These parties also question why the United States and coalition partners are willing to act militarily to halt Islamic State atrocities but not to protect Syrian civilians from attacks by government forces or opposition groups.

**U.S. Obligations to Partners.** Senior Administration officials have told Congress and the press that the Administration is prepared to provide military protection to U.S.-trained Syrian participants of the Train and Equip program in their engagements with Islamic State forces and if they come under attack by other forces, including the Syrian government. In the case of potential attack by Syrian government forces, for example, such protection could entail attacks against Syrian military units, now backed by Iran and Russia. However, DOD-equipped forces have focused on the Islamic State and avoided engagement with the Syrian military. In response to a question on whether the U.S.-backed SDF in northern Syria could eventually clash with Syrian government forces near the IS capital of Raqqa, U.S. military officials stated that U.S.-backed forces in northern Syria “know that the engagement they have with the United States, with the coalition, is specific to the fight against ISIL.”

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61 Testimony of Secretary of State John Kerry, Secretary of Defense Ashton Carter, and Chairman of the Joint Chiefs of Staff General Martin Dempsey before the Senate Foreign Relations Committee. March 11, 2015; and Briefing by Secretary of Defense Ashton Carter and CJCS General Martin E. Dempsey, May 7, 2015.

62 Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room, June 6, 2016.
U.S.-trained or -equipped units have come under attack by the Nusra Front, the Islamic State, the Turkish military, the Syrian military, and the Russian air force. The United States responded with airstrikes to counter IS and Nusra Front attacks, and has sought to dissuade further attacks by other states’ forces.

Managing disputes. U.S. assistance to the Kurdish YPG continues to be a significant point of contention with Turkey, which considers the YPG to be a terrorist group. The United States has tried to ameliorate these concerns by bolstering the presence of Sunni Arabs within the U.S.-supported Syrian Defense Forces, a primarily Kurdish force. In addition, there have also been reports about fighting between different Syrian rebel groups supported by the United States.

End User Issues. Material assistance provided by the United States to Syrian rebels could potentially fall into the hands of extremist groups or the Assad government. Since the start of the DOD-administered Syria Train and Equip Program, there have been several reports of U.S.-provided weaponry falling into the hands of the Nusra Front or the Islamic State. There has also been at least one report of U.S. weapons being diverted by regional allies.

For information on the operational aspects of U.S. operations against the Islamic State in Syria and Iraq, see CRS Report R43612, The Islamic State and U.S. Policy, by Christopher M. Blanchard and Carla E. Humud.

U.S. Assistance to Syrians and the Syrian Opposition

A broad set of bilateral U.S. sanctions on Syria existed prior to the outbreak of conflict, and some, such as those triggered by Syria’s designation as a state sponsor of terrorism, initially had a limiting effect on the delivery of U.S. assistance in the country. The FY2014 Consolidated Appropriations Act (Section 7041[i]) of Division K of P.L. 113-76) significantly expanded the Administration’s authority to provide nonlethal assistance in Syria for certain purposes using the Economic Support Fund (ESF) account. Such assistance had been restricted by a series of preexisting provisions of law (including some terrorism-related sanctions provisions) that required the President to assert emergency and contingency authorities (i.e., Sections 451 and 614 of the Foreign Assistance Act of 1961, as amended) to provide such assistance to the unarmed Syrian opposition and communities in Syria. Such assistance has been provided to select unarmed opposition groups on a periodic basis since May 2012, although the Administration has not publicly released a detailed accounting or list of recipients. Congressional committees of jurisdiction are notified when the Administration intends to obligate funds for these purposes.

The FY2014 assistance authorities, as expanded and extended by the FY2015 Appropriations Act (Section 7041[h] of P.L. 113-235), made FY2015 and prior year ESF funding available “notwithstanding any other provision of law” for select nonlethal purposes. The FY2016 Appropriations Act (Section 7041[h] of P.L. 114-113) extended this authority further, granting

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64 Ibid.
65 “In Syria, militias armed by the Pentagon fight those armed by the CIA,” Los Angeles Times, March 27, 2016.
notwithstanding exceptions for FY2016 ESF funds as well as for FY2016 funds in the International Narcotics Control and Law Enforcement (INCLE) and Peacekeeping Operations (PKO) accounts. In prior years, the Administration has used the INCLE and PKO accounts to support justice sector activities in opposition-held areas of Syria and to provide nonlethal assistance to select armed opposition groups. The FY2016 appropriations act authorizes “nonlethal assistance for programs to address the needs of civilians affected by conflict in Syria, and for programs that seek to—

(A) establish governance in Syria that is representative, inclusive, and accountable;
(B) expand the role of women in negotiations to end the violence and in any political transition in Syria;
(C) develop and implement political processes that are democratic, transparent, and adhere to the rule of law;
(D) further the legitimacy of the Syrian opposition through cross-border programs;
(E) develop civil society and an independent media in Syria;
(F) promote economic development in Syria;
(G) document, investigate, and prosecute human rights violations in Syria, including through transitional justice programs and support for nongovernmental organizations;
(H) counter extremist ideologies;
(I) assist Syrian refugees whose education has been interrupted by the ongoing conflict to complete higher education requirements at regional academic institutions; and
(J) assist vulnerable populations in Syria and in neighboring countries.

The acts require the Secretary of State to “take all appropriate steps to ensure that mechanisms are in place for the adequate monitoring, oversight, and control of such assistance inside Syria,” and require the Secretary of State to “promptly inform the appropriate congressional committees of each significant instance in which assistance provided pursuant to the authority of this subsection has been compromised, to include the type and amount of assistance affected, a description of the incident and parties involved, and an explanation of the Department of State’s response.”

The acts further require the Obama Administration to submit a comprehensive interagency strategy prior to using the authorities that includes a “mission statement, achievable objectives and timelines, and a description of inter-agency and donor coordination and implementation of such strategy.” The strategy, which may be classified, must also include “a description of oversight and vetting procedures to prevent the misuse of funds.” All funds obligated pursuant to the authorities are subject to established congressional notification procedures.

Foreign operations legislation under consideration in Congress would extend and/or add and amend these authorities for some FY2017 funds (see comparison in Table 1). The House version of the FY2017 foreign operations appropriations bill (H.R. 5912) would extend the notwithstanding authority for ESF funding and amend some authorized purposes. The Senate version (S. 3117) would extend the notwithstanding authority for the same three accounts as FY2016 (ESF, INCLE, and PKO) and would amend and add the authorized purposes of assistance.
<table>
<thead>
<tr>
<th>FY2016 Appropriations Act</th>
<th>Senate FY2017 Proposal (Sec. 7041(h)(1) of S. 3117)</th>
<th>House FY2017 Proposal (Sec. 7041(h)(1) of H.R. 5912)</th>
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| Authorizes and appropriates FY2016 ESF, INCLE, and PKO funding for "non-lethal assistance for programs to address the needs of civilians affected by conflict in Syria, and for programs that seek to—  
(A) establish governance in Syria that is representative, inclusive, and accountable;  
(B) expand the role of women in negotiations to end the violence and in any political transition in Syria;  
(C) develop and implement political processes that are democratic, transparent, and adhere to the rule of law;  
(D) further the legitimacy of the Syrian opposition through cross-border programs;  
(E) develop civil society and an independent media in Syria;  
(F) promote economic development in Syria;  
(G) document, investigate, and prosecute human rights violations in Syria, including through transitional justice programs and support for nongovernmental organizations;  
(H) counter extremist ideologies;  
(I) assist Syrian refugees whose education has been interrupted by the ongoing conflict to complete higher education requirements at regional academic institutions; and  
(J) assist vulnerable populations in Syria and in neighboring countries. | Would authorize and appropriate FY2017 ESF, INCLE, and PKO funding for "non-lethal assistance for programs to address the needs of civilians affected by conflict in Syria, and for programs that seek to—  
(A) establish governance in Syria that is representative, inclusive, and accountable;  
(B) empower women through political and economic programs, and address the psychosocial needs of women and their families in Syria and neighboring countries;  
(C) develop and implement political processes that are democratic, transparent, and strengthen the rule of law;  
(D) further the legitimacy and viability of the Syrian opposition through cross-border programs;  
(E) develop and sustain civil society and an independent media in Syria;  
(F) promote stability and economic development in Syria, including in areas liberated from extremists;  
(G) document, investigate, and prosecute human rights violations in Syria, including through transitional justice programs and support for nongovernmental organizations;  
(H) expand the role of women in negotiations to end the violence and in any political transition in Syria;  
(I) assist Syrian refugees whose education has been interrupted by the ongoing conflict to complete higher education requirements at universities, regional academic institutions, and through distance learning;  
(J) assist vulnerable populations in Syria and in neighboring countries;  
(K) protect and preserve the cultural identity of the people of Syria, particularly those living in neighboring countries and among the youth, and promote the use of traditional art, music, and literature as a counterbalance to extremism;  
(L) protect and preserve cultural heritage sites in Syria, particularly those damaged and destroyed by extremists; and  
(M) counter extremism in Syria. | Would authorize and appropriate FY2017 ESF funding for "non-lethal assistance for programs to address the needs of civilians affected by conflict in Syria, and for programs that seek to—  
(A) establish governance in Syria that is representative, inclusive, and accountable;  
(B) expand the role of women in negotiations to end the violence and in any political transition in Syria;  
(C) develop and implement political processes that are democratic, transparent, and adhere to the rule of law;  
(D) further the legitimacy of the Syrian opposition through cross-border programs;  
(E) develop civil society and an independent media in Syria;  
(F) promote economic development in Syria;  
(G) document, investigate, and prosecute human rights violations in Syria, including through transitional justice programs and support for nongovernmental organizations;  
(H) counter extremist ideologies;  
(I) assist Syrian refugees whose education has been interrupted by the ongoing conflict to complete higher education requirements at regional academic institutions; and  
(J) assist vulnerable populations in Syria and in neighboring countries. |

Source: Congress.gov. Differences italicized in FY2017 Senate proposal for reference purposes only.
Nonlethal Assistance to Armed Syrian Opposition Elements

Until the creation of the Syria Train and Equip program in 2014 discussed below, overt U.S. assistance to armed opposition forces remained restricted to nonlethal items. Prior to the creation of the program and the extension of the FY2016 foreign assistance authorities discussed above, congressional appropriators and authorizers had not provided the Administration with notwithstanding authority to provide nonlethal assistance to armed opposition groups. For that purpose, the Administration had relied upon special authorities granted by the Foreign Assistance Act of 1961, as amended (Section 552[c] and Section 614).

In 2012, the Administration began to use these special authorities to provide food rations and medical supplies to the National Coalition of Revolutionary and Opposition Forces (SOC) and the Turkey-based Syrian Military Council (SMC). Since then, U.S. assistance has expanded to encompass a range of smaller, local groups. In August 2015, the State Department reported,

Non-lethal assistance is being provided to a range of civilian opposition groups, including local councils, civil society organizations, and SOC-affiliated entities to bolster their institutional capacity, create linkages among opposition groups inside and outside Syria, and help counter violent extremism. These efforts enable the delivery of basic goods and essential services to liberated communities as they step in to fill voids in local governance. In addition to civil administration training programs, we have provided opposition groups with a wide array of critical equipment, including generators, ambulances, cranes, dump trucks, fire trucks, water storage units, search and rescue equipment, educational kits for schools, winterization materials, and commodity baskets for needy families in the local community.

This equipment is used to bolster governance by providing services such as emergency power, sanitation, water, and education services. Other U.S. assistance provided under authorities granted by Congress in FY2014-FY2016 appropriations acts supports the maintenance of public safety, rule of law, and the documentation of human rights violations.

Administration officials have noted that U.S. efforts to deliver and monitor security assistance and other aid inside Syria have been hindered by border closures, ongoing fighting, and risks from extremist groups. Some U.S. nonlethal assistance to armed opposition groups has fallen into the hands of unintended recipients and has led to changes in delivery and oversight mechanisms. Infighting among some opposition forces, the empowerment of the Islamic State in Syria, and concerns expressed by other outside actors such as Russia and Turkey have created further complications. Although the Islamic State has lost control of border crossings it formerly held, other anti-U.S. extremist groups control some border crossings in northwestern Syria. As such, access issues may continue to hinder efforts to expand support to anti-IS forces.

In July 2016, the Government Accountability Office released a report examining the delivery of nonlethal assistance to Syria. The report recommended that the Department of State, USAID, and their implementing partners incorporate greater oversight of fraud risk in the delivery of such aid.

Syria Train and Equip Program

The establishment of the Syria Train and Equip program by Congress in 2014 represented a further evolution of the involvement of the United States in supporting Syrian opposition groups. Several hundred U.S. military training personnel and a similar number of support personnel deployed in support of the program, which Congress authorized to train and equip vetted Syrians to fight the Islamic State, defend against terrorist threats, and promote “the conditions for a negotiated settlement to end the conflict in Syria.” According to Administration officials, the program originally was designed to recruit, vet, train, and equip a force of 5,400 Syrians per year for each of three years. However, challenges in implementation significantly limited the program’s output in 2015, and in October 2015, Obama Administration officials announced plans for a significant shift in the program’s focus toward equipping select vetted fighters inside Syria and away from training and equipping new units in neighboring countries.

The shift from training and equipping of new vetted units toward equipping existing vetted armed groups has featured some unique risks. While equipment losses have not proven to be a major systemic concern since the change was announced, some Syrian opposition groups that reportedly have received U.S. equipment and weaponry have surrendered or lost these items to other groups, including to the Islamic State. The comprehensive training approach under the program’s first iteration sought to create unit cohesion, groom and support reliable leaders to serve as U.S. partners, and inculcate a spirit of nationalist motivation among fighters in the place of local, sectarian, or ideological goals. The amended approach appears to have more rapidly and effectively equipped some anti-IS forces in some areas of Syria, but it has had less apparent and quantifiable effects on the development and practices of opposition forces that may influence security in Syria for years to come. Increased reliance on vetted group leaders may also have reduced U.S. visibility and influence over which individual fighters receive U.S. weapons.

While some critics disagree strategically with President Obama and argue that U.S.-backed forces should be trained for offensive operations against the Syrian government, the anti-Islamic State focus of the program does not appear set to fundamentally change.

Related Appropriations and Authorities

Of the $500 million in Counterterrorism Partnerships Fund monies approved by congressional defense committees for the Train and Equip program in FY2015, $384 million was obligated as of September 30, 2015, with $116 million transferred back to the Fund at the end of the fiscal year to preserve its availability in FY2016. The $116 million were subsequently transferred back out of the CTPF to various operations and maintenance accounts for program activities in November 2015.

The FY2016 NDAA (P.L. 114-92) authorized $406.45 million in funding for the program, less than the Obama Administration’s request for $600 million. FY2016 defense appropriations

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71 For more on this program and related legislation, see CRS Report R43727, \textit{Train and Equip Program for Syria: Authorities, Funding, and Issues for Congress}, by Christopher M. Blanchard and Amy Belasco.

72 The program came under intense scrutiny in the wake of August and September 2015 reports that some of the small number of U.S. trainees that had completed the program quit and others may have turned over equipment and weaponry to Jabhat al Nusra, the Al Qaeda affiliate that controls much of Idlib Province in northwest Syria. As of October 2015, U.S. officials reported that the program had produced 124 graduates, 70 of whom had returned to Syria in September 2015. Of the other 54, U.S. CENTCOM Commander General Lloyd Austin told the Senate Armed Services Committee that “four or five” then remained “in the fight” against the Islamic State in Syria, after having come under Jabhat al Nusra attack in July 2015.
legislation (H.R. 2685, S. 1558) would have provided $600 million for the program on different terms. However, the omnibus appropriations act for FY2016 did not appropriate funding for the Syria Train and Equip Fund, but it allows the Secretary of Defense to use funds from the Counterterrorism Partnerships Fund for efforts to assist appropriately vetted elements of the Syrian opposition, if the Secretary outlines a detailed and clear plan for the use of such funds and provides such justification to the congressional defense committees in a reprogramming request.73

In March 2016, the Administration requested congressional approval to reprogram $300 million in FY2016 CTPF funding to support the continuation of the program. The congressional defense committees approved the reprogramming action after a period of review and debate.74

The overarching authority for the program provided in the FY2015 NDAA (NDAA, P.L. 113-291) expires after December 31, 2016, although some activities envisioned under the redesigned program could arguably proceed pursuant to other authorities.

The Administration’s FY2017 request includes $250 million in defense funding to train, equip, and/or sustain appropriately vetted Syrian forces engaged in the fight against the Islamic State.75 Of the amount requested, $210.8 million would support the procurement and provision of weapons, ammunition, and equipment; $18.6 million would support lift and transportation costs; and $20.6 million would support trainee stipends and operational sustainment.

The House-approved version of the FY2017 NDAA (H.R. 4909) would authorize the appropriation of $250 million for a Syria Train and Equip Fund (STEF). In addition, Section 1221 of that bill would extend the authority for the program through December 31, 2017. The committee would require the Administration to continue to use prior approval reprogramming requests for the program. These requests would need to be accompanied by certifications that the Administration had developed a plan to take and hold Raqqa, Syria, and to deploy numbers and types of U.S. personnel necessary to enable trained and equipped Syrian forces to defend themselves against the Islamic State and the Syrian government. An amendment offered to the House bill that would have removed the authorization for the program and fund was considered and rejected by committee members during the markup of the bill and was not made in order for reconsideration on the House floor.

The Senate-approved version of the FY2017 NDAA (Section 1221 of S. 2943) would extend the authorization for the Syria Train and Equip Program through December 31, 2019, and would require notification of congressional committees 30 days prior to the initiation of new initiatives under the program. Unlike the House bill, S. 2943 would authorize $1.26 billion for a Counter Islamic State in Iraq and the Levant Fund that would fund both the Iraq and Syria Train and Equip Programs, along with other activities.

Defense appropriators also have proposed a combined fund for FY2017 anti-IS partnership programs, with the House proposing an $880 million Counter-Islamic State of Iraq and the Levant Train and Equip Fund (H.R. 5293), and Senate appropriators proposing a $930 million Counter-ISIL Train and Equip Fund (S. 3000).

74 Department of Defense, Prior Approval Reprogramming Action FY16-11PA, March 17, 2016.
Proposed Restrictions on Man-Portable Air Defense Systems (MANPADS)

Since 2013, Congress has considered and enacted some proposals to restrict the use of authorized and appropriated funds for the procurement or transfer of man-portable air defense systems (MANPADS) to Syria. Proposed MANPADS restrictions have reflected the concerns of some Members of Congress that MANPADS could fall into the hands of hostile parties and threaten civilian aircraft, allied military aircraft, and U.S. aircraft that are conducting air strikes against terrorist groups or that may otherwise be supporting Syrian groups.

As of September 2016, some media reports suggest that non-U.S. entities may seek to provide MANPADS to entities in Syria as a means of responding to escalating violence against opposition held areas and empowering certain anti-Assad forces to defend themselves and Syrian civilians from air assaults by Syrian government and Russian air forces.76 Responding to questions about the potential provision of MANPADS to Syrian rebels by Gulf states, State Department Deputy Spokesman Mark Toner stated, "We cannot dictate what other countries—and I'm not naming names—may or may not decide to do in terms of supporting certain groups within Syria."77 Press reports since 2012 have documented the appearance of MANPADS in limited numbers among some Syrian armed groups.78

In the 113th Congress, proposals introduced and considered sought to define the types of assistance that could be provided and to place conditions or restrictions on the transfer of certain weapons systems to Syrians (S. 960, H.R. 1327). Section 9016 of the FY2015 defense appropriations act (P.L. 113-235) stated that none of the funds used pursuant to the authorities contained in the section for the Syria Train and Equip program "shall be used for the procurement or transfer of man portable air defense systems."79 Parallel authority for the program was established by Section 1209 of the FY2015 defense authorization act (P.L. 113-291) and does not expire until December 31, 2016. The Section 1209 authority, as subsequently amended, does not restrict the purchase or transfer of MANPADS pursuant to the authority.

In the 114th Congress, for FY2016, the House proposed version of the FY2016 defense appropriations act (H.R. 2685) would have authorized and appropriated monies for the continuation of the Syria Train and Equip program and was amended to provide that "none of the funds used pursuant to this authority shall be used for the procurement or transfer of man-portable air-defense systems."80 As enacted, the final version of the FY2016 defense appropriations act (Division C of P.L. 114-113) does not include a Syria related prohibition on MANPADS procurement or transfer, but provides in Section 9013 that "none of the funds made available by this Act under the heading 'Iraq Train and Equip Fund' may be used to procure or transfer man-portable air defense systems." As of 2016, the Syria Train and Equip program continues to be funded through prior approval reprogramming transfers from the Counterterrorism Partnerships Fund account to operational accounts. FY2017 proposals under consideration would extend the authorization for the program and provide for its funding from a proposed consolidated account to counter the Islamic State organization.

For FY2017, Section 9013 of the House-passed version of the FY2017 defense appropriations act (H.R. 5293) would prohibit the use of funds made available by the act for the "Counter-Islamic State of Iraq and the Levant Train and Equip Fund" to procure or transfer MANPADS. The House further adopted an en bloc floor amendment during its consideration of the FY2017 defense authorization bill (incorporated as Section 1229 of H.R. 4909) that included an amendment to prohibit the obligation or expenditure of funds authorized to be appropriated for or otherwise available to the Department of Defense for FY2017 "to transfer or facilitate the transfer" of MANPADS to any entity in Syria.81 The Senate-passed versions of the FY2017 defense authorization (S. 2943) and the FY2017 defense appropriation (S. 3000) do not contain similar provisions.

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76 Jonathan Landay and Arshad Mohammed, "Gulf may arm rebels now Syria truce is dead - U.S. officials," September 27, 2016.
77 State Department press briefing by Deputy Spokesperson Mark C. Toner, September 27, 2016.
79 In June 2014, the House adopted H.Amdt. 914 to H.R. 4870, which provided that "None of the funds made available by this Act may be obligated or expended to transfer man-portable air defense systems (MANPADS) to any entity in Syria." It was included in the House engrossed version of the bill as Section 10010.
80 H.Amdt. 487 to H.R. 2685.
81 See Amendment 81 in H.Rept. 114-571, adopted as part of en bloc amendment H.Amdt. 1046 to H.R. 4909. If enacted, the amendment would provide that, "none of the funds authorized to be appropriated by this Act or otherwise made available for the Department of Defense for fiscal year 2017 may be obligated or expended to transfer or facilitate the transfer of man-portable air defense systems (MANPADS) to any entity in Syria."
Other Reported U.S. Assistance

Then-Secretary of Defense Chuck Hagel said in a September 2013 hearing before the Senate Foreign Relations Committee that the Administration was taking steps to provide arms to some Syrian rebels under covert action authorities. 82 Several press accounts citing unnamed U.S. government sources have described reported U.S. and partner nation efforts to that effect. 83 To date, other U.S. officials have not publicly acknowledged any such efforts or publicly described which elements of the Syrian opposition may have received U.S. training or support via any such channels, what any training may have entailed, what types of weaponry may have been provided, or what safeguards may be in place to monitor the disposition of equipment and the actions of any U.S.-trained or equipped personnel. One June 2015 article discussed differences of opinion among Members of Congress about future funding for the reported program. 84 In October 2015, unnamed U.S. officials were cited in press reports that suggested that Russia was actively targeting Syrian opposition groups that had received covert support from the United States. 85

<table>
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<th>U.S.-Origin Weaponry and the Syria Conflict</th>
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| Since April 2014, various anti-Assad forces have released videos of their operatives loading and firing what appears to be U.S.-origin anti-tank weaponry in Syria. 86 In April 2014, an official affiliated with the now-defunct opposition group Harakat Hazm told the New York Times that “friendly states” had provided “modest numbers” of the weapons. 87 The commander of the group told the Washington Post that those who supplied the missiles had U.S. government approval and said the shipment suggested “a change in the U.S. attitude toward allowing Syria’s friends to support the Syrian people.” 88

Asked in April 2014 about the reported shipments and use of U.S. origin weaponry by Syrian rebels, U.S. National Security Council spokeswoman Bernadette Meehan said, “The United States is committed to building the capacity of the moderate opposition, including through the provision of assistance to vetted members of the moderate armed opposition. As we have consistently said, we are not going to detail every single type of our assistance.” 89 In May 2014, an unnamed senior Administration official reiterated that formulation to members of the press in a background briefing, while stating that “asymmetry which exists on the ground militarily, unfortunately, between the regime and the moderate opposition is problematic for the emergence of the kinds of political conditions necessary for a serious political process. And we and others are focused on that.” 90

82 Secretary Hagel said, “it was June of this year that the president made the decision to support lethal assistance to the opposition. As you all know, we have been very supportive with hundreds of millions of dollars of nonlethal assistance. The vetting process that Secretary Kerry noted has been significant, but—I’ll ask General Dempsey if he wants to add anything—but we, the Department of Defense, have not been directly involved in this. This is, as you know, a covert action. And, as Secretary Kerry noted, probably to [go] into much more detail would—would require a closed or classified hearing.”


86 See Harakat Hazm YouTube Channel, April 15, 2014, at http://www.youtube.com/watch?v=5x5Q4aTGvu0.


90 Transcript of Background Briefing on Syria by Senior Administration Official, U.S. State Department, May 5, 2014.
Specific public information is lacking about the sources of U.S.-origin weaponry and which units or personnel may have continuing access to U.S.-origin weaponry. In 2015, a range of opposition groups largely affiliated with the Free Syrian Army movement published videos that purported to depict their personnel firing U.S.-origin anti-tank weapons. This includes groups targeted by Russian airstrikes, some of whom have subsequently posted footage of their fighters using such weaponry to repel follow-on ground attacks by pro-Asad forces. Islamist groups also have posted similar videos and images of captured U.S.-origin anti-tank weapon stocks, including the Ansar al Islam Front, Jabhat al Nusra, and the Islamic State. In June 2016, a joint investigation by the New York Times and Al Jazeera concluded that weapons shipped into Jordan by U.S. and Saudi intelligence services intended for Syrian rebels were instead diverted by Jordanian intelligence officials and sold on the black market.

Chemical Weapons and Disarmament

A major policy concern of the United States has been the use or loss of control of chemical weapons in Syria during the ongoing civil war. Syrian opposition sources and Syrian government officials have repeatedly traded allegations concerning the use of chemical weapons and toxic chemicals as weapons of war since late 2012. Several governments—including the governments of Syria and the United States—have submitted allegations of chemical attacks to the U.N. Secretary General and/or the Organization for the Prohibition of Chemical Weapons (OPCW). The United States, the United Nations, and other countries have assessed that the Syrian government has used chemical weapons repeatedly against opposition forces and civilians in the country. Expert teams affiliated with the U.N. Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic and the OPCW Fact Finding Mission in Syria have investigated some of these allegations and have found evidence that in some cases confirms and in others suggests that chemical weapons and/or toxic chemicals have been used in attacks by

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91 Section 3(a)(2) of the Arms Export Control Act (22 U.S.C. 2753 (a)(2)) applies obligations, restrictions, and possible penalties for misuse of U.S.-origin equipment to any retransfer by foreign recipients of U.S.-supplied defense articles, defense services, and related technical data to another nation. If such a retransfer occurred in the absence of prior U.S. approval, then the nation making such a transfer could be determined to be in violation of its agreement with the United States not to take such an action without prior consent from the U.S. government.

92 See Tajammu al Izza YouTube Channel, October 1, 2015, at https://www.youtube.com/watch?v=AqGuUbVgI8.

93 See Ansar al Islam Front YouTube Channel, August 10, 2014, at http://www.youtube.com/watch?v=k9pxIFUKEZg and http://www.youtube.com/watch?v=1QeIDMPQ6Pw.


97 Prepared by Mary Beth Nikitin, Specialist in Nonproliferation.

98 Reports by U.N. Member States have been made via confidential correspondence, such as letters containing allegations described generally in the December 2013 final report of U.N. Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic (the U.N. Mission). See U.N. Mission, Final Report, December 12, 2013, pp. 2-6.

99 The U.N. Mission to investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic released its report on September 16, 2013, concluding that surface-to-surface rockets containing the chemical weapons nerve agent sarin were used in the Ghouta area of Damascus against civilians on a "relatively large scale." The 2013 U.N. investigative mission was not tasked with assigning culpability for the attacks.
the Syrian regime and by the Islamic State. Syrian civilians, opposition fighters, and military personnel have been targeted in alleged attacks.\textsuperscript{100}

The largest-scale use of chemical weapons to date was reportedly an August 21, 2013, nerve gas attack, which the U.S. government estimated killed over 1,400 people.\textsuperscript{101} In August 2013, the Obama Administration had threatened military action against Syria in response to alleged nerve gas attacks by Syrian government forces. As part of a diplomatic solution to the crisis based on a U.S.-Russian joint proposal, the Administration withdrew the threat of military force and Syria agreed to give up its chemical weapons and join the international Chemical Weapons Convention (CWC), which bans the use of any toxic chemicals in warfare and requires Syria to destroy all of its chemical weapons stocks and production facilities under international supervision. U.N. Security Council Resolution 2118 (2013) further mandated that Syria give up all its chemical weapons under Chapter VII provisions of the U.N. Charter.\textsuperscript{102}

At the start of the war, Syria had more than 1,000 metric tons of chemical warfare agents and precursor chemicals, including several hundred metric tons of the nerve agent sarin, several hundred metric tons of mustard agent in ready-to-use form, and several metric tons of the nerve agent VX. The international community oversaw the removal and destruction of these chemical weapons agents from Syria, and, as of January 4, 2016, all Category 1 and 2 declared chemicals had been destroyed.\textsuperscript{103}

Destruction of chemical weapons facilities is still underway,\textsuperscript{104} and the United States has raised questions over whether Syria has declared all of its chemical weapons stocks. The OPCW has not been able to verify the completeness of the declaration, part of Syria’s obligations under the CWC. The OPCW’s Declaration Assessment Team (DAT) continues to investigate “gaps, inconsistencies and discrepancies” through interviews and lab analysis of samples from site visits but the cooperation of the Syrian government has been limited and little progress has been made according to the August 2016 OPCW Executive Council report.\textsuperscript{105}

Reports of chemical weapons use in Syria continue. Earlier U.N. and OPCW investigations had not been tasked with assigning responsibility for alleged attacks but with identifying whether chemical weapons were used. However, on August 7, 2015, the U.N. Security Council unanimously adopted Resolution 2235, which established a new OPCW-UN Joint Investigative Mechanism (JIM) tasked with identifying “to the greatest extent feasible” those responsible for or involved in chemical attacks identified by the OPCW fact finding mission.\textsuperscript{106} In September 2015,


\textsuperscript{101} Government Assessment of the Syrian Government’s Use of Chemical Weapons on August 21, 2013, White House Office of the Press Secretary, August 30, 2013.

\textsuperscript{102} Chapter VII of the UN Charter authorizes the use of punitive measures such as sanctions or military force.


\textsuperscript{104} “Note by the Director General: Progress in the Elimination of the Syrian Chemical Weapons Programme,” EC-83/DG.6, August 22, 2016. https://www.opcw.org/fileadmin/OPCW/EC/83/en/ec83dg06_e_.pdf. As of August 22, 2016, the OPCW reported that 24 of the 27 declared chemical weapons production facilities (CWPFs) had been destroyed. The “poor security situation” prevents destruction of the remaining aircraft hangar and two stationary above-ground facilities. The OPCW said that Syrian government is cooperating on this matter.

\textsuperscript{105} Ibid.

\textsuperscript{106} Resolution 2235 required that the U.N. Secretary-General, in coordination with the OPCW Director-General, submit within 20 days recommendations for its approval on the establishment of a Joint Investigative Mechanism “to identify (continued...)
the United Nations Security Council adopted the Secretary General’s proposal for the
establishment of the OPCW-UN JIM, and the Secretary General appointed Virginia Gamba of
Argentina to head the independent three-member panel that leads the JIM.

While Resolution 2235 empowers the JIM to have access anywhere in Syria, the JIM’s mission
has been complicated by the security situation on the ground. The JIM initially investigated nine
attacks alleged to have occurred between April 2014 and August 2015. Of these, three cases
lacked sufficient evidence to draw conclusions, three cases require further investigation, and three
cases were concluded. Eight of the cases involved chlorine-filled barrel bombs. The JIM
submitted its report on August 24, 2016, which attributed three cases of chemical weapons use.\textsuperscript{107}
According to the report:

- Bombs with toxic chemicals (such as chlorine) were dropped in Talmenes in
  April 2014 by the Syrian Air Force;
- Bombs with toxic chemicals (such as chlorine) were used in Sarmin in March
  2015 by the Syrian Air Force; and,
- Mortar shells filled with sulfur mustard were used by the Islamic State in Marea
  in August 2015.\textsuperscript{108}

In August 2016, press and social media reports said that the Syrian government was using
chlorine in barrel bombs in Aleppo and other locations. The Syrian government continues to deny
categorically that it has used chemical weapons or toxic chemicals, while accusing opposition
forces of doing so and calling into question the methods and results of some investigations into
alleged chemical attacks.\textsuperscript{109} The U.N. representatives of the United States, France, and the United
Kingdom continue to cite information they believe suggests Syrian government complicity in
conducting ongoing chemical attacks, particularly with chlorine.

(...continued)

to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organisers (sic),
sponsors or otherwise involved in the use of chemicals as weapons, including chlorine or any other toxic chemical, in
the Syrian Arab Republic where the OPCW FFM determines or has determined that a specific incident in the Syrian
Arab Republic involved or likely involved the use of chemicals as weapons, including chlorine or any other toxic
chemical..."

\textsuperscript{107} Letter dated 24 August 2016 from the Leadership Panel of the Organization for the Prohibition of Chemical
Weapons-United Nations Joint Investigative Mechanism addressed to the Secretary-General, S/2016/738,

\textsuperscript{108} The JIM report states that OPCW experts were able to identify that the sulfur mustard was produced by the Islamic
State because of the way it was produced, which was different from Syrian government stocks. “The OPCW confirmed
that the sulfur mustard from the Syrian Arab Republic did not contain impurities such as polysulphides, meaning that a
different process was used by the Government. The OPCW also reported that the sulfur mustard used by ISIL in
northern Iraq on several occasions in 2015 and 2016 was produced through the Levinstein process.” Ibid, p.97

\textsuperscript{109} On August 7, the Permanent Representative of Syria to the United Nations Dr. Bashar Jaafari told the United
Nations Security Council that, “the Syrian Government and the Syrian army have never used chemical weapons, and
never will. Contrariwise, Syria’s army and its civilians have been targeted with toxic chemicals and chemical weapons,
including chlorine gas, by armed terrorist groups, such as Daesh [Arabic acronym for ISIL] and the Al-Nusra Front, in
many parts of Syria...” He accused unspecified investigation missions of having “based their work on false, fabricated
statements made by parties well known to all. Those missions have carried out partial and biased investigations —
outside Syria — without a modicum of coordination with the Syrian authorities.” (U.N. Document S/PV.7501.) The
U.N. and OPCW investigative missions have worked inside Syria with the permission of the Syrian government. In
2011, the U.N. Human Rights Council established an Independent International Commission of Inquiry on the Syrian
Arab Republic that has reported extensively on the conflict, including on alleged chemical attacks. The Commission
uses a “reasonable grounds to believe” standard of evidence and relies on first-hand accounts from Syrians now in
neighboring countries, remote interviews, and other publicly available information.
There also have been additional press reports on possible use of mustard gas in Syria and Iraq by IS fighters.10 U.S. Brigadier General Kevin Killea, chief of staff for military operations in Iraq and Syria, said that the United States was conducting testing to confirm these reports, which to date have not been officially confirmed by U.S. or U.N. investigations. The OPCW’s chief has said that the Islamic State has produced and used sulfur mustard in northern Iraq and Syria.11 U.S. forces struck Islamic State sites in Iraq believed to be associated with chemical weapons production in September 2016, and a multilateral effort removed chemical weapons precursors from Libya in August 2016 after Islamic State affiliate forces threatened the area where the materials had been stored. The Pentagon has said that U.S. troops fighting in Iraq are expected to continue to face weaponized mustard gas attacks by the Islamic State.112

Outlook

Russia’s military intervention in Syria has reframed many of the policy questions that U.S. policymakers have grappled with since the outbreak of conflict there in 2011. In broad terms, the Administration has argued that pressure must be brought to bear on the Syrian government in order to convince its leaders to negotiate a settlement to the conflict that would result in President Asad’s departure from office and the preservation of Syrian state institutions. Asad and Russia fundamentally reject this view and argue that “counterterrorism” cooperation with the Syrian government against its adversaries should precede further discussion of transition arrangements. Efforts to forcefully compel Asad’s departure or empower opposition groups to depose Asad may risk direct confrontation with Russian military forces, with potentially broad implications beyond Syria. At the same time, the risk remains that any perceived U.S. acquiescence to or cooperation with Russia’s intervention on Asad’s behalf risks alienating anti-Asad forces and their regional backers, as well as providing Russia with an opportunity to consolidate a new, active role for itself in regional security arrangements.

Over the longer term, Syria’s diversity and the interplay of its conflict and regional sectarian rivalries raise the prospect of continued violence even in the wake of the type of “managed transition” identified as a U.S. policy goal. The presence and power in Syria of armed groups directly opposed to the governance models promoted by many Syrians and the United States suggests that the conflict could persist after any negotiated settlement seeking to replace the current Asad-led government with a government of national unity or other inclusive formulation. Political opposition coalitions active internationally appear to lack both grassroots support and, because of their lack of material control over the most powerful armed groups, they appear to lack the ability to guarantee security commitments that might presumably be part of a negotiated settlement. State weakness may allow extremist and terrorist groups to operate from Syria for years to come.

Observers, U.S. officials, and Members of Congress continue to differ over which incentives and disincentives may prove most effective in influencing combatants and their supporters. Still less defined are the long-term commitments that the United States and others may be willing to make.

to achieve an inclusive political transition acceptable to Syrians; protect civilians; defend U.S. partners; promote accountability and reconciliation; or contribute to the rebuilding of a country destroyed by years of brutal war.
Appendix A. Syrian History and Demographics

Background: Syria, its People, and the Conflict

The Syrian Arab Republic emerged as an independent country during the Second World War after a period of French rule and nationalist unrest in the wake of the First World War. Prior to that, the territory that now comprises Syria was administered by the Ottoman Empire and had earlier been an important stage for major events in the founding of Christianity and Islam, Muslim-Christian battles during the Crusades, and the repulsion of the Mongol invasion of the Middle East. The country’s strategic, central location made it a venue for superpower and regional competition during the Cold War era, and its current religious, ethnic, political, economic, and environmental challenges mirror those of some other countries in the Middle East.

Long before the current conflict, Syrians struggled with challenges that have bred deep dissatisfaction in other Arab autocracies, including high unemployment, high inflation, limited upward mobility, rampant corruption, lack of political freedoms, and repressive security forces. These factors fueled some opposition to Syria’s authoritarian government, which has been dominated by the Baath (Renaissance) Party since 1963, and the Al Asad family since 1970. President Bashar al Asad’s father—Hafiz al Asad—ruled the country as president from 1971 until his death in 2000. Beneficiaries of both the Asad family’s rule and the economic and social status quo were drawn from across Syria’s diverse citizenry; together, they offered support to the regime, helping it to manage, defuse, or repress dissent.

Syria’s Diverse Population

The Syrian population, like those of many other Middle East countries, includes different ethnic and religious groups. For years, the Asad regime’s strict political controls prevented these differences from playing an overtly divisive role in political or social life, whereas French and Ottoman administrators of Syria had at times manipulated popular divisions. A majority of Syrians, roughly 90% of the population, are ethnic Arabs; however, the country contains small ethnic minorities, notably Kurds, the country’s largest distinct ethnic/linguistic minority (7%-10% of the total population). Of more importance in Syria are religious sectarian differences. In addition to the majority Sunni Muslims, who comprise over 70% of the population, Syria contains several religious sectarian minorities, including three smaller Muslim sects (Alawites, Druze, and Ismailians) and several Christian denominations. The Asad family are members of the minority Alawite sect (roughly 12% of the population), which has its roots in Shia Islam.

Despite the secular nature of the ruling Baath party, religious sects have been important to some Syrians as symbols of group identity and determinants of political orientation. The Asads and the Baath party have cultivated Alawites as a key base of support, and elite security forces have long been led in large part by Alawites, although some officers and most rank and file military personnel have been drawn from the majority Sunni Arab population and other minority groups. The government violently suppressed an armed uprising led by the Sunni Islamist Muslim Brotherhood in the early 1980s, killing thousands of Sunni Muslims and others.113

113 In a March 1980 intelligence product, the Central Intelligence Agency described the then-prevailing dynamic among members of the regime and military in relation to the Islamist upheaval as follows: “President [Hafiz al] Assad has committed his minority Alawite government to a risky course with his reported decision to use the military more freely to crush civil unrest in Syrian cities. This may intimidate his domestic opponents in the short run, but unless Assad is able to reestablish order quickly, it will also further erode his domestic support and could eventually bring about his (continued...)
Religious, ethnic, geographic, and economic identities overlap in influencing the views and choices of Syrians about the current conflict. Within ethnic and sectarian communities are important tribal and familial groupings that often provide the underpinning for political alliances and commercial relationships. Socioeconomic differences abound among farmers, laborers, middle-class wage earners, public sector employees, military officials, and the political and commercial elite. Many rural, less advantaged Syrians originally supported the opposition movement, while urban, wealthier Syrians appeared to have mixed opinions. The decay of Syrian state institutions during the course of the conflict, especially in the security sector, appears to have empowered a new cadre of local actors whose ability to influence developments in areas under their immediate influence has complicated efforts by both the government and opposition groups to maintain law and order, security, and economic activity.

The viciousness of the conflict and the devastation it has brought to large areas of the country have further shaped the opinions of members of Syria’s diverse population. Local and tribal attachments influence some Syrians, as seen in rivalries between the two largest cities, Damascus and Aleppo, in differences between rural agricultural communities and urban areas, and in the concentration of some sectarian and ethnic communities in discrete areas. Despite being authoritarian, Syrian leaders over the years often found it necessary to adopt policies that accommodated, to some degree, various power centers within the country’s diverse population and minimized the potential for communal identities to create conflict.

That need is likely to remain, if not intensify, after the current conflict insofar as the conflict has contributed to a hardening of sectarian identities. While sectarian considerations cannot fully explain power relationships in Syria or predict the future dynamics of the conflict, accounts from Syria strongly suggest that some sectarian and ethnic divisions have grown deeper since 2011. Members of the Sunni Arab majority were at the forefront of the original protest movement in 2011, and predominantly Sunni Arab armed groups have engaged in most of the fighting against the security forces of the Alawite-led government. Support for the Asad government from foreign Shia fighters has galvanized some Sunnis’ views of the regime as irretrievably sectarian. Nevertheless, much of the daily violence occurs between Sunni armed oppositionists and a Syrian military force composed largely of Sunni conscripts.

Syria’s Christians, members of other minority groups, and civilians from some Sunni and Alawite communities have been caught between their parallel fears of what violent political change could mean for their communities and the knowledge that their failure to actively support rebellion may result in their being associated with Asad’s crackdown and suffering retaliation. The Alawite leadership of the Syrian government and its allies in other sects appear to perceive the mostly Sunni Arab uprising as an existential threat to the Baath party’s nearly five-decade hold on power. At the popular level, some Alawites and members of other sects may feel caught between the regime’s demands for loyalty and their fears of retribution from others in the event of regime change or a post-Asad civil war.

Some Sunni Arabs may view the conflict as a means to assert their community’s dominance over Alawites and others, but others may support the Asad government as an alternative to rule by ouster. By committing the military, Assad is playing his last major card to keep his regime in power. Army discipline may well collapse in the face of widespread riots. This could lead to a bloody war between Sunni Muslim and Alawite units. The Alawites, however, may choose to topple Assad before such turmoil develops in order to keep their position secure.” Central Intelligence Agency Directorate of Intelligence, “SPECIAL ANALYSIS - SYRIA: Assad’s Prospects,” National Intelligence Daily, March 17, 1980; in U.S. State Department, Foreign Relations of the United States (FRUS) 1977–1980, Volume IX, Arab-Israeli Dispute, August 1978–December 1980, pp. 1102-4.
extremist forces or out of fear of retaliation for past collaboration with the regime. Some Sunni opposition leaders have sought to assuage other groups' concerns about the implications of potential Sunni dominance, whereas others have demanded that non-Sunni groups accept Sunni religious rule. Some opposition figures have pledged their commitment to seeing that orderly trials and the rule of law prevail in any post-conflict setting. Nevertheless, reports of abuses at the hands of opposition forces suggest that leaders of many armed groups at times are unable or unwilling to ensure that such standards are applied consistently to their pro-Asad adversaries.

While some Kurds view the conflict as an opportunity to achieve greater autonomy, others are wary of supporting Sunni Arab rebels who, should they come to power, may be no less hostile to Kurdish political aspirations than the Asad government. Some members of Syria's various Christian communities have expressed fears that the uprising will lead to a sectarian civil war and that they could be subjected to violent repression, given that Muslim extremist groups have targeted Iraqi Christians in recent years. Other Christians reportedly have offered assistance to some elements of the armed opposition over time.

Appendix B. Parties to the Conflict

The following profiles offer limited descriptions of pro-Asad forces and select political and armed opposition forces. The profiles are based on open primary sources and CRS cannot independently verify the size, equipment, and current precise areas of operation of the armed groups described. At present, open source analysis of armed groups operating in Syria relies largely on the self-reporting of individual groups and coalitions. Information is not evenly and regularly available for all groups. The size and relative strength of groups vary by location and time. Many groups and units who claim to coordinate under various fronts and coalitions in fact appear to operate independently and reserve the right to change allegiances. The use of religious or secular imagery and messages by groups may not be reliable indicators of the long-term political aims of their members or their likely success in implementing those aims.
### Pro-Asad Forces

**Syrian Armed Forces and National Defense Forces**
According to the Syrian Observatory for Human Rights, more than 55,000 members of the regular armed forces have died during the conflict, and reports from Syria suggest that military conscription efforts are struggling in some communities. According to the International Institute for Strategic Studies (IISS), Syrian army force strength has declined from 220,000 in 2011 to 90,000 in 2016. Syria’s air force has maintained its monopoly on operations in Syrian air space in relation to rebel forces, although opposition groups periodically shoot down fixed and rotary-wing aircraft, and coalition and Russian air forces now operate inside of Syria.

The Asad government, with Iranian support, organized informal pro-government popular militia into units of the so-called National Defense Forces and Popular Defense Committees, which have operated in conjunction with or at the direction of the armed forces to clear and hold government-controlled territory.

**Lebanese Hezbollah**
Since at least 2013, Hezbollah has worked with the Syrian military to protect regime supply lines. Hezbollah personnel have played significant roles in battles close to the Lebanese border, in which rebel presence along key highways threatened the government’s ability to move forces and to access predominantly Alawite strongholds on the coast. Hezbollah forces on the Lebanese side of the border reportedly monitor and target rebel positions near the border that facilitate attacks in Syria and Lebanon. In addition to conducting military operations, Hezbollah trains Syrian paramilitary forces, known as National Defense Forces (NDF), to improve their capacity to hold cleared terrain. Hezbollah fighters also train and advise the Syrian military, and often embed with Syrian units. Hezbollah maintains between 4,000 and 8,000 fighters in Syria, according to the International Institute for Strategic Studies. Over one thousand Hezbollah fighters reportedly have been killed in Syria to date, including some senior leaders.

**Iraqi and Other Shia Militias**
Analysts estimate that there are between 5,000 and 10,000 Iraqi Shiites fighting in Syria on behalf of the Syrian government, in addition to an unknown number of Afghans and other Shias. Many hail from Iraqi Shia political and militia groups including Liwa Abu al Fadl al Abbas, Harakat al Nujaba, and Asa‘ib Ahl al Haq. Reports describe these groups as assuming a broad operational role, noting that militias have formed sniper teams, led ambushes, established checkpoints, and provided infantry support for Syrian armored units. It is difficult to assess the motivations of individual Shia foreign fighters in Syria or determine whether Asad’s survival is their primary goal. Reports suggest that Iraqi fighters receive training in Iran before being flown in small batches into Syria, and that they work closely with Lebanese Hezbollah. However, it is unclear who ultimately exercises command and control over these militias.

**Sources:** Graphic created by CRS. More detailed information available on request.
### Select Anti-Asad Forces and Extremist Groups

**Free Syrian Army**

A loose coalition of armed groups fight under the banner of the Free Syrian Army (FSA) but the group lacks a single, organized command and control structure with unified procurement, intelligence, logistics, or sustainment capabilities. In the early period of the Syrian uprising, a number of Syrian military defectors identifying themselves as leaders of the FSA attempted to provide unified leadership and build these types of capabilities for emergent opposition forces across Syria but were unable to exert control over the actions of individual brigades. Regional and personal rivalries, the ascendance of Islamist armed groups, and competing foreign patrons continue to undermine these efforts to date. A Supreme Military Council formed in an attempt to overcome these challenges has proven incapable of overcoming them to date. At present, a number of fighting groups actively refer to themselves as part of the FSA while carrying on operations independently.

**Ahrar al Sham (Free Men of the Levant)**

Ahrar al Sham (AAS) is generally seen as one of the most powerful armed groups in Syria. It has collaborated with other Islamists and nationalists in fighting with pro-Asad and Islamic State forces. However, the group’s apparently close relationship with the Nusra Front, its founders’ links to Al Qaeda, and its Salafi-jihadist ideology lead many Western observers to classify the group as an extremist organization. AAS leadership appears divided on whether the group should participate in negotiations with the Syrian government.

**Jaysh al Islam (Army of Islam)**

This Damascus area-based coalition controls the eastern suburbs of the capital, an opposition stronghold known as Eastern Ghouta. Reportedly backed by Saudi Arabia, it has clashed with Syrian Government, Islamic State, and Nusra Front forces. Jaysh al Islam led the establishment of the Unified Judiciary Council in Eastern Ghouta, which governs the area in accordance with its interpretation of Islamic law. Jaysh al Islam is also part of the leadership of the Syrian High Negotiations Committee (HNC), which represents the Syrian opposition in UN-brokered talks with the Syrian government.

**Jabhat Fatah al Sham (Levant Conquest Front)**

Formerly known as the Nusra Front, this group emerged in late 2011 as Al Qaeda’s affiliate in Syria. In July 2016, Nusra Front leader Abu Muhammad al Jawlani stated that his group would hereafter be known as Jabhat Fatah al Sham, and would have “no affiliation to any external entity.” U.S. officials have downplayed the announcement as a rebranding effort, noting the continuing role and presence of Al Qaeda operatives within the front. The group controls territory in Idlib province, and regularly operates alongside other armed groups, including some that may receive U.S. support.

**The Islamic State (aka ISIL/ISIS/Daesh)**

From its Syria-based capital in Raqqa, the Islamic State controls much of the Euphrates river valley east and south from the Aleppo area to the border with Iraq. It captured central Syria in 2015 and has supporters in the Damascus region and along Syria’s border with Lebanon. Along the northern periphery of its areas of control, the group has suffered a series of setbacks since 2015, mainly at the hand of Kurdish fighters backed by U.S.-led coalition airstrikes. Syria appears to remain a staging ground and source of strategic depth for the Islamic State.

**Sources:** Graphic created by CRS. More detailed information available on request.
## Select U.S.-Backed Forces

**Southern Front**
A coalition of dozens of smaller armed groups, many of which are aligned with the "Free Syrian Army" movement and reported to coordinate and receive assistance through a Military Operations Center (MOC) based in Jordan. Southern Front fighters scored a series of victories against pro-Assad forces in late 2014 and 2015, seizing control of the western stretch of the Syrian-Jordanian border and threatening Assad's control over the provincial capital of Daraa. Several Southern Front-aligned units have posted social media footage of their fighters using U.S.-produced anti-tank weapons against pro-Assad forces. The Front's leaders reportedly have stated their support for secular governance in Syria and eschew coordination with the Nusra Front and other extremists. The willingness of Front members to abide by these guidelines may vary considerably.

**Syrian Democratic Forces**
Formed in late 2015, the Syrian Democratic Forces (SDF) is an umbrella grouping of various Kurdish, Arab, and other Syrian militias—largely led by the YPG—that operates against the Islamic State in northern Syria. According to U.S. officials, the United States has provided intelligence, surveillance, and reconnaissance support to SDF forces as they conduct operations against the Islamic State, and maintains advisors with the SDF on the ground. The United States also sponsors a coalition of Sunni Arab groups—described by U.S. officials as the Syrian Arab Coalition, or SAC—that fights as part of the SDF. While the majority of SDF forces continue to be comprised of the Kurdish YPG, SAC forces on occasion have taken the lead in clearing traditionally Sunni Arab areas, particularly along the Turkish border. Turkey equates the YPG with the PKK, and thus strongly opposes U.S. support for the YPG and is suspicious of support for the SDF.

**New Syrian Army**
Formed in late 2015, the New Syrian Army (NSA) brought together existing local groups in southeastern Syria—notably the Kata’ib Allahu Akbar. NSA fighters operate in the tri-border area near Jordan and Iraq. The group has attempted to interdict the Islamic State’s lines of communication between Syria and Iraq, through a series of operations around key highways and border towns. According to U.S. military officials, the United States has provided advice and assistance to the NSA, including strikes in support of their operations. Some NSA fighters have also received training via the Defense Department-led Syria Train and Equip Program. Russian air forces and the Islamic State have attacked NSA positions.

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**Sources:** Graphic created by CRS. More detailed information available on request.
Select Kurdish Forces and Political Opposition Groups

Kurdish Democratic Unity Party (Partiya Yekînîya Demokrat, PYD)
The PYD seeks Kurdish autonomy in Syria and is affiliated with the Kurdistan Workers Party (PKK), a U.S. designated Foreign Terrorist Organization. The PYD has taken a relatively ambiguous stance toward the Arab-led uprisings to date, but PYD leader Saleh Muslim Mohammed has stated in 2015 that his party and the forces they command are not cooperating with the Asad government. In June 2015, Muslim called for decentralized democracy for Syria and denied that they PYD seeks partition. The PYD and other Syrian Kurdish forces refer to Syrian populated areas of the country as one entity that they call Rojava.

Popular Protection Units (Yekîneyên Parastina Gel, YPG)
The “Popular Protection Units” are a secular militia coalition made up mostly of Kurdish fighters affiliated with the PYD, which is in turn affiliated with the Kurdistan Workers Party (PKK), a U.S. designated Foreign Terrorist Organization. The YPG’s size is undetermined but may include as many as fifty thousand fighters, including Assyrian, Armenian, Circassian, and Arab sub-units. The YPG has played the leading role (with coalition air support) in ejecting Islamic State (IS) fighters from the Syrian-Turkish border areas at Kobane and Tal al Abyad in 2015. Prior to the rise of the Islamic State, YPG forces fought a number of battles with Arab Islamist militia groups for control of towns and strategic border crossings in northern Syria. In 2015, YPG forces aligned with other militias to form the Syrian Democratic Forces (SDF).

National Coalition of Revolutionary and Opposition Forces (aka Etifaf, Syrian Opposition Coalition, SOC)
Based in Turkey and considered to be close to foreign opponents of Asad, the SOC has been the focal point for most formal Western and other international engagement with Syrian political opposition members, although the group acknowledges its limitations and has worked to strengthen its relationships with other political and armed groups. The SOC has sought to generate international support for a more forceful intervention to protect civilians in Syria and to build consensus around principles for a negotiated solution to the conflict. The Syrian Muslim Brotherhood is a member of the Syrian National Council (SNC), which is the SOC’s largest constituent group.

National Coordination Body for Democratic Change (NCP)
The NCB is a small Syria-based alliance of leftist groups, Kurdish activists, and individuals associated with the 2005 Damascus Declaration on political reform. The NCB has stated a willingness to negotiate with the Asad regime (predicated on an end to the use of force against civilians) and opposes foreign intervention in Syria’s conflict.Repeated attempts to merge the NCB with the Syrian National Council failed, and the NCB has declined to support the SOC. Prominent NCB member Haytham al Manna left the NCB in 2015 to form the Qamh Movement, a parallel coalition of Syrian independents seeking to end the conflict.

Sources: Graphic created by CRS. More detailed information available on request.
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Congressional Authority to Limit Military Operations

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Summary

Controversy continues over the appropriate role that Congress should play in regulating U.S. military operations against foreign entities. U.S. action against Libya reignited consideration of long-standing questions concerning the President’s constitutional authority to use military force without congressional authorization, as well as congressional authority to regulate or limit the use of such force. There may be a renewed focus in the 113th Congress on whether or to what extent Congress has the constitutional authority to legislate limits on the President’s authority to conduct military operations in Afghanistan, Yemen, Somalia, or other locations.

This report begins by discussing constitutional provisions allocating war powers between Congress and the President, and presenting a historical overview of relevant court cases. It considers Congress’s constitutional authority to end a military conflict via legislative action; the implications that the War Powers Resolution or the repeal of prior military authorization may have upon the continued use of military force; and other considerations which may inform congressional decisions to limit the use of military force via statutory command or through funding limitations. The report discusses Congress’s ability to limit funding for U.S. participation in hostilities, examining relevant court cases and prior measures taken by Congress to restrict military operations, as well as possible alternative avenues to fund these activities in the event that appropriations are cut. The report then provides historical examples of measures that restrict the use of particular personnel, and concludes with a brief analysis of arguments that might be brought to bear on the question of Congress’s authority to limit the availability of troops to serve in ongoing military operations. Although not beyond debate, such limitations appear to be within Congress’s authority to allocate resources for military operations.

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Introduction

Controversy continues over the appropriate role that Congress should play in regulating U.S. military operations against foreign entities. U.S. action against Libya reignited consideration of long-standing questions concerning the President’s constitutional authority to use military force without congressional authorization, as well as congressional authority to regulate or limit the use of such force. There may be a renewed focus on whether or to what extent Congress has the constitutional authority to legislate limits on the President’s authority to conduct military operations in Afghanistan, Yemen, Somalia, or other locations. Congress may consider measures, for example, to repeal the authorization to use force in against those responsible for the terrorist attacks of 2001, to set deadlines for the withdrawal of U.S. forces, to prohibit some units from participating in certain ongoing military operations, or to make other requirements that could affect the deployment of the Armed Forces.

It has also been suggested that, at least in certain circumstances, the President’s role as Commander in Chief of the Armed Forces provides sufficient authority for his deployment of additional troops, and any efforts on the part of Congress to intervene could represent an unconstitutional violation of separation-of-powers principles. While even proponents of strong executive prerogative in matters of war appear to concede that it is within Congress’s authority to terminate U.S. participation in hostilities by cutting off funding entirely for a military operation, a few have suggested that spending measures that restrict but do not end financial support for an armed conflict would be an infringement on executive power tantamount to an “unconstitutional condition.” The question may turn on whether the President’s decisions on troop deployment and mission assignment are purely operational decisions committed to the President in his role as Commander in Chief, or whether congressional action to limit the availability of troops and the missions they may perform is a valid exercise of Congress’s authority to allocate resources using its war powers and power of the purse.

I. Constitutional Provisions

At least two arguments support the constitutionality of Congress’s authority to limit the President’s ability to continue military operations. First, Congress’s constitutional power over the nation’s Armed Forces arguably provides ample authority to legislate with respect to how they may be employed. Under Article I, Section 8, Congress has the power “To lay and collect Taxes ... to ... pay the Debts and provide for the common Defence,” “To raise and support Armies,” “To

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2 In the 112th Congress, a few proposals were introduced to limit or otherwise restrict continuing U.S. military operations in Afghanistan. See, e.g., H.Amdt. 1103 to H.R. 4130 (proposed amendment to FY2012 defense authorization bill, which would have limited funds made available for ongoing U.S. operations in Afghanistan) (failed by recorded vote: 113 – 303); H.R. 780 (similar).

3 For example, when Congress considered limiting funding for the deployment of troops in Iraq in 2007, some argued that such restrictions would infringe upon the executive’s constitutional authority to determine when and how troops should be deployed during an authorized conflict. See, e.g., David B. Rivkin Jr. and Lee A. Casey, What Congress Can (And Can’t) Do on Iraq, WASH. POST (January 16, 2007) at A19; see also Charles Tiefer, Can Appropriation Riders Speed Our Exit from Iraq?, 42 STAN. J. INT’L L. 291(2006) (predicting arguments that would be made to oppose congressional funding restrictions).
provide and maintain a Navy," "To make Rules for the Government and Regulation of the land and naval Forces," and "To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," as well as "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." Further, Congress is empowered "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ..." as well as "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Secondly, Congress has virtually plenary constitutional power over appropriations, one that is not qualified with reference to its powers in Section 8. Article I, Section 9 provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." It is well established, as a consequence of these provisions, that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress" and that Congress can specify the terms and conditions under which an appropriation may be used, so long as the restrictions do not impair power inherent solely in other branches or otherwise run afoul of constitutional restrictions on congressional prerogatives.

On the executive side, the Constitution vests the President with the "executive Power," Article II, Section 1, clause 1, and appoints him "Commander in Chief of the Army and Navy of the United States," id., §2, clause 1. The President is empowered, "by and with the Advice and Consent of the Senate, to make Treaties," authorized "from time to time [to] give to the Congress Information on the State of the Union, and [to] recommend to their Consideration such Measures as he shall judge necessary and expedient," and bound to "take Care that the Laws be faithfully executed." Id., §3. He is bound by oath to "faithfully execute the Office of President of the United States," and, to the best of his "Ability, preserve, protect and defend the Constitution of the United States." Id., §1, clause 8.

It is clear that the Constitution allocates powers necessary to conduct war between the President and Congress. While the ratification record of the Constitution reveals little about the meaning of the specific war powers clauses, the importance of preventing all of those powers from accumulating in one branch appears to have been well understood, and vesting the powers of the sword and the purse in separate hands appears to have been part of a careful design.

It is generally agreed that some aspects of the exercise of those powers are reserved to the Commander in Chief, and that Congress could conceivably legislate beyond its authority in such a way as to intrude impermissibly into presidential power. The precise boundaries separating

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6 United States v. Klein, 80 U.S. (1872) 128 (1872) (holding invalid an appropriations proviso that effectively nullified some effects of a presidential pardon and that appeared to prescribe a rule of decision in court cases); United States v. Lovett, 328 U.S. 303 (1946) (invalidating as a bill of attainder an appropriations provision denying money to pay salaries of named officials).
7 See Louis Fisher, Presidential War Power 7 (2d ed. 2004) (noting that allocation of war powers to Congress was a break with monarchial theories, under which all such powers belonged to the executive); id. at 8-12.
legislative from executive functions, however, remain elusive. There can be little doubt that Congress would exceed its bounds if it were to confer exclusive power to direct military operations on an officer not subordinate to the President, or to purport to issue military orders directly to subordinate officers. At the same time, Congress’s power to make rules for the government and regulation of the Armed Forces provides it wide latitude for restricting the nature of orders the President may give. Congress’s power of appropriations gives it ample power to supply or withhold resources, even if the President deems them necessary to carry out planned military operations.

Congress’s War Powers

The power “To Declare War” has long been construed to mean not only that Congress can formally take the nation into war, but also that it can authorize the use of the Armed Forces for military expeditions that may not amount to war. While a restrictive interpretation of the power “To declare War” is possible, for example, by viewing the Framers’ use of the verb “to declare” rather than “to make” as an indication of an intent to limit Congress’s ability to affect the course of a war once it is validly commenced, Congress’s other powers over the use of the military would likely fill any resulting void. In practice, courts have not sought to delineate the boundaries

9 It is frequently asserted that Congress has no authority to interfere with tactical decisions on the battlefield or to involve itself in the direction of military campaigns, but inasmuch as nearly any regulation of the Armed Forces could conceivably have some impact on the conduct of military operations, this formulation does not seem particularly useful. Scholars have attempted to formulate better doctrinal approaches, for example, by distinguishing “framework” statutes from detailed regulations, or statutes of general application from those enacted to address a specific military context. While the Supreme Court appears to agree that there are limits to Congress’s powers, it has not adopted a judicial test for determining what legislation crosses the line. For an overview and criticism of various theories relating to the limits of Congress’s war powers, see David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689 (2008).

10 Congress has by statute provided that the President must issue orders to subordinate military commands through the appropriate chain of command rather than directly. See Francis D. Wormuth & Edwin B. Firmage, To Chain the Dog of War: The War Power of Congress in History and Law 93 (2d ed. 1989) (citing the Command of the Army Act of 1867, 14 Stat. 485, 486-87, which required that “all orders and instructions relating to military operations” be “issued through the General of the Army,” and made orders issued contrary to the provision punishable by prison sentence from two to twenty years). Congress has also authorized judges to issue orders directed to military commanders requiring them to provide military aid to marshals for the arrest of persons accused of crimes against the United States who were on board foreign ships in U.S. harbors. 2 Stat. 339 (1805).

11 But see Wormuth & Firmage, supra footnote 10, at 93-94 (asserting that during the Reconstruction period following the Civil War, the “army was given its orders directly by Congress,” and noting that President Andrew Johnson’s efforts to circumvent the statute were cited in the ninth article of impeachment against him, although no proof was offered at trial).


13 Bas v. Tingy, 4 U.S. 37 (1800).

14 The Framers’ decision to substitute “declare” for “make” has generally been interpreted to allow the President the authority to repel sudden attacks. 2 Max Farrand, The Records of the Federal Convention of 1787, 318-19 (rev. ed. 1937)(explanation of James Madison and Elbridge Gerry on their motion to amend text).

of each clause relating to war powers or identify gaps between them to find specific powers that are denied to Congress.\footnote{See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§1170 - 71 (1833) (stating that the powers to issue letters of marque and reprisal and to authorize captures are incidental to the power to declare war, implying their express mention was unnecessary, but noting that these “incidental” powers may also be employed during peace). But see, e.g., J. Terry Emerson, War Powers Legislation, 74 W. Va. L. Rev. 53, 62 (1972) (arguing that early opinions related to the Quasi-War with France, often advanced for the proposition that Congress is empowered to regulate military operations that do not amount to war, should be read as strict interpretations of Congress’s power to make rules for captures).}

Early exercises of Congress’s war powers may shed some light on the original understanding of how the war powers clauses might empower Congress to limit the President’s use of the Armed Forces. In the absence of a standing army, early presidents were constrained to ask Congress for support in advance of undertaking any military operations.\footnote{See ABRAHAM SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 116-17 (1976) (describing President Washington’s efforts to obtain support for military efforts, including a build-up of military strength to preserve peace and maintain U.S. stature among nations).} Congress generally provided the requested support and granted the authority to raise the necessary troops to defend the frontiers from deprivations by hostile Indians\footnote{See, e.g., Act of March 3d, 1791, for raising and adding another Regiment to the Military Establishment of the United States, and for making further provision for the protection of the frontier, 1 Stat. 222; Act of March 5, 1792, 1 Stat. 241 (adding three regiments for three years or until peace with Indian tribes was established); Act of July 16, 1798, 1 Stat. 604 (authorizing the President to raise twelve additional regiments of infantry and six troops of light dragoons during the continuance of differences with the French Republic).} and to build a navy to protect U.S. commerce at sea.\footnote{See, e.g., Act of March 27, 1794, To provide a naval armament, 1 Stat. 351 (“Whereas the depredations committed by Algerine corsairs render it necessary...” authorizing the building and manning of six ships of specific types, until the establishment of peace with the Regency of Algiers) (amended in 1796 to remove restrictions so that vessels could be used for other purposes, 1 Stat. 453); Act of April 27, 1798, To provide an additional Armament for the protection of the Trade of the United States..., 1 Stat. 552; Act of June 22, 1798, 1 Stat. 569 (authorizing the President “to increase the strength of any revenue cutter, for the purposes of defence, against hostilities near the sea coast” by manning the vessels with up to 70 seamen and marines).} Congress, in exercising its authority to raise the army and navy, sometimes raised forces for specific purposes, which may be viewed as both an implicit authorization to use the forces for such purposes and as an implicit limitation on their use.\footnote{Some proposals explicitly to limit how the vessels could be employed were stricken prior to enactment, but the congressional debates left unclear whether the majority of members thought the restrictions unconstitutional or merely unwise, or whether the absence of specific authority was meant to be a limitation. See SOFAER, supra footnote 17, at 147-54. The John Adams Administration interpreted the legislation restrictively, and instructed naval commanders accordingly that their authority was to be “partial and limited.” See id. at 156.} On the other hand, Congress often delegated broad discretion to the President within those limits, and appears to have acquiesced to military actions that were not explicitly authorized.\footnote{See id. at 129 (noting that offensive actions against Wabash Indians and against a British fort may have exceeded express statutory authorization but were authorized by implication through appropriations).}

In several early instances, Congress authorized the President to use military forces for operations that did not amount to a full war. Rather than declaring a formal war with France, Congress authorized the employment of the naval forces for limited hostilities. The Third Congress authorized the President to lay and enforce embargoes of U.S. ports, but only while Congress was not in session (and embargo orders were to expire 15 days after the commencement of the next session of Congress).\footnote{Act of June 4, 1794, 1 Stat. 372. See also Act of June 5, 1794 §§7-8, 1 Stat. 381, 384 (authorizing the President to use Armed Forces to detain violators and compel foreign ships to depart).} The Fifth Congress authorized the President to issue instructions to the
commanders of public armed ships to capture certain French armed vessels and to recapture ships from them, and to retaliate against captured French citizens who had seized U.S. citizens and subjected them to mistreatment. Congress also authorized U.S. merchant vessels to defend themselves against French vessels. The Supreme Court treated these statutes as authorizing a state of "partial war" between the United States and France. Such an undeclared war was described as an "imperfect" war, in which those who are authorized to commit hostilities act "under special authority," as distinguished from a "Solemn" or "perfect" war, in which all members of one nation are at war with all members of the other nation. This suggests an early understanding that Congress's war powers extend to establishing the scope of hostilities to be carried out by the Armed Forces.

In the majority of cases, however, it appears that Congress has given broad deference to the President to decide how much of the Armed Forces to employ in a given situation. After Tripoli declared war against the United States in 1801 and U.S. vessels were already engaged in defensive actions against them, Congress did not enact a full declaration of war. Rather, it issued a sweeping authorization for the commissioning of privateers, captures, and other actions to "equip, officer, man, and employ such of the armed vessels of the United States as may be judged requisite by the President of the United States, for protecting effectually the commerce and seamen thereof on the Atlantic ocean, the Mediterranean and adjoining seas," as well as to "cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require." In declaring war against Great Britain in 1812, Congress authorized the President to "use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper...."

That Congress has traditionally left it up to the President to decide how much of the Armed Forces to employ in a given conflict need not imply that such deference is constitutionally mandated. The fact that Congress has seen fit to include such language may just as easily be read as an indication that Congress believes that the decision is its to delegate. Under this view, even in the case of a declaration of war, Congress retains the power to authorize the President to use only a portion of the Armed Forces to engage in a particular conflict, although some argue that such limitations must come at the initiation of an authorization to use force and cannot later be amended or repealed. On the other hand, some have argued that the President is authorized to

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21 Act of May 28, 1798, 1 Stat. 561. See also Act of July 9, 1798, 1 Stat. 578.
22 Act of March 3, 1799, 1 Stat. 743 (empowering and requiring the President to "cause the most rigorous retaliation to be executed on [French suspects who] have been or hereafter may be captured in pursuance of any of the laws of the United States").
23 1 Stat. 572.
24 Bas v. Tingy, 4 U.S. (Dall.) 37 (1800).
25 Id. at 40. See also Talbot v. Seeman, 5 U.S. (Crand. 1, 28 (1801) ("Congress may authorize general hostilities ... or partial hostilities.")).
26 Act of February 6, 1802, 2 Stat.129 (emphasis added). For more examples of authorizations to use force and declarations of war, see CRS Report RL31133, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications, by Jennifer K. Elsea and Matthew C. Weed.
27 Act of June 18, 1812, ch. 102, 2 Stat 755.
28 See Adam Heder, The Power to End War: The Extent and Limits of Congressional Power, 41 ST. MARY'S L.J. 445 (2010) (arguing, in essence, that once war is declared or force is authorized, the authority to conduct hostilities belongs to the President, is plenary and cannot be repealed). The author posits that legislation passed pursuant to the Declare War Clause is different from "garden-variety" statutes that rely on other enumerated powers due to the existence of the (continued...)

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deploy all of the Armed Forces as he sees fit, with or without an express authorization to use force or a declaration of war. 31 According to this theory, in essence, Congress can stop the deployment of military forces only by cutting appropriations or discharging the troops. 32

Congress has also used its authority to provide for the organization and regulation of the Armed Forces to regulate how military personnel are to be organized and employed. The earliest statutes prescribed in fairly precise terms how military units were to be formed and commanded. For example, the 1798 act establishing the Marine Corps mandated the raising of a corps to consist of “one major, four captains, sixteen first lieutenants, twelve second lieutenants, forty-eight sergeants, forty-eight corporals, thirty-two drums and fifes, and seven hundred and twenty privates.” 33 Congress authorized the President to appoint certain other officers as necessary if he were to assign the Marine Corps or any part of it to shore duty, and to assign the detachment to duty in “forts and garrisons of the United States, on the sea-coast, or any other duty on shore.” Officers of the Marine Corps could be detached to serve on board frigates and other armed vessels. The Marine Corps was increased in size and reorganized in 1834 to be commanded by a colonel, with the proviso that no Marine Corps officer could be placed in command of a navy yard or vessel of the United States. 34

It appears to have been understood that personnel and units authorized to perform certain duties could not be assigned to perform other duties without authorization from Congress. 35 In 1808, when Congress authorized eight new regiments of specific types and composition, it felt compelled to include language making members of the light dragoon regiment liable to “serve on foot as light infantry” until sufficient horses and other accoutrements could be provided. 36 The Supreme Court later interpreted an 1802 statute providing for the establishment of the Corps of Engineers, although broadly worded to permit the President to direct that its members serve such duty in such places as he saw fit, to authorize only engineering duties:

(...continued)

Commander-in-Chief Clause, which the author interprets as providing exclusive authority to conduct war to the President. Id. at 463-64. The author does not address whether the Vesting Clause should be similarly interpreted to give the President complete authority over the execution of laws passed under other enumerated congressional powers.

31 See, e.g., Bradley Larschan, The War Powers Resolution: Conflicting Constitutional Powers, The War Powers, and U.S. Foreign Policy, 16 DENVER J. INT’L L. & POL’Y 33, 45 (1987) (arguing that once Congress has raised an army and appropriated funds for it, “it falls to the President to use the armed forces in his capacity to conduct foreign policy in situations short of war”). The author states that it is “clear that the Congress may prohibit the use of U.S. forces in certain areas by statute,” but that “it is the President who orders deployment of the troops.” Id. at 49.

32 See Heder, supra footnote 30, at 476 (concluding that congressional options are limited to whatever restrictions Congress might impose at the outset, dissolving the army, or cutting funding, but that Congress has no other implied authority under the Constitution to terminate hostilities).

33 1 Stat. 594, 595 (1798).


35 But see id. at 991-93 (discussing possible exception when President Polk deployed in Mexico a regiment of riflemen that Congress had raised for the express purpose of protecting the frontier in Oregon, although Congress had not expressly restricted the deployment of the regiment for other uses, which occasioned a vigorous debate in Congress).

36 2 Stat. 481, 483 (1808).
But, however broad this enactment is in its language, it never has been supposed to authorize the President to employ the corps of engineers upon any other duty, except such as belongs either to military engineering, or to civil engineering.\(^3\)

**The Commander-in-Chief Clause**

Early in the nation’s history, the Commander-in-Chief power was understood to connote “nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy.”\(^38\) Concurring in that view in 1850, Chief Justice Taney stated:

[The President’s] duty and his power are purely military. As Commander-in-Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.\(^39\)

This formula, taken alone, provides only an approximate demarcation of the line separating Congress’s role from the President’s. Advocates of a strong role for Congress might characterize a legislative effort to limit the number of troops available for a particular military operation as placing troops “by law” under the President’s command, while proponents of a strong executive would likely view it as a limitation on the President’s ability to “employ them in the manner” he sees fit. With respect to the latter argument, however, it should be noted that the particular question before the Fleming Court did not call into question the extent to which Congress could restrict the manner of employing troops once placed at the command of the President.

Other early cases demonstrate Congress’s authority to restrict the President’s options for the conduct of war. In *Little v. Barreme*,\(^40\) Chief Justice Marshall had occasion to recognize congressional war power and to deny the exclusivity of presidential power. There, after Congress had authorized limited hostilities with France, a U.S. vessel under orders from the President had seized what its commander believed was a U.S. merchant ship bound from a French port, allegedly carrying contraband material. Congress had, however, provided by statute only for seizure of such vessels bound to French ports.\(^41\) Upholding an award of damages to the ship’s owners for wrongful seizure, the Chief Justice said:

It is by no means clear that the president of the United States whose high duty it is to “take care that the laws be faithfully executed,” and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seems to have prescribed

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\(^{37}\) Gratiot v. United States, 40 U.S. (15 Pet.) 336, 371 (1841) (finding that the President could contract for other services but must pay an additional stipend for them from other funds).

\(^{38}\) *The Federalist*, No. 69 (Alexander Hamilton).


\(^{40}\) 6 U.S. (2 Cr.) 170 (1804).

\(^{41}\) 1 Stat. 613 (1799).
that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port.\textsuperscript{42}

Accordingly, the Court held, the President’s instructions exceeded the authority granted by Congress and were not to be given force of law, even in the context of the President’s military powers and even though the instructions might have been valid in the absence of contradictory legislation.

In \textit{Bas v. Tingy},\textsuperscript{43} the Court looked to congressional enactments rather than plenary presidential power to uphold military conduct related to the limited war with France. The following year, in \textit{Talbot v. Seeman},\textsuperscript{44} the Court upheld as authorized by Congress a U.S. commander’s capture of a neutral ship, saying that “[t]he whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry.” During the War of 1812, the Court recognized in \textit{Brown v. United States}\textsuperscript{45} that Congress was empowered to authorize the confiscation of enemy property during wartime, but that absent such authorization, a seizure authorized by the President was void.\textsuperscript{46}

The onset of the Civil War provided some grist for later assertions of unimpeded presidential prerogative in matters of war. In the \textit{Prize Cases},\textsuperscript{47} the Supreme Court sustained the blockade of Southern ports instituted by President Lincoln in April 1861, at a time when Congress was not in session. Congress had at the first opportunity ratified the President’s actions,\textsuperscript{48} so that it was not necessary for the Court to consider the constitutional basis of the President’s action in the absence of congressional authorization or in the face of any prohibition. Nevertheless, the Court approved the blockade five-to-four as an exercise of presidential power alone, on the basis that a state of war was a fact and that, the nation being under attack, the President was bound to take action without waiting for Congress.\textsuperscript{49} The case has frequently been cited to support claims of greater presidential autonomy by reason of his role as Commander in Chief.

However, it should be recalled that where Lincoln’s suspension of the Writ of Habeas Corpus varied from legislation enacted later to ratify it, the Court looked to the statute\textsuperscript{50} rather than to the executive proclamation\textsuperscript{51} to determine the breadth of its application in the case of \textit{Ex parte}

\textsuperscript{42} 6 U.S. (2 Cr.) at 177-178.
\textsuperscript{43} 4 U.S. (4 Dall.) 37 (1800).
\textsuperscript{44} 5 U.S. (1 Cr.) 1, 28 (1801).
\textsuperscript{45} 12 U.S. (8 Cr.) 110 (1814).
\textsuperscript{46} Justice Marshall also noted that Congress’s power over captures expressly covered the confiscation at issue, and implied that the Captures Clause applies to enemy persons as well as property. \textit{Id.} at 126. For analysis of the Captures Clause, see Aaron D. Simowitz, \textit{The Original Understanding of the Capture Clause}, 59 DePaul L. Rev. 121 (2009); Ingrid Wuerth, \textit{The Captures Clause}, 76 U. Chi. L. Rev. 1683 (2009).
\textsuperscript{47} 67 U.S. (2 Bl.) 635 (1863).
\textsuperscript{48} 12 Stat. 326 (1861) (ratifying all “acts, proclamations, and orders” done by the President “respecting the army and navy ... and calling out or relating to the militia”).
\textsuperscript{49} 67 U.S. (2 Bl.) at 668 (“[The President] does not initiate war, but is bound to accept the challenge without waiting for any special legislative authority.”). The minority argued that only congressional authorization could stamp an insurrection with the character of war. Later, a unanimous Court adopted the majority view. The Protector, 79 U.S. (12 Wall.) 700 (1872).
\textsuperscript{50} Act of March 3d, 1863, 12 Stat. 755 (authorizing the suspension of habeas corpus, but with limitations in Union states to those held as prisoners of war; all others were to be indicted or freed.)
\textsuperscript{51} Proclamation of September 15, 1863, 13 Stat. 734 (suspending habeas corpus with respect to those in federal custody as military offenders or “as prisoners of war, spies, or aiders and abettors of the enemy”).
Milligan. In a partial concurrence to the majority's decision, Chief Justice Chase described the allocation of war powers as follows:

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President....

The Chief Justice described the Commander-in-Chief power as entailing "the command of the forces and the conduct of campaigns," but nevertheless agreed that military trials of civilians accused of violating the law of war in Union states were invalid without congressional approval, despite the government's assertion that the "[Commander in Chief's] power to make an effectual use of his forces [must include the] power to arrest and punish one who arms men to join the enemy in the field against him."

On the other hand, the Supreme Court has also suggested that the President has some independent authority to employ the Armed Forces, at least in the absence of contrary congressional action. In the 1890 case of In re Neagle, the Supreme Court suggested, in dictum, that the President has the power to deploy the military abroad to protect or rescue persons with significant ties to the United States. Discussing examples of the executive lawfully acting in the absence of express statutory authority, Justice Miller approvingly described the Martin Koszta affair, in which an American naval ship intervened to prevent a lawful immigrant from being captured by an Austrian vessel, despite the absence of clear statutory authorization. Only one federal court, in an 1860 opinion, has clearly held that in the absence of congressional authorization, the President has authority to deploy military forces abroad to protect U.S. persons (and property). Nevertheless, there

52 Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
53 Id. at 139 (Chase, C.J., concurring and dissenting in part).
54 Id. at 139 ("Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a compelling necessity...").
55 Id. at 17 (government argument).
56 In re Neagle, 135 U.S. 1, 64 (1890) (describing the incident and rhetorically asking, "Upon what act of congress then existing can anyone lay his finger in support of the action of our government in this matter?"). For further discussion, see Louis Henkin, Foreign Affairs and the U.S. Constitution 347-348 (2nd ed. 2002); Wormald & Firma, supra footnote 10, at 154 (stating that the U.S. captain had acted against the President's orders, but that President Pierce justified the action to Congress, which later awarded the captain a medal). In an earlier opinion, the Court had also stated in dictum that one of the privileges of a U.S. citizen is "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government." Slaughter-House Cases, 83 U.S. 36, 79 (1872). It should be noted that Koszta was not a U.S. citizen, but a legal immigrant who had declared an intention to apply for citizenship. Accordingly, an 1868 statute authorizing the use of any means "not amounting to acts of war" to obtain the release of U.S. citizens was likely inapplicable. Expatriation Act of July 27, 1868, 15 Stat. 223.
57 Durand v. Hollins, 8 Fed. Cas. 111 (C.C.S.D.N.Y. 1860) (Nelson, Circuit Justice) (holding that a Navy commander was not civilly liable for damages caused by his forces during an 1854 action to protect U.S. citizens and property in Greytown, Nicaragua). In an opinion by Circuit Justice Nelson, the court held that the commander was not liable because the military action was pursuant to a valid exercise of federal authority to be exercised by the President: ... as it respects the interposition of the armed abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled (continued...)
historically appears to be some support for this view by both the executive and legislative branches. However, the scope of any such authority remains unclear, as does the degree to which it may be limited by an act of Congress.

The expansion of presidential power related to war, asserted as a combination of Commander-in-Chief authority and the President's inherent authority over the nation's foreign affairs, began in earnest in the 20th century. In United States v. Curtiss-Wright Export Corp., the Supreme Court confirmed that the President enjoys greater discretion when acting with respect to matters of foreign affairs than may be the case when only domestic issues are involved. In that case, Congress, concerned with the outside arming of the belligerent states in the war between Paraguay and Bolivia, had authorized the President to proclaim an arms embargo if he found that such action might contribute to a peaceful resolution of the dispute. President Franklin Roosevelt issued the requisite finding and proclamation, and Curtiss-Wright and associate companies were indicted for violating the embargo. They challenged the statute, arguing that Congress had failed adequately to elaborate standards to guide the President's exercise of the power thus delegated. Writing for the Court, Justice Sutherland concluded that the limitations on delegation in the domestic field were irrelevant where foreign affairs are involved, a result he based on the premise that foreign relations is exclusively an executive function combined with his constitutional model positing that internationally, the power of the federal government is not one of enumerated but of inherent powers, emanating from concepts of sovereignty rather than the Constitution. The Court affirmed the convictions, stating that:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental...

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to protection as the citizen at home. Id. at 112.

58 See GAO, Office of Compt. Gen., President - Authority - Protection of American Lives and Property Abroad, 55 Comp. Gen. 1081 (1975) (describing historical practice and the weight of scholarly authority as supporting the power of the President to order military rescue operations in the absence of congressional authorization); Dept. of Justice, Office of Legal Counsel, 4A U.S. Op. Off. LEGAL COUNSEL 185, Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization (1980) (alleging presidential authority to deploy forces to protect, and retaliate for injuries suffered by, U.S. persons and property). For discussion of the deployment of military forces to protect U.S. persons or property, see FISHER, supra footnote 7, at 57-58 (describing historical practice, and noting mid-20th century study listing 148 examples of this occurrence); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 54-57 (rev. ed. 2004) (discussing mid-19th century instances where presidents unilaterally committed forces to protect U.S. persons or property). The number and degree to which these actions occurred without congressional authorization is the subject of some debate. See WORMUTH & FIRMAGE, supra footnote 10, at 135-51 (discussing and disputing validity of various lists of military actions compiled to demonstrate historical prevalence of presidential war-making). For example, some argue that President Jefferson's ordering of the Navy to stop American shipping from Barbary pirates was done without congressional approval, while others view these orders as having been issued pursuant to legislation providing for a "naval peace establishment." Compare Dept. of Justice, Off. of Legal Counsel, supra, at 187 (describing Jefferson's use of the Navy as a "famous early example" of President's acting without congressional authorization to protect U.S. interests) with FISHER, supra footnote 7, at 35-36 (characterizing the orders as being issued pursuant to congressional authorization, and noting that Jefferson denied having inherent authority to commit such acts). Whether such usage would legitimate the authority is also subject to debate. See WORMUTH & FIRMAGE, supra footnote 10, at 135.


60 The Supreme Court had recently held that the Constitution required Congress to elaborate standards when delegating authority to the President. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.\footnote{299 U.S. at 319-20.}

The case is cited frequently to support a theory of presidential power not subject to restriction by Congress, although the case in fact involved an exercise of authority delegated by Congress. \textit{Curtiss-Wright} remains precedent admonishing courts to show deference to the President in matters involving international affairs, including by interpreting ambiguous statutes in such a manner as to increase the President’s discretion.\footnote{See Haig \textit{v.} Agee, 453 U.S. 280, 291, 293-294 \& n. 24, 307-308 (1981); Sale \textit{v.} Haitian Centers Council, Inc., 509 U.S. 155 (1993) (construing treaty and statutory provisions as not limiting presidential discretion in interdicting refugees on high seas in the light of the President’s “unique responsibility” in foreign and military affairs, citing \textit{Curtiss-Wright}).} The case has also been cited in favor of broad presidential discretion to implement statutes related to military affairs.\footnote{See Loving \textit{v.} United States, 517 U.S. 748 (1996).} To the extent, however, that Justice Sutherland interpreted presidential power as being virtually plenary in the realms of foreign affairs and national defense, the case has not been followed to establish that Congress lacks authority in these areas.

The constitutional allocation of war powers between the President and Congress, where Congress had not delegated the powers exercised by the President, was described by Justice Jackson, concurring in the \textit{Steel Seizure} Case:

> The Constitution expressly places in Congress power “to raise and support Armies” and “to provide and maintain a Navy.” This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement....

> There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of “war powers,” whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him any army or navy to command.\footnote{Youngstown Sheet and Tube Co. \textit{v.} Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).}

The Jackson opinion is commonly understood to establish that whatever powers the President may exercise in the absence of congressional authorization, the President may act contrary to an act of Congress only in matters involving exclusive presidential prerogatives.\footnote{Justice Jackson’s concurrence took note of the fact that \textit{Curtiss-Wright} did not involve a case in which the President took action contrary to an act of Congress. \textit{Id.} at 635-36 \& n.2. \textit{Curtiss-Wright}, he said involved, not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress. The constitutionality of the Act under which the President had proceeded was assailed on the ground that it delegated (continued...)}
Presidents from Truman to Obama have claimed independent authority to commit U.S. Armed Forces to involvements abroad absent any congressional participation other than consultation and after-the-fact financing. In 1994, for example, President Clinton based his authority to order the participation of U.S. forces in NATO actions in Bosnia-Herzegovina on his “constitutional authority to conduct U.S. foreign relations” and as his role as Commander in Chief, and protested efforts to restrict the use of military forces there and elsewhere as an improper and possibly unconstitutional limitation on his “command and control” of U.S. forces. In March 2011, President Obama ordered U.S. military forces to take action as part of an international coalition to enforce U.N. Security Council Resolution 1973, which authorized U.N. Member States to take all necessary measures (other than through military occupation) to protect civilians from attacks by the Libyan government and to establish a no-fly zone over the country. Although these operations had not been authorized by legislation, the executive submitted a report to Congress which claimed that the President has the “constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad.”

The executive branch has also, on occasion, claimed independent authority to detain, interrogate, and try belligerents captured in hostilities, and suggested that this authority may not be

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legislative powers to the President. Much of the Court’s opinion is dictum, but the ratio decidendi is contained in the following language:

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President’s action - or, indeed, whether he shall act at all - may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in Mackenzie v. Hare, 239 U.S. 299, 311, “As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.” (Italics supplied [by Justice Jackson]) Id., at 321-322.

That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.

66 30 WEEKLY COMP. PRES. DOC. 406 (March 2, 1994).
67 See Interview with Radio Reporters, 1993 PUB. PAPERS 1763-64; see also FISHER, supra footnote 7, at 184.
68 Report to the House of Representatives on United States Activities in Libya, submitted June 15, 2011, available at http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616 POWERS_DOC.html?ref=politics, at 25. The Department of Justice’s Office of Legal Counsel issued a legal opinion which claimed that the President possessed independent constitutional authority to commence U.S. military operations in Libya without prior congressional authorization because these operations would be “limited” in scope and the President could “reasonably determine that such use of force was in the national interest.” Dept. of Justice, Office of Legal Counsel, Authority to Use Military Force in Libya (2011), at 1, available at http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf. The opinion stated that “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period” may generally require prior congressional authorization, but claimed that “historical practice of presidential military action without congressional approval precludes any suggestion that Congress’s authority to declare war covers every military engagement, however limited, that the President initiates.” Id. at 8.
circumscribed by Congress. In the context of what it described as the “Global War on Terror,” the George W. Bush Administration claimed that the President’s Commander-in-Chief authority entails inherent authority with respect to the capture and detention of suspected terrorists, authority he has claimed cannot be infringed by legislation,\(^6^9\) meaning that even criminal laws prohibiting torture were deemed inapplicable to activities conducted pursuant to the President’s war powers.\(^7^0\) In 2004, the Supreme Court avoided deciding whether Congress could pass a statute to prohibit or regulate the detention and interrogation of captured suspects, which the Bush Administration had asserted would unconstitutionally interfere with core Commander-in-Chief powers, by finding that Congress had implicitly authorized the detention of enemy combatants when it authorized the use of force in the aftermath of the September 11, 2001, terrorist attacks.\(^7^1\) However, the Supreme Court in 2006 invalidated President Bush’s military order authorizing trials of aliens accused of terrorist offenses by military commission, finding that the regulations promulgated to implement the order did not comply with relevant statutes.\(^7^2\) The Court did not expressly pass on the constitutionality of any statute or discuss possible congressional incursion into areas of exclusive presidential authority, which was seen by many as implicitly confirming Congress’s authority to legislate in such a way as to limit the power of the Commander in Chief.\(^7^3\)

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\(^6^9\) See, e.g. Oversight of the Department of Justice: Hearing Before the Senate Judiciary Committee, 107th Cong. (2002) (testimony of Attorney General John Ashcroft) (arguing that Congress has no constitutional authority to interfere with the President’s decision to detain enemy combatants); see also Reid Skibell, Separation-of-Powers and the Commander in Chief—Congress’s Authority to Override Presidential Decisions in Crisis Situations, 13 Geo. Mason L. Rev. 183 (2004) (documenting Bush Administration’s claims with respect to Congress’s lack of power to legislate in matters related to the conduct of the war and arguing that these represent an expansion over prior administrations’ claims). The Obama Administration subsequently announced that, in litigation involving persons captured and detained as part of the conflict with Al Qaeda and Taliban, the legal arguments in support of the detention of an alleged enemy belligerent would be based upon the authority conferred by Congress pursuant to the 2001 Authorization to Use Military Force (P.L. 107–40), and the executive would “not rely on the President’s authority as Commander-in-Chief independent of Congress’s specific authorization.” Press release, Dept. of Justice, Department of Justice Withdraws “Enemy Combatant” Definition for Guantanamo Detainees (March 13, 2009), available at http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html.

\(^7^0\) See Dept. of Justice, Office of Legal Counsel, Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A, 2002 OLC LEXIS 19 (2002), available at http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf. (opining that “any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”). The Office of Legal Counsel subsequently withdrew this memo. See Dept. of Justice, Office of Legal Counsel, Legal Standards Applicable under 18 U.S.C. §2340-2340A, 2004 OLC LEXIS 4, (2004), available at http://www.justice.gov/olc/18usc23402340a2.htm. Just before President Obama took office, the Office specifically confirmed that it no longer took the position that Congress lacks the power to regulate the interrogation and treatment of wartime prisoners (the earlier withdrawal memo had stated that the portion of the original memo dealing with congressional authority had been unnecessary and overbroad, but had not directly repudiated the position). See Dept. of Justice, Office of Legal Counsel, Memorandum for the Files from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 3-4 (2009) [hereinafter “Bradbury Memo”], available at http://www.justice.gov/opa/documents/memostatusolcoinopinions01152009.pdf. The Bradbury Memo expressly renounced portions of earlier OLC opinions that interpreted Congress’s Art. I power to regulate the Armed Forces as pertaining only to disciplining U.S. troops and not to their treatment of prisoners, and its power to regulate captures as pertaining only to property and not to enemy persons. See id. at 5.


\(^7^3\) The Court adopted Chief Justice Chase’s formulation for allocating war powers, see id. at 591-592, and Justice Jackson’s framework for determining separation-of-powers disputes between the President and Congress, see id. at 593 n.23 (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. The Government does not argue otherwise.”) (citation omitted).
II. Statutory Limitations on the Continued Use of Military Force

While it is well established that Congress and the President each possess authority on ending a military conflict, issues may arise if the political branches are in disagreement as to whether or how U.S. participation in an armed conflict should cease. Inter-branch disagreement regarding the cessation of hostilities has been a rare occurrence, but it is not unprecedented. While Congress appears to have the constitutional authority to compel the cessation of U.S. participation in hostilities via statutory command, efforts to compel the withdrawal of U.S. forces from an armed conflict over the opposition of the President have generally proven ineffective except when tied to funding restrictions. The following sections discuss Congress's constitutional authority to end a military conflict via statute, the implications that the War Powers Resolution or the repeal of prior military authorization have upon the continued use of military force, and other considerations which may inform congressional decisions to limit the use of military force via statutory command or through funding limitations.

Historical Practice

Although the U.S. Constitution expressly empowers Congress to declare war, it is notably silent regarding which political body is responsible for returning the United States to a state of peace. Some evidence suggests that this omission was not accidental. During the Constitutional Convention, a motion was made by one of the delegates to modify the draft document by adding the words “and peace” after the words “to declare war.” This motion, however, was unanimously rejected. Convention records do not clearly evidence the Framers’ intent in rejecting the motion.

Some early constitutional commentators suggested that the motion failed because the Framers believed that the power to make peace more naturally belonged to the treaty-making body, as conflicts between nations were typically resolved through treaties of peace. Although the Framers did not specifically empower Congress to make peace, they also did not expressly locate the power with the treaty-making body, perhaps because of a recognition that peace might sometimes be more easily achieved through means other than treaty.

74 Up to that point, the shared American and English tradition suggested that the institution with the power to instigate war was also the body with the power to end it. Blackstone believed that under the English system, “wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 250 (1756). When America declared its independence, it also rejected the monarchical form of government. Nevertheless, the legal document that the Constitution was intended to replace, the Articles of Confederation, expressly accorded the national legislative body with “the sole and exclusive right and power of determining on peace and war.” ARTICLES OF CONFEDERATION, art. IX, §1. Under the Articles, there was neither a national executive nor judicial body.

75 FARRAND, supra footnote 14, at 319; see also 3 JAMES MADISON, THE PAPERS OF JAMES MADISON 1352 (Henry Gilpin, ed. 1840).

76 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §1173 (1833); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES, 110-111 (2nd ed. 1929). It should be noted that at the time the proposal was rejected, the Framers had designated the Senate as the treaty-making body. The President was made part of the treaty-making body several weeks later. FARRAND, supra footnote 14, at 538.

77 As a practical matter, a requirement that peace be achieved through a treaty between the warring parties would, in (continued...)
It has been suggested that the Framers did not allocate an exclusive body with peace-making authority because they believed “it should be more easy to get out of a war than into it.” Given the failure to designate a single political branch responsible for returning the country from a state of war to a state of peace, the power to make peace was likely understood to be a shared power, with each branch having authority to terminate a military conflict. The executive could return the country to a state of peace through a treaty with the warring party, subject to the Senate’s advice and consent. Congress could declare peace or rescind a previous authorization to use military force pursuant to its plenary authority to repeal prior enactments, its power to regulate commerce with foreign nations, or its power to make laws “necessary and proper” to effectuate its constitutional powers.

Regardless of the Framers’ intent, the legislative and executive branches have historically treated peace-making as a shared power. Peace has been declared in one of three ways: (1) via legislation terminating a conflict, (2) pursuant to a treaty negotiated and signed by the executive and ratified following the advice and consent of the Senate, and (3) through a presidential proclamation. All three methods have been recognized as constitutionally legitimate by the Supreme Court, including most clearly in the 1948 case of Ludecke v. Watkins, where the Court plainly stated, “The state of war may be terminated by treaty or legislation or Presidential proclamation.” Notably, the Court has recognized that the termination of a military conflict is a “political act,” and it has historically refused to review the political branches’ determinations of when a conflict has officially ended.

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certain circumstances, lead to odd results:

The President, who is the Commander-in-Chief...and a majority of both branches of Congress, which declares war and maintains the forces necessary for its prosecution, might desire peace yet be unable to obtain it because a third of the Senate plus one Senator were contrary minded. Or our erstwhile antagonist might be the contrary minded one. Or the war might have resulted in the extinction of said antagonist. Such, in fact, was the situation at the close of the Civil War, which accordingly could not be brought to an end in the legal sense by a treaty of peace...


78 Id. at 669. See also Madison, supra footnote 75, at 1352 (quoting delegate Oliver Ellsworth in debate to give Congress the power to “make war”).

79 See Corwin, supra footnote 77, at 673.

80 Id. at 674.

81 A listing of all instances where the Congress has formally declared war or authorized the use of military force, along with the date and means by which peace was declared or military authorization was terminated, can be found in CRS Report RL31133, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications, by Jennifer K. Elisea and Matthew C. Weed.

82 E.g., Hijo v. United States, 194 U.S. 315 (1904) (recognizing state of war with Spain as ending with ratification of peace treaty); The Protector, 79 U.S. 700 (1871) (relying on presidential proclamations to determine the beginning and ending date of the Civil War); Commercial Trust v. Miller, 262 U.S. 51, 57 (1923) (recognizing congressional act as ending war with Germany). It should be noted that the Civil War is the only “war” which was ended by presidential proclamation. It could be argued that the methods by which the political branches may signal the termination of a domestic insurrection are different than those by which they may end a conflict with a foreign nation.

83 335 U.S. 160, 168 (1948) (internal quotations omitted). There are potentially other ways in which peace could be made that were not contemplated by the Ludecke Court. See Clinton Rossiter, The Supreme Court and the Commander in Chief 79-80 (1970) (suggesting that a war could also be ended by, among other things, an executive agreement with or without specific congressional authorization).

84 Ludecke, 335 U.S. at 168-169.

85 Baker v. Carr, 369 U.S 186, 213-214 (1962) (describing the Court’s refusal to review the political branches’ (continued...)
While historical practice and Supreme Court jurisprudence provide support for congressional authority to terminate an armed conflict via statutory enactment, it should be noted that in all instances where hostilities have been terminated through legislation, there has either been consensus between the political branches regarding the propriety of such action or acquiescence by one branch to the actions of the other to end hostilities. There is no instance where, for example, the courts have been asked to consider whether Congress may return the country to a state of peace via legislation passed over the objection of the President. However, the Constitution does not distinguish between the force and effect given to legislation signed into law by the President and laws which are enacted via the overriding of a presidential veto. In any event, the executive’s authority to continue waging war would be at its “lowest ebb,” as he would be acting in contravention of the expressed will of Congress, meaning he could “rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”

**Implications of the War Powers Resolution**

Enacted in 1973 over President Nixon’s veto, the War Powers Resolution (WPR) was an effort by Congress to reassert its role in matters of war—a role that many Members believed had been allowed to erode during the Korean and Vietnam conflicts. The WPR provides a mechanism by which Congress may ostensibly force the President to withdraw U.S. forces from hostilities which have not been authorized either pursuant to a declaration of war or specific statutory authorization. In the nearly four decades since its enactment, however, the WPR has never been successfully employed by Congress to compel the withdrawal of U.S. forces over the opposition of the President, and most, if not all, presidential administrations have viewed aspects of the WPR as unconstitutionally trenching upon the executive’s constitutional authority in matters of war and foreign relations.

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determination of when or whether a war has ended). See generallyROSSITER, supra footnote 83, at 83-89 (discussing Supreme Court jurisprudence upholding political branches’ determinations as to the official end of a war, including in cases where actual hostilities ceased several years beforehand).

86 U.S. CONST. art. I §7, cl. 2.

87 Youngstown, 343 U.S. at 637-638 (Jackson, J., concurring) Justice Jackson’s concurring opinion in Youngstown established a tripartite analytical framework that is often used by reviewing courts to assess the propriety of presidential action:

> When the President acts pursuant to an express or implied authorization of Congress, his powers are at their maximum.... Congressional inertia, indifference or quiescence may ... invite, measures of independent Presidential responsibility.... When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Id. at 635-638.


89 See generally Dept. of Justice, Office of Legal Counsel, Authority of the President under Domestic and International Law to Use Military Force against Iraq, 26 Op. O.L.C. 1, 39-45 (2002) [hereinafter “2002 OLC Opinion”] (discussing presidential views and Dept. of Justice opinions concerning the constitutionality of the War Powers Resolution). The Department of Justice’s Office of Legal Counsel (OLC) has noted that while it had “has long questioned the constitutionality of the WPR, ...[it had] not done so consistently.” Id. at 43 n.18. Although OLC opinions are not legally binding, they are generally adhered to within the executive branch unless overruled by the President or the Attorney General.
The WPR requires the President to consult with Congress "in every possible instance" prior to introducing U.S. Armed Forces into hostilities and to report to Congress within 48 hours when, absent a declaration of war, U.S. Armed Forces are introduced into "hostilities or ... situations where imminent involvement in hostilities is clearly indicated by the circumstances."90 Section 5(b) of the act provides that after this report is submitted (or after such date that it was required to be submitted), U.S. troops be withdrawn from hostilities at the end of 60 days (90 days in certain circumstances),91 unless Congress authorizes continued involvement by passing a declaration of war or some other specific authorization for continued U.S. involvement in hostilities.92 Moreover, Section 5(c) provides a means by which Congress may, at any time, compel the withdrawal of U.S. forces from unauthorized hostilities occurring outside the United States by means of a concurrent resolution.

The constitutionality and efficacy of various aspects of the WPR have been the subject of longstanding debate. There does appear to be a general consensus that the constitutional validity of Section 5(c) is doubtful in the aftermath of the Supreme Court's ruling in the 1983 case of INS v. Chadha.93 In Chadha, the Court held that for a resolution to become a law, it must go through the bicameral and presentment process in its entirety.94 Accordingly, concurrent or simple resolutions, which are not presented to the President for his signature, could not be used as "legislative vetoes" against executive action. Although the Chadha Court did not expressly find WPR Section 5(c) to be unconstitutional, it was listed in Justice White's dissent as one of nearly 200 legislative vetoes for which the majority had sounded the "death knell,"95 and most commentators have agreed with this assessment.96 Thus, it seems highly unlikely that Section 5(c) of the WPR could be effectively used to limit U.S. military operations.

91 Id. at §1544. The sixty-day period may be extended by no more than thirty additional days if the President certifies in writing to Congress that "unavoidable military necessity respecting the safety" of U.S. forces compels the continued use of such forces in the course of bringing about their withdrawal. Id.
92 Id. See also 50 U.S.C. §1447(a)(1) (stating that authorization to introduce U.S. forces into hostilities shall not be inferred "unless such provision specifically authorizes the introduction of United States Armed Forces"). Congress has passed several measures authorizing the use of military force which describe themselves as constituting "specific authorization" under the WPR. See e.g., P.L. 107-40 (2001) (the authorization to use force against entities responsible for attacks of September 11, 2001 constituted specific authorization under the WPR); P.L. 107-243 (2002) (authorization to use force against Iraq constituted specific authorization under the WPR); P.L. 102-1 (1991) (authorization for first Persian Gulf conflict). The executive branch, however, has taken the position that the WPR does not bind future Congresses from impliedly authorizing hostilities, and took the position that Congress had authorized continuing hostilities against Yugoslavia via appropriations legislation, despite the fact that this legislation did not describe itself as constituting specific authorization under the WPR. See Dept. of Justice, Office of Legal Counsel, Authorization for Continuing Hostilities in Kosovo, 2000 OLC LEXIS 16 (2000), available at http://www.justice.gov/olc/final.htm.
94 Id. at 951.
95 Id. at 967, 1003 (White, J., dissenting).
96 See, e.g., Senate Foreign Relations Comm. Rep., Persian Gulf and the War Powers Resolution, S.Rept. No. 106, 106th Cong., 1st Sess., at 6 (1987) (describing §5(c) as being "effectively nullified" by the Chadha decision); Henkin, supra footnote 56, at 126-127 (recognizing invalidation of §5(c) by Chadha and describing arguments to the contrary as "plausible but not compelling"); Worrith and Ferman, supra footnote 10, at 222 (noting that the reasoning of Chadha "apparently invalidates section 5(c) of the War Powers Resolution"); Ronald D. Rotunda, The War Powers Act in Perspective, 2 Mich. L. & Pol'y Rev. 1, 8 (1997) (claiming that most "scholars have concluded that... [§5(c)] is unconstitutional ever since INS v. Chadha). In contrast, some have argued that neither a declaration of war nor a subsequent rescission of authorization to use force constitutes an "ordinary" act of legislation falling under the requirements of the Presentment Clause. See Stephen L. Carter, The Constitutionality of the War Powers Resolution, 70 (continued...
Congressional Authority to Limit Military Operations

While the provision requiring the withdrawal of troops in Section 5(b) of WPR has also been criticized by some legal observers,\(^97\) there appears to be greater support for the provision's constitutional validity,\(^98\) including within the executive branch.\(^99\) Nonetheless, even assuming that the provision is constitutionally valid, it may not always act as a statutory constraint to military action. As an initial matter, Section 5(b) establishes a requirement for the withdrawal of U.S. troops 60 days after Armed Forces are introduced without congressional authorization into a situation where hostilities are imminent, unless Congress enacts legislation providing authority for the use of force or extends the deadline.\(^100\) Accordingly, this provision would not appear to supply a means by which Congress could compel the withdrawal of U.S. forces from military operations when the introduction of these forces had been done pursuant to congressional authorization, as is the case for ongoing U.S. operations in Afghanistan.\(^101\) Indeed, even if Congress were to rescind statutory authorization for these conflicts, the legality of actions that had been taken pursuant to it would not be nullified so as to trigger the statutory deadline for troop withdrawal established under WPR Section 5(b).\(^102\) Arguably, however, a substantial increase in troop levels that takes place subsequent to any repeal of the authorization for military operations in Afghanistan could trigger the requirements of WPR Section 5(b),\(^103\) although it is

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Val. L. Rev. 101, 130-132 (1984). The legitimacy of this argument is untested and highly controversial, as Congress has always presented a declaration of war or authorization to use military force to the president. Further, even assuming arguendo that a declaration of war does not need to be presented to the President, it is not necessarily clear that legislation ending hostilities would also not require presentment. See Henkin, supra footnote 56, at 127, 379; Carter, supra, at 130-132 (describing weaknesses of argument against presentment requirement); see also J. Gregory Sidak, To Declare War, 41 Duke L.J. 27, 84-85 (1991) (discussing historical and scholarly view that presentment is necessary).

\(^97\) See, e.g., Larschan, supra footnote 31, at 44-45 (1987) (arguing that Section 5(b) of the WPR is effectively "legislative veto" which is constitutionally impermissible post-Chadha, because it requires the President to terminate the use of military force in the event that Congress fails to take any legislative action).

\(^98\) See, e.g., Carter, supra footnote 96, at 133 (characterizing Section 5(b) as "surely constitutional, even after Chadha," and characterizing the provision as a sunset law rather than an unconstitutional legislative veto); Henkin, supra footnote 56, at 107-108 (taking the view that provisions of WPR other than Section 5(c) do not raise facial constitutional objections); John Hart Ely, Suppose Congress Wanted a War Powers Act That Worked, 88 Colum. L. Rev. 1379, 1392 (1988).

\(^99\) In a 1980 opinion, the Department of Justice's Office of Legal Counsel stated its view that "Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by" the WPR. Dept. of Justice, Office of Legal Counsel, Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 44 Op. O.L.C. 185, 196 (1980). In an interview describing the Obama Administration's position that the WPR does not prohibit ongoing U.S. operations against Libya, Administration officials acknowledged that the 1980 OLC Opinion remains in effect, and also claimed that the Administration's position that the U.S. military operation was lawful was not premised on the view that the WPR is unconstitutional. Charlie Savage and Mark Landler, White House Defends Continuing U.S. Role in Libya Operation, N.Y. Times, June 16, 2011 (discussing interview with White House counsel Robert Bauer and State Department Legal Adviser Harold Koh). See generally Barron & Lederman, supra footnote 9, at 1071 n.529 (discussing views of various presidential administrations regarding the constitutionality of Section 5(b), and characterizing them as generally "complicated and equivocal").

\(^100\) The requirement in Section 5(b) does not apply in cases in which Congress "is physically unable to meet as a result of an armed attack upon the United States." 50 U.S.C. §1554. The 60-day deadline is automatically extended for thirty days "if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

\(^101\) P.L. 107-40, §2(b) (the authorization to use force against entities responsible for attacks of September 11, 2001 constituted specific authorization for purposes of the WPR).

\(^102\) See DeCosta, 448 F.2d at 1369 (the repeal of Gulf of Tonkin resolution "did not wipe out its history nor could it have the effect of a nunc pro tunc action").

\(^103\) P.L. 93-148, §§4(a), 5(b). The reporting requirement in §4(a), which begins the sixty-day withdrawal deadline, also (continued...
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unclear how large such an increase would need to be before it would be sufficiently "substantial." Congress has in the past enacted or considered legislation declaring the 60-day limit to have taken effect, although apparently with little practical effect.

Moreover, disagreement may arise between the political branches regarding the scope of military activities covered by Section 5(b). The most prominent recent example of this occurring involves U.S. operations in support of the NATO-led mission against Muammar al Qadhafi's regime in Libya. When U.S. operations continued beyond the 60-day deadline for unauthorized hostilities established by the WPR, some argued that Section 5(b) required their immediate termination unless authorization was obtained from Congress. The Obama Administration did not challenge the constitutionality of the WPR's requirement that unauthorized hostilities be terminated within 60 days, but claimed that this requirement did not apply to ongoing U.S. operations. The continued engagement in manned and unmanned aerial attacks upon Libyan targets, in the Administration's view, was sufficiently limited so as not to constitute "hostilities" under the WPR, because they "do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops."

While the Obama Administration's interpretation of the War Powers Resolution's application of U.S. military activity has been criticized by some observers as overly constrained, it seems unlikely that the dispute will be definitively resolved by the courts. Although there have been several instances where Members of Congress have brought suit against the executive and argued that a particular military action contravenes the WPR or the constitutional allocation of war powers (including a challenge to the Libyan action which was dismissed on standing grounds), in all cases where final rulings have been issued, these challenges have been dismissed without the reviewing court reaching the underlying merits of the litigants' claims. The courts have variously relied on the political question doctrine, the equitable/remedial discretion doctrine, ripeness, mootness, and congressional standing concerns as grounds for dismissal. The courts

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comes into effect in the event troops are introduced in "numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." However, it appears that the deadline only applies if the report was made necessary due to circumstances described in §4(a)(1), where troops are initially introduced into hostilities. See Michael J. Glennon, Constitutional Diplomacy 103 (1990) (explaining that the omission of a requirement for the President to specify whether a report is submitted pursuant to §4(a)(1) or §4(a)(2) or (3) makes it impossible to know whether the sixty-day time period has been triggered).

In addition, it could be argued that even if Congress repealed the AUMF, the subsequent appropriation of funds in support of military operations would constitute legal authorization for such activity—at least in circumstances where Congress intended appropriations to support further hostilities, rather than simply to protect troops already in the field. See OLC Opinion on Hostilities in Kosovo, supra footnote 92, at * 33-52 (discussing instances in which appropriations suggest a clear intent by Congress to authorize further hostilities, and arguing that the WPR "cannot be read to deny legal effect to...[the] clear intent" of Congress to use appropriations measures to authorize further hostilities).

See Glennon, supra footnote 103, at 104 (noting efforts with respect to Lebanon in 1983, P.L. 98-119, and Grenada, in which case no such final triggering legislation emerged, despite both houses having passed measures to that effect). The necessity for separate legislation to trigger the triggering provision, subject as it is to presidential veto, seems to defeat the purpose for §5(b). See id. at 105 (opining that the provision's "central objective was to create a self-activating mechanism to control abuse of presidential discretion in the event Congress lacked the backbone to do so").


For further discussion of the Obama Administration's interpretation of the WPR and the criticisms raised against it, see CRS Report RL30352, War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution, by Michael John Garcia.


See CRS Report RL30352, War Powers Litigation Initiated by Members of Congress Since the Enactment of the (continued...)
have made clear, however, that while formidable, none of the aforementioned procedural barriers constitutes an insurmountable obstacle to resolving the statutory or constitutional issues concerning war powers. All of the opinions to date indicate that the barrier to the exercise of jurisdiction stems from the posture of the cases, not some institutional shortcoming. Absent such an irreconcilable conflict, however, many believe it is unlikely that the courts will venture into this politically and constitutionally charged thicket.

Rescinding Military Authorization Versus Cutting Appropriations: Procedural and Other Considerations

As a procedural matter, it is more difficult for Congress to statutorily require the termination of a military conflict than to limit appropriations necessary for the continuation of hostilities. As in the case of ordinary legislation, congressional declarations of peace and rescissions of military authorization have historically taken the form of a bill or joint resolution passed by both houses and presented to the President for signature. Like other legislation, such measures are subject to presidential veto, which Congress may override only with a two-thirds majority of each house.

In contrast, Congress’s ability to deny funds for the continuation of military hostilities is not contingent upon the enactment of a positive law, though such a denial may take the form of a positive enactment. Although the President has the power to veto legislative proposals, he cannot compel Congress to pass legislation, including bills to appropriate funds necessary for the continuation of a military conflict. Thus, while a majority of both houses would be necessary to

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War Powers Resolution, by Michael John Garcia (discussing various challenges brought by Members of Congress to executive action which purportedly contravenes the War Powers Resolution). Lawsuits brought by private parties alleging that presidential action has violated the WPR have also proven unsuccessful. See, e.g., Whitney v. Obama, 845 F.Supp.2d 136 (D.D.C. 2012) (rejecting on mootness grounds a challenge by private parties alleging that U.S. operations in Libya violated the WPR).

10 See CRS Report RL30352, War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution. See also Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982) (dismissing on political question grounds a challenge by several members of Congress which claimed that executive’s military assistance to the government of El Salvador violated the WPR and constitutional allocation of war powers, but suggesting that “were Congress to pass a resolution to the effect that a report was required under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented”), aff’d per curiam, 720 F.2d 1355, 1357 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210-211 (D.C. Cir. 1985) (Ginsburg, Ruth Bader, J., concurring) (agreeing on ripeness grounds with the dismissal of suit filed by several members of Congress which challenged the Reagan Administration’s provision of assistance to Nicaraguan Contra rebels, and emphasizing that political branches had not as yet reached “a constitutional impasse” requiring judicial resolution).

11 See CRS Report RL31133, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications, by Jennifer K. Elsea and Matthew C. Weed; see also Sidak, supra footnote 96, at 81-86 (discussing historical operation of bicameralism and presentment in the war-making context, along with scholarly views concerning whether presentment is necessary).

12 U.S. Const. art. I §7, cl. (2)-(3).

terminate military authorization, and a super-majority of both houses would be required to override a presidential veto, a simple majority of a single house could prevent the appropriation of funds necessary for the continuation of a military conflict.\textsuperscript{114} It should be noted, however, that legislation probably would be required to prevent the President from exercising statutory authority to transfer certain funds appropriated to other operations for use in support of the military conflict that Congress was attempting to limit. Like other positive legislation, such a measure would be subject to presidential veto.

While it may be procedurally easier for Congress to refuse appropriations for a military conflict than to rescind military authorization or establish a statutory deadline for the termination of U.S. participation in hostilities, policy considerations may sometimes make the latter option more appealing. For example, some Members of Congress who support the winding down of a military operation might nevertheless be reluctant to reduce the funds for troops on the battlefield. There might also be concerns over potential effects that a denial of appropriations might have on unrelated military operations. Although appropriations legislation can be crafted to effectively terminate hostilities while permitting funding of force protection measures during the orderly redeployment of troops from the battlefield, such legislation, like other positive enactments, would be subject to presidential veto. In 2007, for example, Congress passed a supplemental appropriations bill to fund the war in Iraq that contained conditions for further U.S. troop deployments and a deadline for ending some military operations.\textsuperscript{115} The President vetoed the bill, arguing in part that these restrictions were unconstitutional because they "purport[ed] to direct the conduct of operations of war in a way that infringes upon the powers vested in the presidency by the Constitution, including as commander in chief of the Armed Forces."\textsuperscript{116} When an attempt to override the President's veto failed, Congress passed another supplemental bill that provided no timetable for U.S. troop withdrawal from Iraq, which was signed into law by the President.\textsuperscript{117}

In certain circumstances, a President may be more willing to agree to either a statutory limitation on the continuation of an armed conflict, or the rescission of prior statutory authorization for a military operation, than to an appropriations bill that limits the funding of military operations—particularly if these measures do not include a deadline for troop withdrawal. Indeed, during the Vietnam conflict, Congress was able to rescind military authorization at an earlier date than it was able to cut off appropriations. In 1971, Congress passed and President Nixon signed a measure rescinding the 1964 Gulf of Tonkin resolution, which had provided congressional authorization for U.S. military operations against North Vietnam.\textsuperscript{118} The Mansfield Amendment, enacted later that year, called for the "prompt and orderly" withdrawal of U.S. troops from Indochina at the "earliest possible date."\textsuperscript{119} However, these measures did not include a deadline for troop withdrawal. Although U.S. troop presence in South Vietnam diminished considerably pursuant to the Nixon Administration's "Vietnamization" strategy even prior to these enactments, the United

\textsuperscript{114} See Sidak, supra footnote 96, at 104-105.
\textsuperscript{118} P.L. 91-672, §12 (1971).
\textsuperscript{119} P.L. 92-156, §601(a) (1971).
States continued significant air bombing campaigns in the years following the rescission of military authorization. During this same period, President Nixon vetoed or threatened to veto a number of appropriations bills that would have either prohibited funds from being used for certain military operations in Southeast Asia or required a complete withdrawal of U.S. troops from Vietnam. In 1973, two years after rescinding military authorization, Congress was finally able to enact appropriations limitations, signed by the President, that barred combat operations in Indochina. These appropriations measures were approved only after the signing of a cease-fire agreement with North Vietnam and the withdrawal of U.S. troops from South Vietnam, and served primarily to end the aerial bombing campaign in Cambodia and prevent U.S. forces from being reintroduced into hostilities.

In sum, in situations where Congress seeks to prevent the executive’s continuance of military combat operations, it may be procedurally easier for Congress to deny appropriations than it would be to statutorily compel a withdrawal from hostilities. However, past experience suggests that, at least in certain circumstances, policy considerations may cause the two branches to view the rescission of military authorization as a more appealing alternative—postponing an inter-branch conflict on appropriations for a later date, enabling Congress to signal its interest in winding down a conflict, and (at least temporarily) preserving the President’s discretion as to how the conflict is waged.

Legal Consequences of Congressional Rescission of Military Authorization, Absent Additional Congressional Action

Although Congress has the power to rescind authorization of a military conflict or enact a declaration of peace, the practical effect that such an action might have on the President’s ability to continue a military conflict may nevertheless remain difficult to predict. Historically, courts have been unwilling to interpret a congressional rescission of military authorization as barring the executive from continuing to wage a military campaign, at least so long as Congress continues to appropriate money in support of such operations. Although the War Powers Resolution, discussed supra, establishes procedures by which Congress may direct the withdrawal of U.S. troops from military conflicts that lack statutory authorization, the constitutionality and practical effects of these requirements have been questioned. Finally, even in the absence of express congressional authorization, the President may possess some inherent or implied power as Commander in Chief to continue to engage in certain military operations. The following sections explain these points in greater detail.

Judicial Interpretation

Jurisprudence suggests that courts would not necessarily view a repeal of prior authorization, by itself, as compelling the immediate withdrawal of U.S. forces. As an overarching matter, courts

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have been highly reluctant to act in cases involving national security, especially when they require a pronouncement as to the legality of a military conflict or the strategies used therein.\footnote{121} Many such cases have been dismissed without reaching the merits of the arguments at issue, including when they involve a political question that the judiciary considers itself ill-suited to answer.\footnote{122} Legal actions brought by Members of Congress challenging the lawfulness of military actions have had no greater success than suits brought by private citizens.\footnote{123} While the courts have suggested a willingness to intervene in disputes between the two branches that reach a legal (as opposed to political) impasse, they have yet to find an impasse on matters of war that has required judicial settlement. In other words, as long as Congress retains options for bringing about a military disengagement but has not exercised them, courts are unlikely to get involved.\footnote{124}

The Vietnam conflict is the lone instance where Congress repealed military authorization while major combat operations were still ongoing. Although the Nixon Administration significantly decreased the number of U.S. troops present in South Vietnam following the repeal of the Gulf of Tonkin Resolution and enactment of the Mansfield Amendment in 1971,\footnote{125} major combat

\footnote{121} This is not to say that every legal challenge to a wartime activity is doomed to failure. In some circumstances, the courts have found unlawful certain military activities involving the seizure of property or the detention of enemy combatants, at least in instances such action was deemed to lack sufficient congressional authorization. See, e.g., Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804) (upholding damage award to owners of U.S. merchant ship seized during quasi-war with France, when Congress had not authorized such seizures); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, (1952) (finding unlawful the government seizure of property to settle labor dispute during Korean War); Rasul v. Bush, 542 U.S. 466 (2004) (finding that federal habeas statute applied to persons detained in Guantanamo Bay pursuant to the “war on terror”); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (persons deemed “enemy combatants” in the “war on terror” have right to challenge detention before a neutral decision-maker); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (finding that military tribunals convened by presidential order did not comply with the Uniform Code of Military Justice).

\footnote{122} In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court described situations where the political question doctrine was implicated:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the implausibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

\footnote{123} For background and examples, see CRS Report RL30352, War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution, by Michael John Garcia.

\footnote{124} See, e.g., Campbell v. Clinton, 52 F. Supp. 2d 34 (D. D.C. 1999) (dismissing action seeking declaration that the President acted unlawfully in ordering air strikes in Kosovo and Yugoslavia without congressional authorization, because impasse had not been reached, as Congress had not barred introduction of U.S. forces or barred appropriations from being used for such purpose).

\footnote{125} In a statement upon signing into law legislation containing the Mansfield Amendment, President Nixon claimed that its instructions were non-binding and pledged to continue his own policies for ending the war. Courts reached different conclusions as to the binding nature of the Mansfield Amendment’s instructions for withdrawal. In 1972, a district court in the Second Circuit concluded, in an opinion affirmed without opinion by the court of appeals, that the Amendment “had binding force and effect on every officer of the Government...[and] legalized the pursuit of an inconsistent executive or administration policy.” DaCosta v. Nixon, 55 F.R.D. 145 (E.D.N.Y., 1972), aff’d without opinion, 456 F.2d 1335 (2nd Cir. 1972). A year later, however, the Second Circuit Court of Appeals, while not deciding the issue, suggested that the binding nature of the Amendment was unsettled, and noted that “weighty constitutional (continued...
operations continued into 1973, when Congress cut off all funding for military operations in Indochina.

During this period, federal courts heard a number of suits challenging the legality of continued hostilities in the absence of congressional authorization. None of these challenges proved successful, in large part because Congress continued to appropriate money for military operations. It is a well-established principle that Congress’s appropriation of funds may serve in some circumstances to confer authority for executive action.\(^\text{126}\) Reviewing courts have found this principle no less applicable concerning matters of war. The appropriation of billions of dollars in support of U.S. combat operations in Indochina, even after the repeal of the Gulf of Tonkin resolution, was viewed as congressional authorization for continued U.S. participation in hostilities,\(^\text{127}\) regardless of whether some Members of Congress had a motivation for approving continued appropriations other than that reflected in the express language of the enacted legislation.\(^\text{128}\)

Courts have also declined on political question grounds to examine the motives of Congress in choosing to appropriate funds after rescinding direct authorization for U.S. military activities.\(^\text{129}\) In the words of one court, any attempt to assess Congress’s intentions in appropriating funds, and determining whether such appropriations were truly meant to further continuing hostilities, would necessarily “require the interrogation of members of Congress regarding what they intended by their votes, and then synthesis of the various answers. To do otherwise would call for gross

(...continued)

considerations which support the President in his duties as Commander-in-Chief preclude too hasty an adoption of the view” that the Amendment was binding. DaCosta v. Laird, 471 F.2d 1146, 1156-1157 (2nd Cir. 1973).

\(^{126}\) Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1947). See also Berk v. Laird 317 F. Supp. 715, 727-728 (D.C.N.Y. 1970) (discussing Supreme Court jurisprudence recognizing congressional appropriations as authorizing executive activity, and concluding that Congress’s appropriations for ongoing military operations in Indochina constituted authorization of those activities). OLC Opinion on Hostilities in Kosovo, supra footnote 92, at * 14-33 (discussing judicial and scholarly recognition of appropriations statutes serving to authorize combat operations).\(^{127}\) See DaCosta v. Laird, 448 F.2d 1368, 1369 (2nd Cir. 1971), cert. denied, 405 U.S. 979 (“In other words, there was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution.”); Orlando v. Laird, 443 F.2d 1039, 1043 (2nd Cir. 1971), cert. denied, 404 U.S. 869 (“The framers’ intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia.”); Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971) (finding that Constitution had not been breached when President acted with support of Congress, including through the appropriation of billions of dollars to support ongoing combat operations; see also Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y.1970) (decided prior to repeal of Gulf of Tonkin resolution, but recognizing that continued appropriation of funds as authorization of conflict’s continuation).

\(^{128}\) See Holtzman v. Schlesinger, 484 F.2d 1307, 1313-1314 (2nd Cir. 1973), cert. denied, 416 U.S. 936 (1974) (finding appropriations legislation gave President sufficient authority to order the bombing of Cambodia, despite claim by some Members of Congress that legislation was “coerced” by presidential veto of appropriations bills that would have immediately cut off funding of such acts); Drinan v. Nixon, 364 F. Supp. 854 (D.C. Mass. 1973) (same).

\(^{129}\) Orlando, 443 F.2d at 1043 (the decision to endorse military action through appropriations rather than direct authorization was “committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions”); Sarnoff v. Connally, 457 F.2d 809, 810 (9th Cir. 1972), cert. denied, 409 U.S. 929 (“Whether a plaintiff challenges the selective service system or the foreign aid and appropriations aspects of congressional cooperation in the present conflict, he presents a political question which we decline to adjudicate.”); Berk, 317 F. Supp. at 728-729 (recognizing that method that Congress chooses to endorse or authorize action is a political question).
speculation in a delicate matter pertaining to foreign relations." Such an examination of Congress’s motivations was deemed beyond the scope of appropriate judicial scrutiny.

Some argued that Congress’s termination of statutory authorization for ongoing hostilities and instruction that the conflict end at the soonest practical date barred the President, at the very least, from “escalating” hostilities. Though the Court of Appeals for the Second Circuit suggested in a 1971 case that this argument might be valid, subsequent rulings indicated that the court would only be willing to consider this argument in very limited circumstances. Notably, in the 1973 case of DaCosta v. Laird, the Second Circuit Court of Appeals dismissed a challenge to the President’s order to mine the harbors of North Vietnam, where it was argued that this order represented an unlawful escalation of hostilities in light of congressional enactments ordering the withdrawal of U.S. troops at the earliest practicable date. The circuit court dismissed this challenge because it raised a nonjusticiable political question. Deciding such a case would require the court to assess the strategy and tactics used by the executive to wind down a conflict, an assessment it was ill-equipped to make:

Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably determine whether a specific military operation constitutes an “escalation” of the war or is merely a new tactical approach within a continuing strategic plan. What if, for example, the war “de-escalates” so that it is waged as it was prior to the mining of North Vietnam’s harbors, and then “escalates” again? Are the courts required to oversee the conduct of the war on a daily basis, away from the scene of action? In this instance, it was the President’s view that the mining of North Vietnam’s harbor was necessary to preserve the lives of American soldiers in South Vietnam and to bring the war to a close. History will tell whether or not that assessment was correct, but without the benefit of such extended hindsight we are powerless to know.

Though the circuit court did not completely rule out the possibility that a further escalation of hostilities could be deemed unlawful, the court suggested it would be willing to consider such arguments only in the most limited of circumstances. For example, the court suggested that a “radical change in the character of war operations—as by an intentional policy of indiscriminate bombing of civilians without any military objective—might be sufficiently measurable judicially to warrant a court’s consideration.”

In Holtzman v. Schlesinger, decided later that year, the Second Circuit Court of Appeals reversed a lower court decision that had declared unlawful the continued bombing of Cambodia following the removal of U.S. troops and prisoners of war from Vietnam. The circuit court held that it was a nonjusticiable political question as to whether the bombing violated the Mansfield Amendment’s instruction that hostilities be terminated at the “earliest practicable date.” Comparing the situation with that at issue in DaCosta, the court found that the challenge raised “precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary.” Further, even

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131 Id.; Holtzman, 484 F.2d at 1314 & n.4.
132 DaCosta, 448 F.2d at 1370.
133 DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973).
134 Id. at 1155.
135 Id. at 1156 (italics added).
assuming *arguendo* that the military and diplomatic issues raised by the bombing were judicially manageable, the circuit court found that Congress had authorized the bombing through continued appropriations.\(^{137}\)

Taken together, these cases suggest that a reviewing court would probably not interpret a repeal of prior military authorization, or even a requirement that the executive terminate hostilities as soon as practicable, as necessarily requiring the immediate withdrawal of U.S. forces from ongoing hostilities. Further, courts may be reluctant to assess whether specific military tactics or strategies pursued by the executive contradict these statutory requirements and constitute an impermissible "escalation" of a conflict.\(^{138}\) Accordingly, it does not appear that the termination of direct authorization to use force, or perhaps even a statutory requirement that the President take action to wrap up hostilities, would be interpreted by a reviewing court as constraining the executive's ability to continue U.S. combat operations, absent additional action such as the denial of appropriations or possibly the inclusion of an unambiguous deadline for troop withdrawal.

**Inherent Presidential Authority to Use Military Force Absent Congressional Authorization**

Even in the absence of express congressional authorization, it is recognized that the President may still employ military force in *some* circumstances pursuant to his powers as Commander in Chief and his inherent authority in the area of foreign affairs,\(^{139}\) at least so long as no statute stands in his way. In the case of an armed conflict that had been initiated with congressional authorization, a President would likely argue that this inherent authority would permit him to instruct U.S. forces to engage in certain military operations, even if statutory authorization for U.S. participation in that conflict had been rescinded. Further, even if Congress were to enact legislation requiring the cessation of military operations after a specified date, it is highly unlikely that this measure would be interpreted to prohibit any and all military operations, specifically as they relate to rescue and evacuation missions. It appears understood, at least as a matter of historical practice, that such missions are not intended to be covered under legislation otherwise barring future participation in hostilities,\(^{140}\) at least in the absence of clear statutory language to that effect.

\(^{137}\) *Id.* at 1313. Specifically, the court noted the language of §108 of the Joint Resolution Continuing Appropriations for Fiscal 1974, P.L. 93-52, which barred funding for military operations in and around Indochina after August 15, 1973. The Court inferred from this language that military activities at issue in the case before it, occurring before this deadline, were authorized.

\(^{138}\) *See, e.g.*, Mottola v. Nixon, 318 F. Supp. 538, 540 (1970) (characterizing the extension of the conflict in Vietnam into Cambodia as a "necessary incidental, tactical incursion ordered by the Commander in Chief" that would be authorized so long as the military operations in Vietnam were found to be authorized), rev'd on other grounds, 464 F.2d 178 (9th Cir. 1972) (ordering district court to dismiss for lack of standing).

\(^{139}\) *See supra* at "The Commander-in-Chief Clause."

\(^{140}\) For example, even after Congress enacted legislation cutting off funding for all combat operations in Indochina, President Ford's subsequent use of military forces to evacuate U.S. citizens and third country nationals was not seriously questioned, nor was a subsequent authorization of an operation to rescue the crew of the *Mayaguez* from Cambodian territory (a mission which was reported to Congress following the procedures of the War Powers Resolution, but only after the operation was completed). For background on congressional attitudes towards these rescue missions, see *Fisher, supra* footnote 7, at 157-158. *See also* Rappenecker v. United States, 509 F. Supp. 1024, 1030 (D.C. Cal. 1980). The *Rappenecker* case involved a civil suit by former crewmen of the *Mayaguez* for injuries they received during their rescue. Although the President ordered their rescue in the absence of prior congressional authorization, the Court assumed that the order was constitutionally valid. *Id.*
III. Use of the Power of the Purse to Restrict Military Operations

Congress has used its spending power to restrict the deployment and use of the Armed Forces in the past.\textsuperscript{141} In 1973, for instance, after other legislative efforts failed to draw down U.S. participation in combat operations in Indochina,\textsuperscript{142} Congress effectively ended it by means of appropriations riders prohibiting use of funds. Section 307 of the Second Supplemental Appropriations Act for Fiscal Year 1973, P.L. 93-50 (1973), stated that, “None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose.” Section 108 of the Continuing Appropriations Resolution for Fiscal Year 1974, P.L. 93-52 (1973), provided that, “Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.” A year later, Congress passed an authorizing statute, Section 38(f)(1) of the Foreign Assistance Act of 1974, P.L. 93-559 (1974), which set a total ceiling of U.S. civilian and military personnel in Vietnam of 4,000 six months after enactment and a total ceiling of 3,000 within one year of enactment.

A provision of an authorization act, Section 404 of the International Security Assistance and Arms Export Control Act of 1976, P.L. 94-329 (1976), comprehensively prohibited using funds for military and paramilitary operations in Angola. It stated that:

Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose, or which would have the effect, of promoting, augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola, unless and until Congress expressly authorizes such assistance by law enacted after the date of enactment of this section.

This section added that if the President determined that the prohibited assistance to Angola should be furnished, he should submit to the Speaker of the House and the Senate Committee on Foreign Relations a report describing recommended amounts and categories of assistance to be provided and identities of proposed aid recipients. This report also was to include a certification of his determination that furnishing such assistance was important to U.S. national security interests and an unclassified detailed statement of reasons supporting it.

Section 109 of the Foreign Assistance and Related Programs Appropriations Act for Fiscal Year 1976, P.L. 94-330 (1976), signed the same day as P.L. 94-329, provided that, “None of the funds


\textsuperscript{142} \textit{See P.L.} 91-672, §12, 84 Stat. 2053 (repealing Gulf of Tonkin Resolution); P.L. 92-156, §601(a), 85 Stat. 423, 430 (Mansfield Amendment); \textit{see also} P.L. 92-156, §501(a), 85 Stat. 423, 427 (1971) (Fullbright proviso).
appropriated or made available pursuant to this act shall be obligated to finance directly or indirectly any type of military assistance to Angola.”

In the 1980s, various versions of the Boland Amendment were enacted to prohibit using funds for various military activities in or around Nicaragua.\footnote{E.g., P.L. 98-473, §8066, 98 Stat. 1904, 1935 (1984); see 133 Cong Rec. 15664-15701 (June 15, 1987) (detailing various forms of the Boland Amendment that were enacted).} For example, Section 8066 of the Department of Defense Appropriations Act included in the Continuing Appropriations Resolution for Fiscal Year, 1985, P.L. 98-473, 98 Stat. 1935 (1984), stated that

During Fiscal Year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose, or which would have the effect of supporting, indirectly or indirectly, military or paramilitary operation in Nicaragua by any nation, group, organization, movement or individual.

This provision stated that after February 28, 1985, the President could expend $14 million in funds if the President made a report to Congress which specified certain criteria, including the need to provide further assistance for military or paramilitary operations prohibited by the Boland Amendment, and if Congress passed a joint resolution approving such action.

In the 1990s, Congress enacted Section 8151 of the DOD Appropriations Act for Fiscal Year 1994, P.L. 103-139 (1993), which approved using Armed Forces for certain purposes including combat in a security role to protect United Nations units in Somalia, but cut off funding after March 31, 1994, except for a limited number of military troops to protect American diplomatic personnel and American citizens unless further authorized by Congress. Section 8135 of the DOD Appropriations Act for Fiscal Year 1995, P.L. 103-335 (1994), provided that, “None of the funds appropriated in this act may be used for the continuous presence in Somalia of United States military personnel, except for the protection of United States personnel, after September 30, 1994.” In title IX of the DOD Appropriations Act for Fiscal Year 1995, P.L. 103-335 (1994), Congress provided that, “No funds provided in this act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens.”

These examples reveal the approaches that Congress has employed to prohibit or restrict using military force. They have ranged from the least comprehensive “none of the funds appropriated in this act may be used” to the most comprehensive “notwithstanding any other provision of law, no funds may be used.” The phrase “none of the funds appropriated in this act” limits only funds appropriated and made available in the act that carries the restriction, but not funds, if any, that may be available pursuant to other appropriations acts or authorizing statutes. To restrict funds appropriated and made available not only in the act that carries the restriction, but also pursuant to other appropriations acts, Congress has used the phrase “none of the funds appropriated in this act or any other act may be used.” The most comprehensive restriction is “notwithstanding any other provision of law, no funds may be used.” This language precludes using funds that have been appropriated in any appropriations acts as well as any funds that may be made available pursuant to any authorizing statutes including laws that authorize transfers of appropriated or nonappropriated funds.\footnote{See, e.g., 31 U.S.C. chap. 15, subchap. III “Transfers and Reimbursements” for provisions that authorize transfers of funds, including the Economy Act, 31 U.S.C. §§1535 and 1536, which allows an agency to transfer funds to another (continued...)}
Procedural Considerations

There is a parliamentary impediment to including the phrases “none of the funds appropriated in this act or any other act may be used” or “notwithstanding any other provision of law, no funds may be used” in a general appropriations bill.\(^{143}\) House Rule XXI, clause 2, makes subject to a point of order language that changes existing law (i.e., legislation) in a general appropriations bill (i.e., a regular or supplemental appropriations bill providing appropriations for several agencies, but not a continuing resolution).\(^{146}\) A bill that appropriates funds for a single purpose or a single agency is not a general appropriations bill to which this restriction applies. The intent of Rule XXI, clause 2 is to separate the legislative vehicles for authorizations and appropriations.

Nevertheless, a practice has developed that just as the House may decline to appropriate funds for a purpose that has been authorized by law, it may by limitation prohibit the use of appropriated funds in a general appropriations bill for part of a purpose while appropriating funds for the remainder of it. Such a limitation “... may apply solely to the money of the appropriation under consideration” and “... may not apply to money appropriated in other acts.”\(^{147}\) Thus, the phrase “none of the funds appropriated in this act may be used” would not be subject to a point of order, but the phrase “none of the funds in this or any other act may be used” generally would be subject to a point of order under Rule XXI, clause 2 because it would extend the effect of the limitation to money appropriated in other acts and would be considered legislation. To avoid a point of order, a limitation in a general appropriations bill may not impose new or additional duties on an executive official and may not make an appropriation contingent upon (i.e., “unless” or “until”) the occurrence of an event not required by law.\(^{148}\) If a Member raises a point of order that language in a general appropriations bill violates Rule XXI, clause 2, and the point of order is sustained by the chair, the legislative language is stricken.

Although legislation in a general appropriations bill is subject to a point of order under Rule XXI, clause 2, House rules are not self-enforcing. Consequently, legislation may be included in a general appropriations bill and become law if no point of order is raised, if a point of order is overruled, or if the House either suspends the rules or agrees to a special order rule reported from the Committee on Rules that waives the point of order against including such legislation.\(^{149}\)

Similarly, Senate Standing Rule XVI prohibits amendments in a general appropriations bill,\(^ {150}\) if offered by either the Committee on Appropriations or an individual Senator, that would propose

(...continued)

agency if the receiving agency can provide or get by contract goods or services less expensively or more conveniently than the ordering agency can get goods or services by a contract with a commercial enterprise. Transfer authority also is included in some other provisions of the United States Code that apply to individual departments and agencies and sometimes in appropriations acts.


\(^{148}\) See id. §§1053-57 for an explanation of limitations.

\(^{149}\) Id. at §1058.

The Senate rule, however, does permit legislation to be included if it is germane to the subject matter of the bill under consideration. If a point of order that an amendment constitutes legislation on an appropriations bill is raised, the proponent of the language may defend it by asserting that it is germane. The presiding officer makes an initial determination as to whether there is any House language to which the amendment conceivably could be germane. If such language is found, then the question of germaneness is submitted to the Senate. If a majority of Senators vote that the amendment in question is germane, the point of order falls and the amendment remains under consideration. If the Senate does not vote that the amendment is germane, the presiding officer sustains the point of order and the amendment falls.

As mentioned earlier, the intent of these House and Senate rules is to separate authorizing and appropriating functions. Prohibiting use of funds for a purpose or purposes does not contravene the House or Senate rule provided that the prohibition applies only to funds appropriated in the bill being considered.

Because an appropriations act generally funds programs for a fiscal year, each provision contained in the act is presumed to be in effect only until the end of the fiscal year. “A provision contained in an annual appropriation act is not to be construed as permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent. The presumption can be overcome if the provision uses language indicating futurity or if the provision is of a general character bearing no relation to the object of the appropriation... The most common word of futurity is ‘hereafter’ and provisions using this term have often been construed to be permanent.” Other words of futurity include “after the date of approval of this act,” “henceforth,” and specific references to future fiscal years.

While including a word or words of futurity has the effect of making a provision extend beyond the fiscal year covered by an appropriations act, such a provision would constitute legislation that would appear to be subject to a point of order under House Rule XXI, clause 2 and Senate Standing Rule XVI during congressional consideration. If the parliamentary impediments can be overcome, however, such legislation may be enacted and become valid law.

### Availability of Alternative Funds

A fundamental principle in appropriations law is that appropriations may not be augmented with funds from outside sources without statutory authority:

As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority. When Congress makes an appropriation, it also is establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is to

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151 Senate Standing Rule XVI, paragraphs 2 and 4.
152 Riddick at 161 et seq.
154 Id. at 2-36.
prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.\textsuperscript{155}

While no statute in precise terms expressly prohibits augmenting appropriations, the concept is based on some appropriations laws. The Miscellaneous Receipts Statute, 31 U.S.C. Section 3302(b), requires that a government official who receives money for the government from any source must deposit it in the U.S. Treasury as soon as practicable without deduction for any charge or claim. Under the Purpose Statute, 31 U.S.C. Section 1301, appropriated funds may be used only for the purposes for which they are appropriated. A criminal provision, 18 U.S.C. Section 209, prohibits supplementing the salary of an officer or employee of the government from any source other than the United States government.\textsuperscript{156}

An example of a statute permitting gift funds from other countries to finance a war is Section 202 of the Continuing Resolution for Fiscal Year 1991, P.L. 101-403 (1990), passed before the first Gulf war. Section 202 added a new Section 2608 to title 10 of the United States Code to authorize any person, foreign government, or international organization to contribute money or real or personal property for use by the Department of Defense. However, before the Department of Defense could spend the funds, they had to be first appropriated by Congress.

The Purpose Statute states that funds may be used only for purposes for which they have been appropriated; by implication it precludes using funds for purposes that Congress has prohibited. When Congress states that no funds may be used for a purpose, an agency would violate the Purpose Statute if it should use funds for that purpose; it also in some circumstances could contravene a provision of the Antideficiency Act, 31 U.S.C. Section 1341. Section 1341 prohibits entering into obligations or expending funds in advance of or in excess of an amount appropriated unless authorized by law. If Congress has barred using funds for a purpose, entering into an obligation or expending any amount for it would violate the act by exceeding the amount — zero — that Congress has appropriated for the prohibited purpose.\textsuperscript{157}

To determine whether an agency has violated the Antideficiency Act, it would be necessary to review the language in an appropriations act or authorizing statute that includes a prohibition on using funds for a specific purpose. If an appropriations act prohibits using funds “in this act” for a purpose, for example, expending any amount from that act for the prohibited purpose would appear to contravene the Antideficiency Act because Congress has appropriated zero funds for it. Entering into obligations or expending funds, if any, that may be available from a different appropriations act or other fund for that purpose, however, would not appear to be prohibited by the Antideficiency Act; an agency would be able to use funds from sources other than the appropriations act that contains the prohibition or limitation.

Violating the Antideficiency Act would be significant because it has notification and penalty provisions not found in the Purpose Statute. The Purpose Statute does not expressly provide for penalties; it generally is enforced by imposing administrative sanctions on the officer or employee who violates the statute.\textsuperscript{158} The Antideficiency Act, by contrast, not only contains a

\textsuperscript{155} GOVERNMENT ACCOUNTABILITY OFFICE, OFFICE OF GENERAL COUNSEL, II PRINCIPLES OF APPROPRIATIONS LAW, 6-162 (3rd ed. 2006).
\textsuperscript{156} Id. at 6-163.
\textsuperscript{157} Id. at 6-62.
\textsuperscript{158} Id. at 6-78.
provision that provides for administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office, 31 U.S.C. Section 1349, but also one that requires an immediate report of a violation to the President and Congress, 31 U.S.C. Section 1351. Moreover, the Antideficiency Act has a criminal penalty provision: Section 1350 of title 31 provides that an officer or employee who “knowingly and willfully” violates the act “shall be fined not more than $5,000, imprisoned for not more than two years, or both.” Although the act has a criminal provision, no one appears to have been prosecuted or convicted for violating it.\footnote{159} Another criminal provision, 18 U.S.C. Section 435, not part of the Antideficiency Act, makes punishable by a fine of $1,000, imprisonment of not more than one year, or both, knowingly contracting to erect, repair, or furnish any public building or for any public improvement for an amount more than the amount appropriated for that purpose.

The Antideficiency Act prohibits entering into obligations or expending funds in advance of or in excess of an amount appropriated \textit{unless authorized by law}. One law that authorizes entering into obligations in advance of appropriations is the Feed and Forage Act. Also referred to as Revised Statute 3732, the Feed and Forage Act is part of and an express exception to the Adequacy of Appropriations Act, 41 U.S.C. Section 6301. Section 6301 generally states that no government contract or purchase may be made unless it is authorized by law or is under an appropriation adequate to its fulfillment. The Feed and Forage Act exception authorizes the Department of Defense and the Department of Homeland Security with respect to the Coast Guard when it is not operating as service in the Navy to make contracts in advance of appropriations for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies. Obligations entered into pursuant to Feed and Forage Act authority must not exceed the necessities of the current year. The Secretary of Defense and the Secretary of Homeland Security immediately must advise Congress of the exercise of this authority and report quarterly on the estimated obligations incurred pursuant to it.\footnote{160} Although the Feed and Forage Act authorizes \textit{entering into obligations} such as contracts, \textit{actual expenditures} are not permitted pursuant to this authority until Congress appropriates the necessary funds.\footnote{161}

\section*{IV. Limiting Deployment of Military Personnel}

The Constitution accords Congress with ample authority to regulate the use of military personnel. Among other things, Congress is designated with the power “To raise and support Armies;” “To provide and maintain a Navy;” “To make Rules for the Government and Regulation of the land and naval Forces;” and “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.” Some have argued that congressional action limiting the use of particular troops during wartime would, at least in certain circumstances, infringe upon the President’s authority as Commander in Chief to conduct a military campaign in a manner that he deems appropriate.\footnote{163}

\footnotesize

\begin{itemize}
\item \textit{Id. at 6-141.}
\item \textit{U.S. CONST. art. I, §8.}
\item \textit{See Rivkin and Casey, supra footnote 3 (“Congress cannot, in other words, act as the president’s puppet master, and (continued...)}
\end{itemize}
As a matter of historical practice, Congress has occasionally imposed limitations and other requirements on the deployment of U.S. troops, including during wartime. These limitations have been effectuated either through a statutory prohibition on the use of military personnel for a particular purpose, or via the denial of appropriations in support of a particular operation. The following are examples in which Congress has limited the President’s ability to use particular military personnel for certain purposes:

- **1915**—The Army appropriations act restricted Army tours of duty in the Philippines to two years and tours in the Canal Zone to three years, unless a servicemember requested otherwise or in cases of insurrection or actual or threatened hostilities. The restriction was amended in 1934 to provide for two-year tours in both areas as well as at certain other foreign duty stations. The restriction was repealed in 1945, and replaced with a requirement for the Secretary of Defense to report twice annually to the Armed Services committees regarding regulations governing the lengths of tours of duty for the Army and Air Force outside the continental United States.

- **1933**—The Treasury and Post Office Appropriation Act for FY1934 provided that “Assignments of officers of the Army, Navy, or Marine Corps to permanent duty in the Philippines, on the Asiatic Station, or in China, Hawaii, Puerto Rico, or the Panama Canal Zone shall be for not less than three years. No such officer shall be transferred to duty in the continental United States before the expiration of such period unless the health of such officer or the public interest requires such transfer, and the reason for the transfer shall be stated in the order directing such transfer.”

- **1940**—The Selective Training and Service Act of 1940 provided that “Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands.”

- **1945**—In an act extending the Selective Training and Service Act until the end of World War II, as determined by the earlier of dates proclaimed by the President or by concurrent resolution by both houses of Congress, provided that no inductee under the age of 19 “shall be ordered into actual combat service until after he has been given at least six months of [appropriate] military training.”

- **1948**—The Selective Service Act of 1948 provided that 18- and 19-year old enlistees for one-year tours could not be assigned to land bases outside the continental United States.

(...continued)
so long as currently authorized and appropriated funding lasts, the president can dispatch additional troops to Iraq with or without Congress’s blessing.

164 38 Stat. 1078.
168 P.L. 76-783, §3(e), 54 Stat. 885, 886.
• 1951—The Universal Military Training and Service Act of 1951 required inductees, enlistees, and other persons called to active duty to receive at least four months' "full and adequate" training prior to deployment overseas, and prohibited the expenditure of funds to transport or maintain a servicemember overseas in violation of the provision.\textsuperscript{171}

• 1956—10 U.S.C. Section 6015 prohibited assignment of female servicemembers to duty on combat aircraft and all vessels of the Navy.\textsuperscript{172} 10 U.S.C. Section 6018 prohibited the assignment of Navy officers to shore duty not explicitly authorized by law.\textsuperscript{173}

• 1985—The National Defense Authorization Act, 1985 prohibited the expenditure of funds to support an end strength of U.S. Armed Forces personnel stationed in NATO countries above a level of 326,414.\textsuperscript{174} The measure was later modified to reduce the level further but to provide waiver authority to the President to increase the force level to up to 311,855, upon notification to Congress, if he determined the national security interests required exceeding the ceiling.\textsuperscript{175}

• 1992—The National Defense Authorization Act for FY1992 prohibited the use of appropriated funds to support an end strength level of members of the Armed Forces of the United States assigned to permanent duty ashore in nations outside the United States at any level in excess of 60 percent of the end strength level of such members on September 30, 1992, with exceptions in the event of declarations of war or emergency.\textsuperscript{176}

The precise scope of Congress's ability to limit the deployment of U.S. military forces has not been ruled upon by the courts, and it is therefore unclear whether legislative measures limiting the use of particular military personnel during wartime would ever be deemed an unconstitutional infringement upon the President's authority as Commander in Chief.\textsuperscript{177} Nonetheless, historical practice suggests that, at least in some circumstances, Congress may oblige the President to comply with certain requirements on the deployment of particular military personnel, including during periods of armed conflict.

V. Analysis and Conclusion

Much of the historical debate over war powers has taken place in the context where a President has initiated the use of military force with ambiguous or no congressional authorization.\textsuperscript{178} There

\textsuperscript{171} P.L. 82-51, §1(d), 65 Stat. 75, 78.
\textsuperscript{172} 70A Stat. 375-76.
\textsuperscript{173} 70A Stat. 376.
\textsuperscript{174} 98 P.L. 525, §1002(c)(1), 98 Stat. 2575.
\textsuperscript{176} P.L. 102-484, §1302, 106 Stat. 2545.
\textsuperscript{177} For example, some have suggested that Congress could not bar the President from using military force to respond to a foreign invasion. See Sidak, supra footnote 96, at 51-55.
\textsuperscript{178} The focus on the respective powers of the President and Congress to control the initiation of war has in recent years given way to a much broader analysis of the branches' respective powers to control the conduct of war. See, e.g., Barron & Lederman, supra footnote 9; Barron & Lederman, Constitutional History, supra footnote 34; Jules Lobel, Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War, 69 OHIO ST. (continued...
is no obvious reason, however, to suppose that Congress’s constitutional power to limit hostilities depends on whether the hostilities were initiated with Congress’s express approval at the outset. Likewise, it does not seem consistent to suggest that Congress’s authority to limit the scope of hostilities may be exercised validly only at the initiation of hostilities, without opportunity for changing course once troops are engaged.

In modern times, federal courts have been reticent to decide cases involving war powers on the merits, including those involving appropriations measures. However, in discussing whether a particular challenge raises non-justiciable political questions involving matters textually committed to the political branches by the Constitution, courts have generally reiterated the understanding of a shared allocation of war powers. That is, it is generally agreed that Congress cannot “direct campaigns,” but that Congress can regulate the conduct of hostilities, at least to some degree, and that Congress can limit military operations without the risk of a presidential veto by refusing to appropriate funds.

In 1970, in response to a challenge related to the Vietnam conflict, a federal district court expounded on the theme of congressional authority, with particular reference to Congress’s appropriations power:

The power to commit American military forces under various sets of circumstances is shared by Congress and the Executive... The Constitutional expression of this arrangement was not agreed upon by the Framers without considerable debate and compromise. A desire to facilitate the independent functioning of the Executive in foreign affairs and as commander-in-chief was tempered by a widely shared sentiment opposing the concentration of unchecked military power in the hands of the president. Thus, while the president was designated commander-in-chief of the armed forces, Congress was given the power to declare war. However, it would be shortsighted to view Art. I, §8, cl. 11 as the only limitation upon the Executive’s military powers... [I]t is evident that the Founding Fathers...

(...continued)


179 See Tiefer, supra footnote 3, at 310-12 (outlining possible arguments for differentiating between authorized and unauthorized wars).


181 See Stith, supra, footnote 5, at 1387 (noting that courts have declined to enforce executive compliance with appropriations limitations, “particularly in areas where the Executive’s powers constitutional are significant”).


183 Massachusetts v. Laird, 451 F.2d 26, 31-32 (1st Cir. 1971) (“The Congress may without executive cooperation declare war, thus triggering treaty obligations and domestic emergency powers. The executive may without congressional participation repel attack, perhaps catapulting the country into a major conflict. But beyond these independent powers, each of which has its own rationale, the Constitutional scheme envisages the joint participation of the Congress and the executive in determining the scale and duration of hostilities.”). Another court found justiciable the question of whether military operations were constitutional, proclaiming the test to be “whether there is any action by the Congress sufficient to authorize or ratify the military activity in question.” Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), cert. denied, 404 U.S. 869 (1971). The same court, however, found a determination of the effects of Congress’s repeal of the Gulf of Tonkin Resolution to be a non-justiciable political question. DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971), cert. denied 405 U.S. 979 (1972).
envisioned congressional power to raise and support military forces as providing that body with an effective means of controlling presidential use thereof. Specifically, the House of Representatives ... was viewed by the Framers as the bulwark against encroachment by the other branches. In *The Federalist* No. 58 (Hamilton or Madison), we find:

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.\(^{184}\)

Despite Congress’s well-established authority over appropriations, some have argued that the power of the purse cannot be wielded in such a way as to fetter the discretion of the Commander in Chief.\(^{185}\) Congress's power of the purse is subject to the same constitutional restrictions as any other legislative enactment, including those that affect allocation of powers among the three branches.\(^{186}\) That is, Congress cannot use appropriations measures to achieve unconstitutional results, although it might, in some circumstances, achieve a similar result simply by failing to appropriate money.\(^{187}\) The doctrine of “unconstitutional conditions” generally applies to laws conditioning benefits for states or private citizens on their relinquishment of constitutional rights, but some have argued that it applies as well to legislation authorizing executive branch expenditures.\(^{188}\) This notion, however, adds little to the analysis. If Congress has ample constitutional authority to enact legislation that restricts the scope of military operations, as relevant judicial opinions suggest, then it can also use the appropriations process for that purpose. The larger question remains whether any limitation enacted amounts to an unconstitutional usurpation of the actual conduct of war.


\(^{185}\) See Rivkin and Casey, supra footnote 3; see also Rosen, supra footnote 12, at 14-18 (outlining theories but questioning their validity).

\(^{186}\) Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) (Congress may not enlarge the original jurisdiction of the Supreme Court); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (Congress may not nullify effects of a presidential pardon or prescribe a rule of decision in a court case ); United States v. Lovett, 328 U.S. 303 (1946) (Congress may not create a bill of attainder by means of an appropriations measure denying money to pay salaries of named officials); Reid v. Covert, 354 U.S. 1 (1957) (Congress may not displace judicial role by subjecting civilians to military courts-martial during time of peace); INS v. Chadha, 462 U.S. 919 (1983) (Congress may not invalidate executive decisions by one-house “legislative veto”).

\(^{187}\) For example, in *United States v. Klein*, the Supreme Court invalidated a statute that prohibited the Court of Claims from receiving evidence of a presidential pardon in support of a claim against the government, finding the law interfered with the judicial power and the President’s pardon power. However, the Court upheld a statute that prohibited payment of the same claims out of the Treasury. Hart v. United States, 118 U.S. 62 (1886). Congress’s failure to appropriate funds for constitutionally mandated activities might itself be unconstitutional, but neither the courts nor the President would have the authority in such a case to mandate the expenditure of funds from the Treasury for the activity. See Stith, supra, footnote 5, at 1351.

\(^{188}\) See, e.g., John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 145 & n25 (1988) (“Congress cannot condition funding or authority for the President to act in the foreign affairs arena upon the President’s surrender of his own constitutionally grounded duties and privileges.”)
Some commentators agree that Congress has the authority to cut off funds for military operations entirely, but assert that a partial cut-off or limitation on the use of funds in an ongoing conflict would amount to an unconstitutional interference with the President’s authority to conduct battlefield operations.¹⁸⁹ There has been some suggestion in the past that the President’s responsibility to provide for troops in the field justifies further deployments without prior authorization from Congress,¹⁹⁰ with some arguing that the President has an independent implied spending power to carry out these responsibilities.¹⁹¹ These arguments do not easily square with Congress’s established prerogative to limit the scope of wars through its war powers, and do not conform with Congress’s absolute authority to appropriate funds. Moreover, the persuasiveness of such arguments may depend upon whether or not U.S. participation in hostilities has been authorized by Congress.

Congress has frequently, although not invariably, acceded to presidential initiatives involving the use of military force. While a history of congressional acquiescence may create a gloss on the constitutional allocation of powers,¹⁹² such a gloss will not necessarily withstand an express statutory mandate to the contrary. It does not appear that Congress has developed a sufficiently consistent or lengthy historical practice to have abandoned either its war power or its authority over appropriations. The executive branch has objected to legislative proposals it views as intrusive into presidential power, including limitations found in appropriations measures.¹⁹³ And it remains possible to construe the function of “conducting military operations” broadly to find impermissible congressional interference in even the most mundane statutes regulating the Armed Forces. To date, however, no court has invalidated a statute passed by Congress on the basis that it impinges the constitutional authority of the Commander in Chief,¹⁹⁴ whether directly or

¹⁸⁹ See Rivkin and Casey, supra footnote 3 (“Under our constitutional system ... the power to cut off funding does not imply the authority to effect lesser restrictions, such as establishing benchmarks or other conditions on the president’s direction of the war.”).
¹⁹¹ See Rosen, supra footnote 12, at 14-18 (summarizing theories).
¹⁹² See Dames & Moore v. Regan, 453 U.S. 654 (1981) (executive agreements settling claims with Iran subsequent to the 1979-1981 hostage crisis held to be within President’s power, in part because of unbroken historical practice of Congress acceding to Presidential settlement of foreign claims by executive agreement).
¹⁹⁴ In one case, the Supreme Court agreed with the Court of Claims that a law passed pursuant to Congress’s authority to regulate the Armed Forces could not restrict a President’s commander-in-chief powers, and interpreted the statute accordingly. In Swaim v. United States, 165 U.S. 553 (1897), an officer challenged his court-martial on the grounds that it had been ordered by the President himself, where contemporary statute provided for the convening of courts-martial by certain commanders. The Court held the President had the inherent authority to convene courts-martial, citing with approval the legislative record describing the Articles of War as “not [intended] to exclude the inherent power residing in the president of the United States under the Constitution.” Id. at 557. The Senate Committee explained further:

In this state of the history of legislation and practice, and in consideration of the nature of the office of commander in chief of the armies of the United States, the committee is of opinion that the acts of congress which have authorized the constitution of general courts-martial by an officer commanding an army, department, etc., are, instead of being restrictive of the power of the commander in chief, separate acts of legislation, and merely provide for the constitution of general courts-martial by officers subordinate to the commander in chief, and who, without such legislation, would not possess that power, and that they do not in any manner control or restrain the commander in chief of the army from exercising the power which the committee think, in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised.

(continued...)

Congressional Research Service
indirectly through appropriations. In contrast, presidential assertions of authority based on the Commander-in-Chief Clause, in excess of or contrary to congressional authority, have been struck down by the courts.\footnote{195}

On the other hand, Presidents have sometimes deemed such limitations to be unconstitutional or merely precatory, and have at times not given them the force of law.\footnote{196} In other words, Administrations have relied on an argument based on the assumption that a given spending measure unconstitutionally impinges on the President’s Commander-in-Chief authority to justify the President’s failure to adhere to a limitation on national security spending while continuing to spend the funds,\footnote{197} sometimes employing the “canon of constitutional avoidance” to construe a statute in conformity with its own view of its inherent powers.\footnote{198} While the avoidance canon does not appear to have been employed by the courts to resolve separation-of-powers conflicts between the President and Congress, such issues seem unlikely to be resolved by the courts in any event.\footnote{199}

In sum, it seems that under the constitutional allocation of powers Congress has the prerogative of placing a legally binding condition on the use of appropriations to regulate or end the deployment of U.S. Armed Forces. Such a prohibition seems directly related to the allocation of resources at the President’s disposal, and would therefore not appear to interfere impermissibly with the President’s ability to exercise command and control over the U.S. Armed Forces. Although not beyond question, such a prohibition would arguably survive challenge as an incident both of Congress’s war power and of its power over appropriations.


\footnote{196} See Powell, supra footnote 193, at 552-53.

\footnote{197} See Tiefer, supra footnote 3, at 312 (providing examples of the “say no, but keep the dough” approach for circumventing appropriations limitations viewed as unconstitutional); Powell, supra note 181, at 553 (describing executive branch formula for determining the effect on an appropriation of an invalid condition to be based on “whether Congress’s main purpose in enacting the appropriation was to create a means of forcing the congressional policy embodied in the condition on the President”).

\footnote{198} As formulated by the Supreme Court, the avoidance canon means that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). The executive branch has employed the canon to construe various legislative measures as advisory in nature based on its view that such measures would, if viewed as mandatory, raise grave constitutional questions regarding the separation of powers. For examples and analysis of the issue, see H. Jefferson Powell, The Executive and the Avoidance Canon, 81 IND. L.J. 1313 (2006); Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 COLUM. L. REV. 1189 (2006).

\footnote{199} See Morrison, supra footnote 198, at 1228.
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Black Holes and Open Secrets: The Impact of Covert Action on International Law

ALEXANDRA H. PERINA

Governments maintain secrecy over a range of conduct in order to protect national security, but in no area is secrecy more likely to impact foreign relations and destabilize the international political order than in the use of force. Although the political costs of secrecy are widely discussed, there has been virtually no attention in scholarship to how secrecy influences the law itself. This Article considers how secrecy and covert conduct shape the development of international law. Focusing on the area of the use of force, it examines how international law-making processes are affected when a state acts covertly—that is, when a state does not publicly acknowledge its conduct—and that covert conduct comes—partially or fully, accurately or inaccurately—to public light.

Despite widespread public perception that covert conduct necessarily violates international law, states act covertly for a range of legitimate political, diplomatic, and strategic reasons. Covert behavior may be—though certainly is not always—consistent with international law. I consider how covert actors’ non-engagement in public discourse distorts the landscape of evidence that informs other actors’ legal judgments. Where states view their conduct as lawful, acting covertly diminishes their ability to reinforce or develop the law, ceding that ground to third parties. I

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address whether secret and covert practice can count as evidence of customary law, and suggest that violating the law covertly may be less damaging to legal rules than overt violation, by denying the act precedential value. I also argue that unacknowledged conduct has an inherently corrosive effect on the law by casting doubt on whether the operative legal rules have obligatory effect, potentially contributing to the rules' desuetude. Although one might assume that covert conduct is simply negligible to the evolution of the law, this Article shows how secrecy and covertness in fact shape law-making processes, and their substantive outcomes.

States will continue, often legitimately, to act covertly and maintain secrecy over aspects of their conduct. It is crucial for governments to understand the legal consequences and costs of secrecy and covertness, in order to manage their programs more strategically and potentially mitigate some of the pernicious effects on the law.

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INTRODUCTION

Consider the following scenario: An individual with ties to a terrorist group is killed in a targeted strike in East Africa. Media reporting of the incident trickles out gradually; some reports speculate that the operation was conducted by the United States, but U.S. officials offer "no comment" when asked about the matter. Other sources suggest that the attack was perpetrated by local rivals acting as proxies for another foreign government. The strike is never authoritatively attributed, nor any justification offered. Though the reported facts are sparse and murky, it is widely denounced by human rights groups and academic commentators as unlawful and unethical. How should states assess whether it reflects a lawful use of force or a violation of the U.N. Charter to which they should object? Should they be concerned that it portends unilateral action within their own borders by a state relying on undisclosed legal theories? And should the responsible state be concerned that others will cite it as precedent for future bad acts?

While governments maintain secrecy over a broad range of activities, the benefits and risks of secrecy in international affairs are greatest in the context of the use of force. With advances in technology, states can employ force far from home with increasing stealth and ease. They can conduct precision strikes remotely with unmanned aircraft, and inflict damage using cyber tools that victim states may not recognize for years, or ever be able to attribute accurately.
The political implications of secrecy in matters of national security—such as the potential for eroding public confidence and diplomatic relationships—are widely discussed. But there has been scant attention to the consequences for international law of the lack of public acknowledgement and accounting of state uses of force. To be sure, secrecy has been generally viewed as undermining the rule of law by casting doubt on whether governments comply with their legal obligations. But the issue of how secrecy affects international law itself—potentially shaping the substantive content of legal rules and in extremis undermining the vitality of the international legal framework—has been unexamined in legal scholarship. This Article takes up that issue.

This Article explores how secrecy influences international law by considering how international law-making processes are altered when a state acts “covertly”—a term used herein to identify when a state does not publicly acknowledge its conduct—and that covert conduct comes—partially or fully, accurately or inaccurately—into public light. It takes as a starting point that states sometimes conduct lawful conduct secretly and will continue legitimately to conduct operations outside of the public eye. However, future policy decisions about whether and how much to reveal about such activities should be made with an understanding of the consequences of covertness and secrecy for the international legal order.

Part I discusses the dynamics of secrecy in government policy, including the legitimate purposes and the costs of policies of secrecy. It also considers the use of covert action in foreign policy, noting that political or diplomatic interests—rather than primarily or exclusively legal interests—may lead governments to act in ways that they do not intend to acknowledge publicly. It then addresses the status of covert action under international law, arguing that there is nothing per se unlawful about conducting otherwise lawful conduct covertly, and that in the area of the use of force, international legal obligations for disclosure are limited and not necessarily incompatible with covert action. Finally, Part I briefly surveys the domestic legal frameworks for covert action in the United States, the United Kingdom, and Israel, with a particular focus on the discernable posture of each toward compliance with international law.

Part II examines how the public record relating to

1. The definition of covert action in the U.S. National Security Act, 50 U.S.C. § 3093(e) (2014), is consistent with but not exhaustive of the kind of conduct I am concerned with in this Article. See infra Part I.D.
unacknowledged government conduct, including factual allegations and legal judgments, is shaped in the absence of the covert actor's acknowledgment.² It recognizes the difficulties of credibly establishing facts and assessing the international lawfulness of covert uses of force in light of the absence of authoritative factual or legal claims by the responsible state and the possibility of misinformation from many sources.

Part III turns to how the resulting public record—however impoverished it may be—shapes international law. It establishes that secret and covert acts cannot constitute evidence of state practice that forms customary international law or reflects states’ interpretations of treaty obligations. It then considers the scenario in which covert conduct is in fact justifiable under international law, arguing that in such cases, the greatest cost to the responsible state of acting covertly is that secrecy and non-acknowledgment severely diminish its ability to shape public discourse effectively. As a result, in choosing policies of secrecy and covertness, a state effectively cedes its privileged position in articulating and developing the law to third parties.

Part III also considers the scenario in which covert actions violate international law, and argues that covert violations may be less damaging to legal rules than overt violations because they cannot constitute a legal precedent that legitimizes future conduct. In addition, ambiguity about a state’s own view of its compliance with the law is inherently corrosive to the controlling legal rules, contributing to perceptions that such rules are not obligatory and undermining a culture of legal compliance. Finally, Part III discusses cyber conduct as illustrative of many of these dynamics.

This Article aims to begin a deeper conversation than has been had to date about the substantive impact of secrecy and covertness on the law. It does not purport to address exhaustively the structural consequences of secrecy and covert action, and the theses presented herein no doubt are subject to refinement and elaboration, which I hope others will take up.

A. Terminology

The term “covert” is used here generically to denote conduct that is officially unacknowledged by the responsible state, reflecting

². The scenarios, factual allegations, legal theories, and judgments discussed herein are based on public sources, including press reporting, which may or may not be accurate. This Article neither assumes nor takes a position on the accuracy of any of the press sources cited.
secrecy on the narrow issue of attribution. Covert acts are generally conducted so as to create "plausible deniability," though to be sure mechanisms of obscuring attribution are not always effective. Covert actions discussed herein are unacknowledged operations intended to influence events in another country, conducted by any state agency or actor, or other entity acting on behalf of a state.

This generic sense of "covert" is largely consistent with but slightly broader than the U.S. statutory definition of "covert action." The National Security Act defines covert action as "an activity or activities of the U.S. Government to influence political, economic, or military conditions abroad, where it is intended that the role of the U.S. Government will not be apparent or acknowledged publicly," excluding certain categories of government conduct such as intelligence gathering and traditional diplomatic, military, or law enforcement activity. Though the term "clandestine" is often colloquially used interchangeably with "covert," the U.S. military defines "clandestine" to mean a military operation designed so as to conceal the operation itself. Clandestine, unacknowledged traditional military activities that fall outside the U.S. statutory definition of covert action could be "covert" conduct of interest to this study.

3. See S. REP. NO. 102–85, at 43 (1991), reprinted in 1991 U.S.C.C.A.N. 193, 237, available at http://www.intelligence.senate.gov/pdfs102nd/10285.pdf ("The essential element of a covert action is that the role of the United States in the activity is not apparent and not intended to be acknowledged at the time it is undertaken. The U.S., in other words, seeks a form of plausible denial to the outside world.").

4. 50 U.S.C. § 3093(e) (This section was editorially transferred from 50 U.S.C. § 413(b) in 2012.). This definition excludes, for example, surveillance activities, which are traditionally undertaken in secrecy and in a manner designed to hide attribution. "Traditional . . . military activities" are excluded from that definition, and thus from the statutory requirements for U.S. covert action, and are authorized under different U.S. legal authorities and subject to separate oversight requirements. For discussion of the convergence of "Title 10" military activities and "Title 50" intelligence activities in practice, and the potential legal implications, see Robert Chesney, Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate, 5 J. NAT'L SEC. L. & POL'Y 639 (2012). For discussion of the "traditional military activities" exception to the covert action statute, noting that both military and intelligence agencies acting under different authorities can conduct unacknowledged activities, see Marty Lederman, Secrecy, Nonacknowledgment, and Yemen, JUST SECURITY (Feb. 26, 2014, 8:11 AM), http://justsecurity.org/2014/02/26/secrecy-nonacknowledgment-yemen/.

B. Scope

This Article focuses on the use of force for several reasons. First, because article 2(4) of the U.N. Charter prohibits the threat and use of force, state uses of force necessarily have legal significance. Article 2(4) alters the default legal environment from one of permissiveness to one of prohibition, with which uses of force must be reconciled to be lawful. That is, under the Charter regime, lawful state uses of force must be justifiable in self-defense, conducted in the context of an armed conflict in accordance with the law of war, authorized by the U.N. Security Council, or undertaken with the consent of the state in which force is being used.

In addition, while states may act covertly in many ways, the use of force is, as a factual matter, simply harder to conceal than, for example, covert propaganda or covert assistance. To be sure, covert uses of force may evade recognition as state acts: An act of sabotage could appear to be an accident; an assassination could be staged as a suicide. Nevertheless, violence, death, and destruction generally attract attention and raise questions about the cause of and responsibility for the harm.

Because uses of force are readily cognizable as events with legal significance, there are inevitably efforts to assign them a legal value. Covertness and secrecy frustrate these efforts, with effects on the legal discourse that may be particularly discernable in the area of the use of force.


7. Michael Glennon identifies myriad reasons why lawyers cling to a formalist approach of assigning legal value, including aversion to the “spectrum of a ‘legal vacuum’” and the emotional and practical appeal that the clarity of such an analytic system would provide. Michael J. Glennon, The Road Ahead: Gaps, Drips, and Leaks, 89 Int’l L. Stud. 362, 364 (2013). The impulse to analyze and ascribe a legal value to reported uses of force stems from similar instincts; assimilation of an incident into the legal order by assigning it a legal value within that order has the effect of reinforcing the overarching legal framework and clarifying the content of the rules.
I. SECRECY, FOREIGN POLICY, AND THE LAW

A. Secrecy and Foreign Policy

The tension between secrecy and transparency in government policy is hardly new, and has always been particularly strained in the context of national security. Even the strongest critics of government secrecy recognize that it plays some legitimate role in the functioning of the state, beneficial both to governments and citizens.\(^8\) Secrecy permits government officials to deliberate candidly while developing the best policy options. Similarly, it affords a zone of privacy in diplomatic relationships and foreign negotiations that enhances flexibility and compromise, and enables outcomes that might otherwise be precluded by public posturing. In the military context, it protects against the transmission of crucial information to enemies. It permits governments to control the timing of disclosures in policy implementation, in military and law enforcement operations, and in areas such as in monetary policy, to prevent unfair advantages to certain groups.\(^9\) Secrecy is required to fulfill the state’s duty to protect individual privacy, including taxpayer, medical, or other personal information the state has administrative grounds to collect, and, of course, protects intelligence sources and methods.\(^10\) Unsurprisingly, there is considerable debate about the legitimate scope of each of these justifications for secrecy.

At the same time, secrecy can undermine decision-making by limiting the actors involved in vetting ideas, either incidentally or intentionally.\(^11\) In addition, secrecy may itself irrationally change the perceived value of information through what has been called the “secrecy heuristic.” People impute higher informational quality from secrecy in the foreign policy context, viewing classified material as more accurate, reliable, and useful than public information. They are

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9. W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 13 (1992); BOK, supra note 8, at 174–76.


11. See REISMAN & BAKER, supra note 9, at 14–15; BOK, supra note 8, at 195–96 (noting that Secretary of State Cyrus Vance was excluded from the final planning and decision-making for the failed 1980 covert rescue of U.S. hostages in Iran because he was known to oppose it).
also favorably inclined toward policy decisions that they believe are based on secret information. In that vein, secrecy may be used strategically to protect the government’s professional superiority in policy-making.

Secrecy can also hinder effective policy implementation, sometimes with dramatic national security consequences. The failure of the 1980 attempt to rescue U.S. hostages in Tehran, in which eight U.S. servicemen died, has been attributed to excessive and “self-defeating” military secrecy, which prevented operators from having the flexibility and communication tools to adapt to changing circumstances on the ground. Additionally, secrecy can shield

12. A series of experiments in which subjects assessed both unclassified and ostensibly declassified government policy memoranda showed that classified materials are valued more highly. Subjects asked to judge internal government memos arguing for or against a policy were told that one of the memos had been classified; participants judged the quality of the memo that had ostensibly been secret to be higher than its unclassified counterpart. Subjects also rated government decisions that they believed to be based on classified information more favorably, because they perceived the secret material to be of higher quality. Mark Travers, Leaf Van Boven & Charles Judd, The Secrecy Heuristic: Inferring Quality from Secrecy in Foreign Policy Contexts, 35 POL. PSYCHOL. 97–111 (2014); Leaf Van Boven, Charles Judd & Mark Travers, Do You Wanna Know a Secret?, N.Y. TIMES, June 28, 2013, http://www.nytimes.com/2013/06/30/opinion/sunday/do-you-wanna-know-a-secret.html.
The Bay of Pigs operation suggests one example of this bias. The CIA’s Inspector General found in an after-action report that the Agency had failed to collect adequate information about Cuban public opinion of Fidel Castro, and overlooked an extensive, publicly reported 1960 poll by an American social scientist that concluded Cubans were “unlikely to shift their present overwhelming allegiance to Fidel Castro.” Citing this incident, Senator Moynihan observed, “[I]n a culture of secrecy, that which is not secret is easily dismissed.” DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 223 (1998).

13. Max Weber has cited this phenomenon as a general bureaucratic tendency. See BOK, supra note 8, at 177. Former Attorney General Nicholas Katzenbach has criticized the sense of professional superiority resulting from secrecy as detrimental to the office of the presidency in particular. “Having almost sole access to the full range of classified information and expert opinion, Presidents are tempted to think that the opinions of Congressmen, academics, journalists and the public at large are, almost unavoidably, inadequately informed.” Nicholas de B. Katzenbach, Foreign Policy, Public Opinion, and Secrecy, FOREIGN AFFAIRS, Oct. 1973, at 1, 8 (1973). He cites the Bay of Pigs operation as an example of presidential judgment undermined by an insularity that “reduces the politically healthy feeling of being constrained by the disagreement of many of one’s peers . . . . The idea that, in an open society, one can expect to launch a covert attack on a neighboring country in total secrecy seems patently absurd.” Id. at 8, 10; see also REISMAN & BAKER, supra note 9, at 55.

14. BOK, supra note 8, at 195–96. The 9/11 Commission also identified compartmented information systems and resistance to information-sharing across agencies as a significant impediment to intelligence analysis within the U.S. government. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, FINAL REPORT 416–19 (2004) [hereinafter 9/11 COMMISSION REPORT].
government actors from accountability for corruption or poor
decisions, and fuel conspiracy theories.\textsuperscript{15} Secrecy has also been
viewed as corrosive of an individual’s moral judgment, diminishing
one’s sense of personal accountability.\textsuperscript{16}

Finally, secrecy sits uncomfortably within liberal democratic
societies, which fundamentally rely on transparency and public
engagement in both the composition and decision-making of
government institutions.\textsuperscript{17} Confidential reporting mechanisms to
congressional or special committees on secret matters are generally
viewed as limited and ineffective proxies for direct democratic
oversight of government.\textsuperscript{18}

B. Covert Action and Foreign Policy

Even if one recognizes a legitimate role for government
secrecy in order to protect deliberation, privacy, and effective policy
roll-out, why would a government need to hide its decided policy and
actual conduct, post hoc?

There is a widespread assumption that activities are
conducted covertly—that is, concealed and unacknowledged—
because they violate international law.\textsuperscript{19} In 1993, when President

\textsuperscript{15} See, e.g., Stephen Holmes, What’s in it for Obama?, 35 LONDON BOOK REV., July
18, 2013, available at http://www.blb.co.uk/v35/n14/stephen-holmes/whats-in-it-for-obama
(“[Skeptics] fear that, relieved by secrecy of having to provide plausible reasons for its
actions, the US is deploying drones mostly because it invested so much effort in developing
them.”).

\textsuperscript{16} See, e.g., Box, supra note 8, at 109, 200–01 (discussing the psychological
consequences of secrecy and isolation on individuals, noting the conditions in which Robert
Oppenheimer and others scientists continued to pursue the nuclear bomb after 1943, when it
was clear that the Germans posed no nuclear threat).

\textsuperscript{17} See, e.g., Pozen, supra note 8, at 285–92.

\textsuperscript{18} Katzenbach, supra note 13, at 14–15; see also STIMSON CTR., RECOMMENDATIONS
062414.pdf (arguing that U.S. targeted strikes using UAVs “pose[] challenges to democracy
and the American system of checks and balances” and that secrecy impedes Congressional
oversight mechanisms of U.S. military and intelligence uses of armed UAVs even where
congressional committees are fully briefed) [hereinafter STIMSON DRONE POLICY REPORT].

\textsuperscript{19} REISMAN & BAKER, supra note 9, at 13 (“The normative conclusion conveyed by
the word covert is that the action per se and the way it has been accomplished are
unlawful.”); W. Michael Reisman, Covert Action, Remarks at the International Studies
Association Annual Meeting Intelligence Section, Washington, D.C, March 29, 1994, in 20
YALE J. INT’L L. 419, 419 (1995) (observing that popular opinion is that “all covert activity,
as distinct from intelligence collection, is unlawful”); Kenneth Anderson, Targeted Killing is
Clinton was considering the legal implications of a proposed rendition with his senior staff, Vice President Al Gore reportedly exclaimed, “[o]f course it’s a violation of international law, that’s why it’s a covert action.”

Despite the widespread perception that actions are undertaken covertly because they are unlawful, the reality is far more complex. In fact, there are a range of political, diplomatic, and strategic reasons—even “quite respectable” ones—why a state may choose to act covertly that do not reflect and are not driven by the legality of the underlying act.

There are situations that are “covert by agreement,” in which diplomatic arrangements commit cooperating states to maintain secrecy. Secrecy may serve multiple states’ interests by avoiding publicity about conduct or relationships that would be unpopular with domestic constituents or other allies. A state may condition its consent to a foreign partner’s covert conduct within its territory on its own plausible deniability. Alternatively, covert agreements may permit a territorial state to take credit with domestic, public audiences for a foreign covert actor’s conduct.


21. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 224 (June 27) (dissenting opinion of Judge Schwebel) (A state may act covertly “not because it doubts—or necessarily doubts—the legality of its action but for other quite respectable reasons.”) [hereinafter Schwebel Dissent]. Respectable reasons may include diplomatic relations with the cooperating state, the desire to put pressure on the victim state, domestic politics, or Congressional oversight preferences. Id.

22. Reisman & Baker, supra note 9, at 13–14 (offering the hypothetical example that if the United States provided military assistance to Iraqi forces during the Iran-Iraq war, secrecy would have served the political interests of both cooperating states).


24. Such an arrangement has been reported in the case of certain counterterrorism activities in Pakistan. See Robertson & Botelho, supra note 23 (reporting that Musharraf asserted in 2013 that the United States was responsible for a 2004 strike that killed Nek Mohammed, a tribal leader accused of harboring al-Qaeda militants, which had been attributed to Pakistani forces at the time). A similar arrangement has been reported with
A covert actor’s non-acknowledgment of a use of force may also offer the victim state and the international community latitude to avoid escalation. An overt attack and the public rhetoric that would attend it could put greater political pressure on a victim state to respond in some fashion. Acting covertly thus may achieve a discrete military aim while otherwise preserving the strategic status quo.25 For example, the media has speculated that the Israeli government declined to confirm reported strikes in Syria in recent years in order “to avoid embarrassing Assad and sparking a potential response.”26 Because transparency typically enhances stability by putting parties on notice of others’ policies, a state acting covertly for this reason is likely to have signaled its objectives and intentions to avoid misunderstandings.27 Moreover, if the victim of a use of force knows that it was effectively caught in a wrong, it may be harder to complain about a covert act that was undertaken in response to that wrongful conduct.28

Yemen. SANGER, supra note 23, at 259.

25. See ABRAM N. SHULSKY & GARY J. SCHMITT, SILENT WARFARE: UNDERSTANDING THE WORLD OF INTELLIGENCE 75 (2002); REISMAN & BAKER, supra note 9, at 77 (Covert operations may “minimize the risk of arena escalation” and “minimize destruction of total values in dispute between elites regarding elite objectives.”); Schwebel Dissent, supra note 21, ¶ 210 (“[C]overt measures may in some circumstances be more modest, and more readily terminated, than overt applications of the use of force.”). However, the volume and pace of covert activity bear on the level of political pressure on the international community to respond. An isolated strike may be easier for the victim and the international community willfully to ignore than a full-scale covert campaign. The more extensive—or at least extensively reported—the conduct, the more difficult it is politically for other actors to turn a blind eye to it. See, e.g., STIMSON DRONE POLICY REPORT, supra note 18, at 19, 28.


27. For example, in Operation Orchard (the 2007 Israeli covert bombing of a nuclear facility in Syria), Israeli Prime Minister Ehud Olmert reportedly called Turkish Prime Minister Tayyip Erdogan immediately after the strike and asked him to convey to Syrian President Bashar al-Assad that the Israelis planned no further military action and would not publicize the event, if Syria would not. Erich Folllath & Holger Stark, The Story of “Operation Orchard”: How Israel Destroyed Syria’s Al Kibar Nuclear Reactor, DER SPIEGEL, Nov. 2, 2009, available at http://www.spiegel.de/international/world/0,1518,658663,00.html (translated by Christopher Sultan) [hereinafter Der Spiegel Report].

28. It was assessed that Syrian officials were unlikely to respond overtly to the 2007 Israeli strike on the al-Kibar nuclear facility because doing so would further expose the fact that they were in violation of their international obligations. See infra Part II.A.1; see also
Even where covert conduct has been reported widely in the media and the public has well-founded bases to infer attribution, official non-acknowledgement preserves ambiguity about the ultimate intentions of the covert actor, and can protect sources, methods, and future opportunities for action.29

Finally, certain types of conduct, such as disinformation, financial subsidization of media or dissident actors, or blackmail, may violate a foreign state’s domestic law even though it would not be contrary to international law.20 In such cases, acting covertly may be essential to the effectiveness of the operation and allows the acting state to avoid acknowledging that it has violated the host state’s law and exposing its agents to culpability.

The reasons why a state chooses to act covertly and the ultimate targets of the covertness—that is, the specific audience whose potential awareness motivates non-disclosure—are likely to shape the state’s posture toward eventual disclosure. For example, if State A acts covertly because its conduct violates international law, the factors motivating coyness might be the desires not to incur legal and political sanctions or to avoid setting a public precedent, so the target of coyness would be the international community at large. In contrast, if State B believes its conduct is lawful but is bound not to acknowledge its actions publicly by agreement with State C, it might signal a theory that would justify such conduct to the public, share information with its allies in classified channels, or revise its nondisclosure commitments to State C as circumstances change over time.


29. *See* Wilson v. CIA, 586 F.3d 171, 197–99 (2d Cir. 2009) (Katzman, C.J., concurring) (Official disclosures of unofficial publicly reported information may hinder national security by undermining the benefits of ambiguity that attend plausible deniability; provoking foreign retaliation; and impeding future intelligence gathering capabilities.). In August 2014, the White House invoked the need to preserve future opportunities in justifying its earlier non-disclosure of an attempted rescue of U.S. national James Foley and other hostages held in Syria. An official spokeswoman stated that the administration “never intended to disclose this operation” and did so only under threat of media revelations. Michael Shear & Eric Schmitt, *In Raid to Save Foley and Other Hostages, U.S. Found None*, N.Y. TIMES, Aug. 20, 2014, http://www.nytimes.com/2014/08/21/world/middleeast/us-commandos-tried-to-rescue-foley-and-other-hostages.html.

30. For examples of covert activities by strategy, see REISMAN & BAKER, supra note 9, at 11–12. While this paper focuses on the covert activity involving the use of force, certain non-violent covert activity, such as financial assistance to dissident political actors, may implicate international law principles of sovereignty and non-interference.
Covert conduct has been a historical mainstay of many states' foreign policies, at least since the Second World War, and there is reason to believe states will rely on covert activities increasingly in the future. Covert operations have become a preferred tool both of powerful states and of traditionally weaker states, who seek to increase their leverage and "level the playing field" by drawing upon new weaponry and information capabilities that are ever more widely available to more nations. Admiral James Stavridis has argued that a "new triad" of security capabilities—special operations forces, unmanned vehicles, and cyber systems—valued for their precision, flexibility, and stealth, are the kinetic tools of choice in the future. These systems enhance the capabilities of states to project power and influence abroad in targeted, discreet ways; they lower the risks to nationals of the acting state; and in some cases they can be more cost effective than traditional systems. But the very attributes of these tools that are so appealing present corresponding costs; by taking their conduct out of the public realm, states cede their influence in shaping international public opinion about their conduct, with consequences not only for the legitimacy of their actions but for the law.

C. Covert Conduct Under International Law

Is covert conduct necessarily unlawful? Richard Falk argued in 1975:

31. David F. Rudgers, The Origins of Covert Action, 35 J. CONTEM. HIST. 249, 249 (2000) ("Despite attempts to give covert action a venerable lineage, it is primarily a product of the unusual circumstances arising in the early Cold War years and a mindset developed... during the second world war.") (internal citation omitted). Quantitatively substantiating the proposition that covert action is growing in prevalence is difficult, if not impossible, as it would require reliable data over time about the volume and scope of covert activity that remains effectively concealed from public disclosure. While as noted below technological developments favor increased use of covert capabilities, it may also simply be more difficult to maintain absolute secrecy over many kinds of covert activity, so any increased reporting of alleging covert conduct does not necessarily indicate more widespread occurrence in absolute terms. See Jack Goldsmith, A Partial Defense of the Front Page Rule, HOOVER INSTITUTION (Jan. 22, 2014), http://www.hoover.org/research/partial-defense-front-page-rule.


The international law case is, in a sense, self-evident and is partially conceded by the CIA’s insistence upon secrecy and the related practice of defending itself against allegations by cover stories (i.e., lies). The secrecy/deception pattern arises in part because the behavior is inherently objectionable to a segment of domestic and, even more so, world public opinion. There is also an implicit awareness that CIA covert activities in foreign societies violate their fundamental international law rights as sovereign states.\textsuperscript{34}

Falk is certainly correct that covert conduct sometimes violates basic tenets of international law, but not that it necessarily does. Indeed, unless it would be inherently unlawful to undertake covertly an otherwise lawful act, covert conduct should be judged by the same legal standards that apply to overt conduct. Without disputing the fact that history is replete with examples of covert state activity that breach international law, the issue of legality is better isolated by asking whether international law mandates disclosure. From that point of departure, there is no general rule of law that requires states to acknowledge and justify their conduct publicly.\textsuperscript{35}

While secrecy has been a longstanding, historically accepted feature of international politics and diplomatic relations, the concept of transparency as an “unconditional virtue” has taken cultural root in many contemporary Western societies.\textsuperscript{36} The cultural proclivity toward transparency has permeated legal expectations as well, driven by human rights law and the promise of enhancing the legitimacy and effectiveness of public law. But, although “it has occasionally been qualified as a general principle of law,” the content of any such principle remains elusive, lacking in granularity sufficient to render it operational or enforceable, and “no one has (so far) had the temerity

\textsuperscript{34} Richard A. Falk, \textit{CIA Covert Action and International Law}, 12 Soc’y 39, 40 (1975). He cites the principles of sovereignty and non-intervention as commonly affronted, and states that even in cases where a foreign state acts covertly in concert with the territorial host, it may be argued that “secret authorization of foreign military and para–military action violates the principle of national self–determination that inheres in a state (or society) rather than in its government.”

\textsuperscript{35} See Reisman, Covert Action, \textit{supra} note 19, at 420 (concluding that “international legal process . . . frequently accepted or accommodated itself to . . . [covert actions]. This accommodation was most likely to occur when the evaluators held that, the covert character of the operation notwithstanding, the application of the instrument was otherwise lawful under international law.”).

to characterize transparency as a rule of customary international law.”

Although transparency as a general rule of international law could, as such, be characterized at most as emerging, it has taken firmer legal root in treaty obligations in specific areas of practice.

1. *Jus Ad Bellum*

In the area of the use of force, Article 51 of the U.N. Charter requires that states “immediately” report to the U.N. Security Council “measures taken . . . in the exercise of [the] right of self-defence,” to give the Council an opportunity itself to take action to restore international peace and security. But states have enormous latitude in determining how much detail to report. If actions in self-defense signal the start of an armed conflict, there is no expectation of—or state practice supporting—further notification of all subsequent conduct in the prosecution of the conflict.

For example, in October 2001, the United States reported to the Security Council, citing Article 51, that it and other states were taking actions in exercise of the rights of individual and collective self-defense in response to the September 11 attacks on the United States. The letter stated, “we may find that our self-defense requires further actions with respect to other organizations and other States,” effectively encompassing future conduct of uncertain scope, including the actions of other, unidentified partner states, with respect to undetermined parties. The United States has not since that time provided additional written notifications under Article 51 on its counter-terrorism operations related to the 9/11 attacks, including, for example, after the May 2011 U.S. operation in Pakistan that killed Osama bin Laden. This absence suggests that the United States may view the October 2001 notification as continuing to satisfy the reporting requirement with respect to its conduct in self-defense related to that conflict. Thus, states may view a broadly-framed

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37. *Id.* at 4–5.

38. U.N. Charter art. 51.


40. The United States’ letter to the Security Council in September 2014 notifying military actions in Syria presented a variation in this practice. That letter presents notice of and justification for U.S. actions against the Islamic State of Iraq and the Levant (ISIL). It further states, “[i]n addition, the United States has initiated military actions Syria against al-
report to the Security Council identifying a situation necessitating measures in self-defense as encompassing future related conduct, overt and covert. Moreover, nothing in Article 51 requires a state’s report to be written or explicitly styled as pursuant to Article 51, and it has been at least suggested that oral statements might satisfy the requirement. As a result, states’ actual Article 51 reporting practices—through implementation or noncompliance—appear to have preserved considerable latitude for secrecy.

What if a state does not file an Article 51 letter? In *Nicaragua v. United States*, the International Court of Justice addressed the legal implications of a state’s failure to file a written report in connection with alleged U.S. covert activity in Central America in support of the opposition to the Nicaraguan Sandinista government, or *contras*, between 1981 and 1985. The United States claimed before the Court that it provided assistance to El Salvador, Honduras, and Costa Rica upon the request of each state and in exercise of their collective self-defense. Noting that no state

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41. See, e.g., Permanent Representative of Kuwait to the U.N., Letter dated Aug. 12, 1990 from the Permanent Representative of Kuwait addressed to the President of the Security Council, U.N. Doc. S/21498 (Aug. 12, 1990) (notifying exercise of its individual and collective right of self-defense pursuant to Article 51 by requesting “some nations to take such military or other steps as are necessary to ensure the effective and prompt implementation of Security Council Resolution 661 (1990)”).

42. Schwebel Dissent, *supra* note 21, ¶ 225 (noting U.S. statements in Security Council sessions between in March 1982 and February 1984 indicating that the United States was taking “responsive” action to safeguard U.S. security interests from Nicaraguan conduct and providing assistance to friendly states in Central America).

43. Ashley Deeks, *A Call for Article 51 Letters*, LAWFARE (June 25, 2014, 6:30 PM), http://www.lawfareblog.com/2014/06/a-call-for-article-51-letters/ (noting the lack of Article 51 letters justifying state uses of force even in cases of acknowledged conduct).

44. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicaragua Merits Judgment].

45. Counter-Memorial of the United States of America (Questions of Jurisdiction and Admissibility), Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. Pleadings 2, ¶ 202 (Aug. 17, 1984) [hereinafter U.S. Counter-Memorial 2]. The United States withdrew from participation in the litigation prior to the merits phase and
had reported measures taken in self-defense at the time of the events alleged, the Court treated the lack of written notification contemporaneous with the initiation of measures as a point of evidence undercutting the plea as a matter of fact, but not foreclosing the legal availability of the defense. 46

While the political and functional importance of Article 51 reporting should not be minimized, Judge Schwebel pointed out in his dissent to the Nicaragua judgment that the failure to report a use of force in self-defense does not necessarily render the defensive conduct unlawful. The reporting provision creates a procedural rather than a substantive legal requirement for the use of force under the Charter, with the consequence that while a failure to report would constitute a violation of Article 51, it would not "deprive" a state of its right of self-defense. 47 He observed that "it is by no means clear . . . that covert actions in self-defense are prohibited," citing United Nations covert assistance during the Korean War and covert support by the United Kingdom to Malaysia against Indonesia in the 1960s as examples of such "legitimate" defensive measures. 48 The requirements of Article 51 therefore appear to have accommodated covert action, despite the reporting requirement’s aim of transparency.

did not address this issue in the proceedings. Correspondence, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Doc. 114, at 408 (Jan. 18, 1985).

46. Nicaragua Merits Judgment, supra note 44, ¶ 200 ("the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence"), ¶¶ 121–22, 235 (1986). The United States took a similar approach in citing the lack of notification to the Security Council under Article 51 as "evidence of the hollowness" of the Soviet Union’s claim that its military incursion into Afghanistan in 1979 was in furtherance of collective self-defense. Statement of U.S. Representative McHenry, Meeting of the Security Council, U.N. Doc. S/PV.2187 at 3 (Jan. 6, 1980). The Nicaragua Court was limited to applying customary international law in the case as a result of the U.S. multilateral treaty reservation, and acknowledged that the reporting requirement arose only as a matter of treaty obligation, so did not opine on whether a failure to file precludes the legality of the use of force. Nicaragua Merits Judgment, supra note 44, ¶ 56.

47. Schwebel Dissent, supra note 21, ¶ 227 (failure to report does not transform the character of measures taken from defensive into aggressive), ¶ 230 (failure to report cannot deprive a state of its inherent right to self-defense; doing so would "invest a procedural provision, however important, with a determinative substantive significance which would be unwarranted").

48. Id. ¶ 223.
2. *Jus In Bello*

There is no general obligation in the law of armed conflict\(^{49}\) to publicly disclose specific military operations, although it has been persuasively argued that transparency is important to the political legitimacy of military conduct by demonstrating compliance with the law.\(^{50}\) Indeed, commentators who argue that there is a legal obligation mandating public disclosure tend to conflate transparency with accountability.\(^{51}\) For example, former U.N. Special Rapporteur on extrajudicial, arbitrary, or summary executions Philip Alston argued in his extensive critique of U.S. “targeted killings” that international humanitarian law requires transparency. Noting obligations in the Geneva Conventions to ensure respect for the Conventions and to investigate and prosecute violations, he concludes that “governments must specifically disclose the measures that they have put in place to ensure respect for their obligations.”\(^{52}\)

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49. The “law of armed conflict” is used interchangeably with the “law of war” in this paper. Many commentators also refer to “international humanitarian law” (IHL) for the law of war; in some contexts, however, international humanitarian law denotes a broader field that encompasses law applicable to contexts of grave humanitarian concern which may occur outside of armed conflict, such as genocide and crimes against humanity.


51. For a critique of the conflation of transparency with governmental accountability in public discourse, see Steve Vladeck & Andy Wright, *Why (Some) Secrecy is Good for Civil Liberties*, JUST SECURITY (July 24, 2014, 8:18 AM), http://justsecurity.org/13189/secrecy-civil-liberties/#more-13189.

But the substantive obligations cited can be fully discharged without public disclosure of implementing measures or specific conduct; Alston’s substantial inference of a disclosure obligation has no basis in the text of the Conventions or in state practice. In fact, the virtual “silence” on disclosure obligations in the law of war reflects “a presumption favoring a State’s right to secrecy” in wartime, and it is hardly surprising that states have not undertaken treaty obligations mandating general public disclosure of their military conduct. Put simply, nondisclosure of the ways in which a government complies with its obligations under the law of war does not violate the laws of war.

Although the lex lata in the use of force does not currently entail overarching disclosure requirements, there are sparse but significant disclosure obligations in certain law of war treaties. Additional Protocol I to the Geneva Conventions requires precautionary measures in the conduct of hostilities, including that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” For state parties bound by this instrument or states which are not party to the treaty but support the principle, such as the United States, the qualification permitting derogation of advance disclosure provides operational flexibility that would likely accommodate covert conduct.

The strongest argument for an international obligation of

53. Orna Ben-Naftali & Roy Peled, How Much Secrecy Does Warfare Need, in TRANSPARENCY IN INTERNATIONAL LAW, supra note 36, at 321 (“in times of war the State’s right to secrecy assumes priority”). For a discussion of the kinds of information that states legitimately protect in conflict, see id. at 329 (at the “core of ‘national security’” is . . . “any piece of information which offers a substantial operative advantage to military rivals,”), 343 (“concealment and even misinformation are acceptable cornerstone of war tactics”).


56. The commentary to this article indicates that the qualification was included in contemplation of the need for operational secrecy, “when the element of surprise in the attack is a condition of its success.” Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 2223, available at https://www.icrc.org/ihl/COM/470-750073?OpenDocument [hereinafter AP I Commentary]. In some cases, covert operations may require such an operational element of surprise. In others, covert actors might view the policy of covertness as itself a circumstance precluding advance warning.
disclosure stems from the concept of the “right to truth” in human rights law, a corollary of which was incorporated into the law of war in Additional Protocol I. Article 32 of that Protocol addresses the “right of families to know the fate of their relatives,” presented as a general animating principle that frames further specific obligations relative to missing persons and remains of the deceased. The commentary acknowledges uncertainty as to whether it entails any operational requirements beyond those enumerated in the text of the convention. While there are clear limits on the intended scope of the right—it does not impose obligations on state parties relative to their own nationals or create any private right of action—it is difficult to square the spirit of principle with state policies that, through secrecy, misinformation, or non-acknowledgment, would deprive families members of any knowledge of “the fate of their relatives” in armed conflict.

3. International Law Permits Covertness

The challenges of disentangling the political, legal, and moral aspects of a covert action may be considerable. But as the Court in Nicaragua stressed, the international lawfulness of state conduct does not hinge on the internal, often ultimately unknowable political motives of a state. In response to Nicaragua’s claim that the United States’ assertion of self-defense was pretextual, the Court stated that if the legal conditions to act in self-defense were met, “the possibility of an additional motive, one perhaps even more decisive . . . other than that officially proclaimed by the United States, could not deprive the [United States] of its right to resort to collective self-defense.”

International law neither prohibits covert conduct *per se* nor

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57. Additional Protocol I, *supra* note 54, art. 32. The United States, though not a party to Additional Protocol I, has expressed support for this principle. See Matheson, *supra* note 55, at 424; *Panel Discussion on the Right to Truth: Statement by the Delegation of the United States of America, Human Rights Council 13th Session, U.S. MISSION GENEVA* (Mar. 9, 2010), https://geneva.usmission.gov/2010/03/10/right-to-truth/ (declaring support for the principle that “families have a right to know the fate of their missing family members”).

58. *AP I Commentary, supra* note 56, ¶ 1212 (“[A]lthough there may be a right, the content of the obligation imposed on States, on other Parties to the conflict, and on the organizations concerned, is not easy to determine.”).

59. *Id.* (“[I]t cannot be denied that there is no individual legal right for a representative of a family to insist that a government or other organization concerned undertake any particular action”); see also *id.* ¶ 1195 (affirming the provisions on missing and deceased persons do not apply relative to a state party’s own nationals).

exempts it from legal purview. 61 Covert actions may frequently violate international law, including principles of sovereignty and non-interference, and, in the context of the use of force, Article 2(4) of the U.N. Charter, among other obligations. 62 But they may not. Falk was right to flag the importance of bringing established international legal principles to bear on covert conduct. But his question “whether international law forecloses the CIA option” when it “acts to destabilize constitutionally elected governments” should be answered not by reference to the government agency actor or the lack of public acknowledgment, but to the legality of the underlying conduct. Whereas some, like Falk, seem to presume illegality from secrecy, or, like Michael Reisman, tend to treat covert activity as a species of state behavior necessitating a unique legal system of valuation, 63 this Article approaches covertness as a feature of behavior that presents challenges for evaluating the legality of the conduct. Covertness is simply an attribute of execution, a political posture of the state toward certain of its own acts—and one that is often imperfectly maintained and in all cases reversible. When covert conduct violates the law, it is the underlying activity that runs afoul of legal requirements, not the secrecy of the matter. 64 If there is nothing inherently unlawful about secrecy or non-acknowledgment, then covert conduct must be assessed by the same standards as apply to overt conduct.


62. Falk’s assertion that “authoritative legal guidelines exist and are incompatible with carrying-out in foreign societies covert operations of the sort associated with the CIA” is correct insofar as the “sort” of operations he contemplates is assassination, impermissible interventions in internal affairs, and other conduct that is internationally unlawful, without regard to whether it is undertaken secretly or publicly. Richard A. Falk, Comment, *President Gerald Ford, CIA Covert Operations, and the Status of International Law*, 69 Am. J. Int’l L. 354, 357 (1975).

63. *Reisman & Baker*, supra note 9, at 77 (“[T]he legality of any proactive covert operation should be tested by whether it promotes the basic policy objectives of the Charter, for example, self-determination; whether it adds to or detracts from minimum world order; whether it is consistent with contingencies authorizing the overt use of force; and whether covert coercion was implemented only after plausibly less coercive measures were tried.”).

64. Indeed, a great deal of secrecy often attends the ultimate motives, operational details, and legal rationales of states’ overt conduct as well. See, e.g., Naftali & Peled, *supra* note 53, at 356–57 (discussing how secrecy and noncooperation by the government of Israel impeded international efforts to assess the facts and legality of Operation Cast Lead in Gaza in 2009).
D. Covert Conduct Under Domestic Law

Given that at least some states act covertly in ways that violate international law, are the responsible governments simply indifferent to international law? Do their domestic systems permit, prohibit, or simply ignore these breaches?

As discernable from public sources, domestic legal regimes range from those that explicitly recognize the state’s authority to conduct covert action, like the U.S. statutory scheme, to those that address it implicitly, as in the United Kingdom, to those that do not, at least publicly, regulate covert action, such as in Israel. This section briefly examines each in turn, as reflective of the variety of domestic legal approaches toward covert action among states that are, by media accounts, reported to engage in covert conduct.

1. The United States

The National Security Act of 1947 established the Central Intelligence Agency (CIA) for the purpose of coordinating intelligence activities of the U.S. government. In addition to assigning the Agency the duties of evaluating intelligence relating to national security and protecting intelligence sources and methods, inter alia, the statute authorizes the Agency “to perform such other functions and duties relating to intelligence affecting the national security as the National Security Council may from time to time direct.” This catchall provision—enumerated fifth and thus often referred to as the CIA’s “fifth function”—was understood at the time by both the Congress and the Executive to include covert action, which was not identified explicitly, according to one of the chief drafters, because it was viewed as “injurious to our national interest to advertise the fact that we might engage in such activities.”

Since the inception of the CIA, debate within the United States concerning covert action “has focused not on the lawfulness of covert action but on the constitutional allocation of competence to control it.”

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65. A broader comparative survey of domestic regulatory treatment of covert action, to the extent feasible, would be a worthwhile area of further inquiry.
67. Id. § 102(d)(5).
68. Rudgers, supra note 31, at 249; see also Chesney, supra note 4, at 586–87.
69. REISMAN & BAKER, supra note 9, at 2.
generally and covert action in particular are not specifically enumerated. The President’s powers in this area derive from constitutional authorities with respect to foreign affairs and national defense, while Congress’ relevant powers include its power of the purse.\(^\text{70}\) Congressional bursts of regulation of covert action over the years, typically following on the heels of public controversy caused by the disclosure of covert conduct that is viewed as unlawful, have largely taken the form of procedural and oversight requirements rather than substantive restrictions. For example, the Hughes-Ryan Amendment of 1974 required that no congressional appropriation could be spent on covert activities “unless and until the President finds that each such activity is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress . . . .”\(^\text{71}\) Through the 1980s, the requirements of notice to Congress were refined through legislation\(^\text{72}\) and “gentlemen’s agreements” between oversight committees and the Director of Central Intelligence.\(^\text{73}\)

The Iran-Contra affair sparked public and congressional outrage that led to the reforms of the 1991 Intelligence Authorization Act, which established the modern statutory framework for covert action. The statute, which has subsequently been amended several times, defines covert action as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly,” excluding certain categories of conduct that are regulated otherwise.\(^\text{74}\) Under the statute, the President must determine that the

\(^\text{70}\) Id. at 117; \textit{SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTERIM REPORT}, S. REP. NO. 94-465, at 38–39 (1975), \textit{available at} http://www.intelligence.senate.gov/churchcommittee.html [hereinafter CHURCH COMMITTEE INTERIM REPORT].

\(^\text{71}\) Foreign Assistance Act of 1961, Pub. L. No. 93-559 sec. 32, § 661, 1795, 1804 (amended 1974); \textit{see also} Chesney, \textit{supra} note 4, at 588.


\(^\text{73}\) Id.; \textit{REISMAN & BAKER, supra} note 9, at 131–32.

\(^\text{74}\) 50 U.S.C. § 3093(e); \textit{see} Chesney, \textit{supra} note 4, at 593–97. The definition and its exclusions were intended to reflect, rather than redefine, the contemporary practice and
covert action is “necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States,” and record those determinations in a written “finding,” which must also identify which agencies of government other than the CIA, and any non-governmental parties, are authorized to fund or participate in the covert program. 75 Findings must be reported to the congressional intelligence committees in advance of the commencement of the covert activity, except in extraordinary circumstances, and the committees must also be kept “fully and currently informed” of all covert activities, including “significant failures.” 76 The executive must also furnish information about the legal basis of covert conduct, and provide additional written notification of any “significant change” or new undertaking pursuant to previously approved programs. 77

Section 503(a)(5) of the National Security Act addresses compliance with the law in its requirement that a finding “may not authorize any action that would violate the Constitution or any statute of the United States.” 78 But what posture toward international law does that signify?

Notably, the CIA’s General Counsel Caroline Krass confirmed the executive’s view that as a matter of U.S. domestic law, covert action may violate certain international legal obligations. When asked about the circumstances under which covert uses of force must comply with U.S. treaty obligations, she stated:


75. 50 U.S.C. § 3093(a). The requirement that the President record these determinations in a written instrument was intended to curtail earlier practice in which a Special Group of senior advisors assessed and authorized covert programs, and had the discretion to decide which required Presidential consultation. It foreclosed the problem of so-called “internal plausible deniability,” which diffused internal accountability by permitting the President and senior staff to obfuscate their decision-making and fostered internal miscommunication. CHURCH COMMITTEE INTERIM REPORT, supra note 70, at 9–12. Exec. Order No. 12,333, 3 C.F.R. 200 (1981) [hereinafter EO 12,333], section 1.7(a)(4), provides that all covert actions shall be conducted by the CIA (or the armed forces in time of war) unless the President determines otherwise.

76. 50 U.S.C. § 3093(b), (c).
77. 50 U.S.C. § 3093(c), (d).
78. 50 U.S.C. § 3093(a)(5). This mandate of compliance with the Constitution and U.S. statutes is itself unusual, as most legislative authorizations presume rather than explicitly require conformity with the Constitution and U.S. statutes. A related exception is Executive Order 12,333, which regulates U.S. intelligence activities generally and similarly states: “Nothing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States.” EO 12,333, supra note 75, § 2.8.
[T]he President may direct covert action to the extent authorized by Article II of the Constitution and . . . within the limits imposed by Congress . . . . [B]y [Section 503(a)(5)], Congress did not prohibit the President from authorizing a covert action that would violate a non-self-executing treaty or customary international law . . . . I am not aware of any provisions in the U.N. Charter or the Geneva Conventions that are self-executing as a matter of U.S. domestic law.79

She noted that certain non-self-executing treaty provisions may nevertheless be reflected in domestic statutes, such as the criminalization of certain violations of the 1949 Geneva Conventions in the War Crimes Statute,80 and would thus constrain covert conduct under section 503(a)(5).

The executive’s rationale for limiting obligatory performance of U.S. international legal obligations in the covert action context to self-executing treaties remains opaque. Is the omission of an explicit reference to international law in section 503(a)(5) an implicit congressional authorization to violate it?81 Does the reference to the Constitution and U.S. statute somehow capture self-executing treaty law, but filter out customary international law and non-self-executing treaties?82

A 1989 Justice Department opinion offered one executive branch view—albeit a deeply contested one—of the President’s

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80. 18 U.S.C. § 2441; see Additional Prehearing Questions, supra note 79.

81. A package of amendments proposed by Senator Barbara Boxer that would have added the words “any treaties, such as the United Nations Charter, which under the Constitution are the Supreme Law of the Land, Art. VI, cl. 2,” to this section after reference to the Constitution was defeated, evidencing that Congress’ exclusion of a reference to international law was deliberate. 136 Cong. Rec. H10020–04, H10084 (1990).

82. The Constitution’s Supremacy Clause, which states that Treaties are “the Supreme Law of the Land,” U.S. Const. art. VI, cl. 2, makes no distinction between self-executing and non-self-executing provisions.
Article II authority to violate international law in the conduct of foreign affairs. The opinion addressed whether the FBI could violate international law by forcibly abducting a fugitive abroad without the consent of the territorial host state, thereby violating customary international law principles of sovereignty and potentially also the prohibition on the use of force in Article 2(4) of the U.N. Charter. The Department of Justice advised that the President has inherent constitutional authority to violate customary international law, a proposition now fairly widely accepted.

The opinion also addressed the President’s authority to override non-self-executing provisions of treaties, stating:

Treaties that are self-executing can provide rules of decision for a United States court, but when a treaty is non-self-executing, it addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court . . . . Accordingly, the decision whether to act consistently with an unexecuted treaty is a political issue rather than a legal one, and unexecuted treaties, like customary international law, are not legally


84. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. c (1987); Jonathan Charney, The Power of the Executive Branch of the United States Government to Violate Customary International Law, 80 AM. J. INT’L L. 913 (1986) (President’s constitutional authorities, including over the conduct of foreign affairs, entail the power to violate customary international law, which is intrinsic to the evolution of customary international law); Louis Henkin, The President and International Law, 80 AM. J. INT’L L. 930 (1986) (President may act within his constitutional authorities to supersede certain international legal obligations; authorities as Commander in Chief and sole organ of foreign affairs “perhaps” permit presidential acts that violate international law). But see Michael J. Glennon, Can the President Do No Wrong?, 80 AM. J. INT’L L. 923 (1986) (Congress’ constitutional powers to define and punish limit the President’s constitutional authorities, including to violate international law without congressional authorization.). The OLC opinion appears to track Charney’s approach. See OLC FBI Opinion, supra note 83, at 169–77. Where a state acts covertly and does not intend its conduct to be acknowledged, however, the justification that an act in violation of customary international law may be taken under the authority to effect progressive developments of the law is less compelling. See Ashley Deeks, Covert Action and International Law Compliance, LAWFARE (Dec. 18, 2013, 3:35 PM), http://www.lawfareblog.com/2013/12/covert-action-and-international-law-compliance/.
binding on the political branches. The President, acting within the scope of his constitutional or statutory authority, thus retains full authority to determine whether to pursue action abridging the provisions of unexecuted treaties.  

Whether or not the logic of this opinion is still controlling in the executive branch, its conclusion is consistent with the apparent current approach that treats compliance with both customary international law and non-self-executing treaty obligations as issues of presidential discretion. When pressed about how the United States decides “when to abide by international law” in its covert conduct, Krass stated that senior U.S. government lawyers, including from the Departments of Justice, State, and Defense, review a proposed activity to ensure compliance with U.S. domestic law “and to identify any potential violations of international law.” Where an activity is assessed to be in breach of customary international law or non-self-executing treaty law, “the Director [of the CIA] is informed of the international law implications . . . to enable policy discussions regarding whether to recommend that the President nonetheless authorize the covert action.”

But even if the President does have constitutional authority to cause the United States to violate certain types of international law, that in and of itself would not explain a distinction between overt and covert conduct. Why, for example, is it commonly assumed that CIA covert action could more readily violate the U.N. Charter than may overt action undertaken by the Department of Defense? If the President’s discretion to breach certain provisions of international law stems wholly from Article II authorities, presumably that authority would apply equally in the direction of military operations and of covert conduct.

One possibility is that in areas where the President and the Congress have concurrent constitutional authorities, such as in the conduct of foreign intelligence activities, Congressional “inertia, indifference, or quiescence” enables the executive to assert its powers

85. OLC FBI Opinion, supra note 83, at 178–79 (internal citations omitted).


87. Id. at 3 (emphasis added); see also Stephen W. Preston, CIA General Counsel, Remarks at Harvard Law School (Apr. 10, 2012), available at https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html (describing legal review of hypothetical proposed covert action to “ensure that it satisfies applicable U.S. and international law”).
more strongly. Through the National Security Act of 1947 and subsequent legislation, Congress regulated the exercise of Presidential authority in conducting covert action. Congressional silence with respect to international law in section 503(a)(3) of the National Security Act could be viewed either minimally, as indifference to the violation of international law in the conduct of covert action, or more strongly as signaling ratification of such executive discretion. On such a theory, the executive’s authorities to act in violation of international law through covert action would be stronger than those available to the President acting overtly, including under traditional military authorities.

Whatever its provenance, domestic legal latitude to violate international obligations does not relieve the United States of responsibility for any breaches as a matter of international law, of course. The United States remains fully responsible for covert violations of international law, notwithstanding that they may be permissible under U.S. domestic law.

Krass’ statements suggest that where a presidential policy decision is made to undertake covert conduct inconsistent with international law, there has been consideration of the potential international legal consequences. The popular perception that acting covertly permits the U.S. government to avoid compliance with international law, therefore, reflects significant oversimplification.


90. Restatement (Third) of Foreign Relations Law of the United § 115(1)(b) (1987). The question of the Senate Intelligence Committee to Caroline D. Krass—“how does the U.S. decide when to abide by international law and when it does not apply?”—underscores the importance of decoupling domestic and international legal requirements in evaluating the legal status and implications of U.S. covert actions. Krass QFRs, supra note 86, at 3. Krass’ statements indicated that the U.S. government always abides by international law in its covert conduct where the law in question is a self-executing treaty or otherwise incorporated into U.S. domestic statute—that is, where U.S. domestic law mandates compliance. Id. at 3–4. Compliance with customary international law and non-self executing treaty law that is not otherwise incorporated into domestic law, however, is treated under U.S. domestic law as a matter of policy discretion for the President. But international law applies in all circumstances, and the United States can be held liable under international law for any covert breaches.

U.S. domestic law does not permit the United States to ignore international law wholesale in the conduct of covert action and acting covertly does not absolve the United States of international responsibility for its conduct.92

2. The United Kingdom

In the United Kingdom, the Intelligence Services Act of 1994 identifies two functions of the Secret Intelligence Service (SIS), its external intelligence agency: “to obtain and provide information relating to the actions or intentions of persons outside the British Islands” and “to perform other tasks relating to the actions or intentions of such persons.”93 The functions are exercisable only “in the interest of national security, with particular reference to . . . defense and foreign policies,” for economic interests, or to prevent or detect “serious crime.”94 The Secretary of State must be satisfied that authorized activities are necessary within the mandate of the Intelligence Service, and that the “nature and likely consequences” of such acts will be “reasonable”; authorizations may have effect for six months and are extendable.95 Significantly, section 7 of the Act exempts from civil and criminal liability those individuals who commit acts outside the British Islands that are authorized by the Foreign Secretary and would otherwise incur legal liability in the United Kingdom.96

The broad residual function of the SIS to perform “other tasks” related to foreign persons roughly resembles the “fifth function” authority underlying the CIA’s mandate to engage in covert action. Coupled with the immunity provisions in section 7, it has been understood to create a permissive legal framework that

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92. The international law effects of acting covertly are discussed further. See infra Part III.


94. Id. § 1(2).

95. Id. § 7(3–7); see also John Wadham, The Intelligence Services Act of 1994, 57 Mod. L. Rev. 914, 918–19 (1994) (noting that proposals to include clear, guiding principles explicitly in the act were debated in both the House of Lords and the House of Commons but were rejected by the Government).

96. Intelligence Services Act 1994, § 7(1).
empowers the government to authorize individuals to engage in conduct that would otherwise violate the law. In contrast to the U.S. National Security Act, the Intelligence Services Act does not identify whether there are any laws—domestic or international—that are in effect non-derogable in the performance of “other tasks” for purposes of section 7 immunity. The statutory framework thus appears to permit the Secretary of State to direct actions that would otherwise violate the law, including international law.

3. Israel

If the United Kingdom’s public acknowledgement and regulation of covert activity are considerably more discreet than the U.S. statutory framework, Israel’s contemporary posture is remarkably candid about the function and objectives of its covert programs while maintaining almost complete opacity about their legal status and internal regulation.

Israel’s Mossad, also called the Israeli Secret Intelligence Service, is responsible for foreign intelligence collection and “special covert activity outside Israel’s borders.” Established by Prime Minister Ben Gurion in 1949, ostensibly by secret fiat, it was originally administratively embedded in the Foreign Ministry because Ben Gurion “objected in principle to public acknowledgment of the existence of a security and intelligence service,” but its director took instructions from and reported to the Prime Minister only.

In contrast, the Mossad today is hardly coy about its mission and objectives. Its website identifies its “most prominent” areas of work as including “[c]overt intelligence gathering beyond Israel’s borders”; “[p]reventing the development and procurement of non-

97. See Wadham, supra note 95, at 922–23 (describing section 7 as “the statutory equivalent of James Bond’s ‘license to kill’”); Shlomo Shpiro, Parliamentary and Administrative Reforms in the Control of Intelligence Services in the European Union, 4 COLUM. J. EUR. L. 545, 573–574 (1998).

98. It is of course possible that there are nonpublic regulations or policies that further limit the Secretary’s discretion under the statute. The Foreign Secretary’s grants of immunity under section 7 are “normally limited to specific acts such as theft, payment to an agent and bribery,” according to media reports. Duncan Gardham, Does MI6 Have a License to Kill?, TELEGRAPH, Dec. 3, 2012, http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/9699795/Does-MI6-have-a-licence-to-kill.html.


conventional weapons by hostile countries”; “[d]eveloping and maintaining special diplomatic or other covert relations”; and “[p]lanning and carrying out special operations beyond Israel’s borders.”\textsuperscript{101}

The legal foundation of and limits on the Mossad are less transparent. The authority of the government to conduct foreign intelligence collection and activities derives from the Israeli Basic Law, which authorizes the government to carry out functions not “entrusted to any other authority,” but does not identify specific agencies or their mandates.\textsuperscript{102} Public reporting indicates that the appointment of the Mossad’s director, as well as oversight of the agency’s operations, remain the sole purview of the prime minister. The Knesset’s Subcommittee for Intelligence and Secret Services is notified of activities after the fact and may undertake review of specific operations but its authority appears limited to issuing recommendations.\textsuperscript{103}

There have been periodic calls for legislation to govern the Mossad, including in 2002 when comprehensive legislation was enacted addressing, for the first time, the internal security and intelligence agency, known as the Shabak or Shin Bet.\textsuperscript{104} Despite

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\item[101.] About Us, MOSSAD, https://www.mossad.gov.il/eng/about/Pages/default.aspx (last visited May 17, 2015).
\item[103.] See Segal, supra note 102. For example, the Subcommittee conducted an investigation of a 1997 operation in Amman, in which Mossad agents poisoned Hamas leader Khaled Mashal, but were apprehended afterward by Jordanian security services; the director of Mossad flew to Amman with an antidote and negotiated the return of the agents in exchange for the release of a number Hamas’ prisoners. JERUSALEM GOVERNMENT PRESS OFFICE, REPORT OF THE COMMISSION CONCERNING THE EVENTS IN JORDAN SEPTEMBER 1997 (1998), available at http://fas.org/irp/world/israel/ciechanover.htm.
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occasional efforts in the Knesset to advance such legislation, regulation of the Mossad remains either classified or absent. The legal parameters of Israeli covert conduct, including whether compliance with international law is required, therefore remain unclear to the public.

II. ASSESSING COVERT CONDUCT

In an ideal case, a state using force or otherwise intervening in foreign countries would offer a public justification, asserting the salient facts it relied upon in deciding to act and its legal claim of right. When a state acts covertly, no such explicit, comprehensive justifications are forthcoming. But covert conduct is of course hardly always a well-kept secret.

Covert programs and conduct that successfully evade public reporting are “deep secrets,” or matters about which those who are unwitting do not know they do not know. Even if covert action results in known effects—say, a ship burns down or a weapon malfunctions—it remains deeply secret if there is no public speculation about the state’s involvement. In contrast, “shallow

http://www.shabak.gov.il/English/about/Pages/TheISAStatute.aspx (last visited May 17, 2015).


106. Consider, for example, the presentation given by State Department Legal Adviser John Stevenson justifying U.S. operations in Cambodia against North Vietnamese troops and bases, which detailed the factual context of the decision to use force, efforts exhausted to avoid forceful means, the international legal rationale, and the limited scope, nature, and duration of the measures undertaken. Press Release, U.S. State Dept’, U.S. Statement on Issues of International Law in Cambodian Incursion (May 30, 1970) (No. 166), reprinted in 9 I.L.M. 840 (1970).


secrets,” are secrets the existence of which is known, or at least suspected, while the specific content remains obscured. Media reporting that discusses alleged covert conduct elevates deep covert secrets to shallow ones, putting the public on notice that there is—or may be—a category of government practice and policy that is being concealed from them. Accretions of information or allegations may incrementally diminish a secret’s depth, until in some cases it may be considered an “open secret” even if it continues to be unacknowledged. Thus, covertsness and secrecy are distinct characteristics, but the latter has traditionally attended the former as secrecy facilitates the masking of unacknowledged programs.

Even when covert conduct becomes an “open secret,” the responsible actor cannot—at least publicly and for attribution—offer any explanation of the justification for the action, or any description of what occurred, why, under what circumstances, and to what effect. This part considers the composition of the public record of factual allegations and legal judgments when covert conduct ascends from the depths to shallower levels of secrecy. The public record in such cases—accurate or inaccurate—has dynamic effects on international law.

A. Establishing Covert Facts

1. Development of a Public Factual Narrative

In the absence of the acting state’s announcement and explanation of its use of force, the media typically have the lead in developing and disclosing a narrative about covert conduct. Reports may draw from local eyewitnesses, government sources, former government officials, victim and third state reactions, and other investigative sources, such as nongovernmental organizations. The challenges of obtaining and corroborating information are likely to be significant. Information may be provided selectively or inaccurately, and actors may condemn publicly what they condone or even

109. Pozen supra note 8, at 274 (“A state secret is shallow if ordinary citizens understand they are being denied relevant information and have some ability to estimate its content.”).

110. Id. at 271 n.45 (Open secrets are “those about which the entire community knows a tremendous amount but has no official confirmation. . . . These are still secrets, in the thin sense that the government will not substantiate the information.”).

111. See Lederman, supra note 4. Governments often keep information about overt conduct secret as well, such as intelligence upon which military judgments are made and the legal judgments and factual details relating to specific operations.
privately assist. Third party providers of misinformation may be aware that the covert actor is ill-positioned—by its own design, of course—to refute such claims effectively. In sum, reports of covert conduct may be incomplete or replete with disinformation.112

Victim states are naturally strategic in their public reaction to a covert incident. While in some circumstances they may be best served to ignore or disavow an incident altogether,113 they might falsely or selectively characterize events to favor their political interests. After the reported Israeli covert strike on al-Kibar in 2007, Syria underreported the damage wrought in an attempt to mask the fact that it was constructing a nuclear facility in violation of its commitments under the Treaty on the Nonproliferation of Nuclear Weapons. When Syria complained to the United Nations that Israel had breached its airspace and committed acts of “aggression,” it stated that “[a]s the Israeli aircraft were departing they dropped some munitions but without managing to cause any human casualties or material damage.”114 But imagery of the area and an investigation by the International Atomic Energy Agency—which concluded the structure was “very likely” a nuclear reactor115—indicated that a sizable installation had been bombed and later demolished, and subsequent press reports estimated that there were at least ten casualties.116

Friendly governments who are privy to shared intelligence may leak information, with or without the covert actor’s approval. In some cases a friendly state may seek to serve as a proxy defender of the act; in others such leaks may merely sour relations with the covert actor. U.S. officials have reportedly provided the media information about alleged Israeli covert strikes, both at the time of the 2007

112. See Reisman & Baker, supra note 9, at 48.
113. See supra Part I.B.
116. According to some reports, there were up to three dozen civilian casualties, including North Korean nationals who were advising Syria on the development of the facility. Ronen Bergman, The Secret War With Iran 361 (2008); David Makovsky, The Silent Strike, New Yorker, Sept. 17, 2012, available at http://www.newyorker.com/magazine/2012/09/17/the-silent-strike. In 2009, Syrian President Assad conceded that the Israelis bombed a military installation but continued to deny that it was a nuclear plant. Der Spiegel Report, supra note 27.
strikes in Syria and more recently.\textsuperscript{117}

Acting covertly diminishes—though does not eliminate—the responsible state’s ability to establish and shape the factual narrative. If public interest in covert allegations of covert conduct gathers steam, the covert actor will come under increasing pressure to address the matter. Historically, governments were loath even to acknowledge that they engaged in covert activity, especially in peacetime.\textsuperscript{118} Since the Second World War, however, the United States and Israel at least have reversed course and openly defended their capability and willingness to undertake covert action.\textsuperscript{119}

When it comes to specific allegations, however, the hallmark of covert conduct is that the acting state does not acknowledge it and indeed may deny it. Some states, including the United States and Israel, typically offer “no comment” in responding to specific allegations of intelligence activities or certain military conduct.\textsuperscript{120} Many public officials are loath to lie affirmatively on the record, which would invite countervailing leaks and ruin personal

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\textit{119. In 1974, President Ford stated, “It’s a recognized fact that historically as well as presently, [covert] actions are taken in the best interests of the countries involved.” REISMAN & BAKER, supra note 9, at 7. President Reagan echoed this statement in 1983: “I do believe in the right of a country when it believes that its interests are best served to practice covert activity.” Id. The Chief of Staff of the Israeli Defense Forces has spoken publicly about the reach of Israeli forces, intimating “dozens of secret activities” ongoing, “close range operations and long-range ones—Iran, and so on. These are not areas that are beyond the IDF’s reach.” Adi Sterman, Israel Can Operate in Iran If It Needs To, IDF Chief Says, TIMES OF ISRAEL, Mar. 19, 2014, http://www.timesofisrael.com/israel-can-operate-in-iran-if-it-needs-to-idf-chief-says/}.}
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\textit{120. The standard practice of both the Defense Department and the Central Intelligence Agency appears to be to decline to comment on allegations about specific operations. See Marty Lederman, Major Development Concerning Transparency of the Use of Force in Yemen, JUST SECURITY (May 14, 2014, 9:07 AM), http://justsecurity.org/10821/major-development-transparency-force/ (noting that since Vietnam the Defense Department will not issue false denials but continues, like the CIA, neither to confirm nor deny its involvement in certain cases). Israel also maintains a “policy of ambiguity.” See Amir Oren, Israel’s Military Censorship Died When Barak Opened His Mouth About Syria, HAARETZ, Feb. 4, 2013, http://www.haaretz.com/opinion/israel-s-military-censorship-died-when-barak-opened-his-mouth-about-syria.premium-1.501431 (“[D]on’t confirm, but don’t lie.”).}
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credibility. To maintain a blanket “no comment” policy therefore both avoids putting officials in a position where they must lie to avoid acknowledgment and maintains strategic ambiguity.

Nevertheless, states acting covertly have a complex range of incentives. Policymakers may wish to act covertly and “at the same time want the world—and often need the world—to know of their successes.” To address both desires, states have a variety of tools to transmit information to the public record, often while maintaining formal covention: Leaks, plants, “pleaks,” partial disclosures, and denials.

Government officials can surreptitiously filter facts to the public through leaks, plants, and what David Pozen has dubbed pleaks. Leaks are unauthorized disclosures, and plants are disclosures approved—at least informally—at senior levels. Pleaks, inhabiting a gray zone between the two, are “quasi-authorized” disclosures that are not explicitly blessed but may be understood to fall within the pleaker’s discretionary purview, and are often tolerated. Disclosures of these kinds may serve a variety of functions. They permit the government to keep the public “minimally informed” and to characterize events “in a manner designed to build support”; they may also “signal [the government’s] respect for international law” by suggesting a legal theory or the cooperation of other states.

The lack of official public acknowledgement, however, avoids revealing more than desired—and, more importantly, ensures compliance with agreements with foreign governments that are conditioned on covention. Unofficial disclosures also permit foreign governments who wish not to engage on the matter to ignore it. Such disclosures permit governments to contribute to the factual record and manage certain dimensions of the public’s need for information and accountability “without incurring the full diplomatic, legal, or political risks that official acknowledgement may entail.”

121. As a matter of personal reputation and credibility, government officials are generally likely to be reluctant to make false denials of specific allegations if questioned by host governments abroad or by diplomatic interlocutors. Instead, they may resort to evasive tactics, such as avoidance, feigning ignorance, or deferring a response “pending consultations with Washington.”

122. Glennon, supra note 7, at 383.


124. Id. at 560.

125. Id.

126. Id. at 561.
Leaks may also stem from insiders who disagree with the chosen policy and seek to bring public attention and political pressure to bear to change course. At least in the United States, a general disinclination to prosecute leakers—in part perhaps due to the cost of exposing classified material during litigation—coupled with the difficulty of identifying the leaker in many cases, effectively preserves ambiguity about whether the disclosure is sanctioned or rogue.127

In some circumstances, governments may make careful official disclosures that bear on alleged covert conduct, such as statements of fact attenuated from any particular conduct. Information may be presented at a high level of generality, such as the United States’ acknowledgement that it conducts targeted lethal operations against al-Qaeda and associated forces outside of areas of active military hostilities.128

Officials may also publicly assert specific facts that could support a political or legal justification for a particular action, without acknowledging it. When Anwar al-Aulaqi was reported killed in September 2011, President Obama publicly acknowledged his death and described Mr. al-Aulaqi’s leadership role in al-Qaeda in the Arabian Peninsula and certain specific actions in furtherance of attacks on U.S. citizens. The same facts were cited when the United States ultimately acknowledged a role in his death and offered a legal justification in 2013.129 Formal disclosures may be carefully crafted to support a public political objective while preserving the covertness of any related program.130

127. Id. at 562–63.


130. Some civil society groups have criticized rather than welcomed fragmentary formal disclosures, concerned that they are misleading in their selectivity. See, e.g., Jameel Jaffer, Selective Disclosure About Targeted Killing, JUST SECURITY (Oct. 7, 2013, 9:25 AM),
For governments that typically offer “no comment,” it is notable when they affirmatively deny a particular allegation. For example, Israel’s policy of strategic ambiguity generally extends to its nuclear capability, targeted killings abroad, and other external counterterrorism operations. Notably, however, when Hezbollah publicly attributed the death of its leader Hassan Lakkis to Israel, the Israeli government formally disavowed its involvement; the Foreign Ministry spokesman flatly told the media, “Israel has nothing to do with this.”

Denials are unlikely to be made lightly as they undercut the future efficacy of the “no comment” policy, recasting it from a position of inscrutability which maintains factual neutrality to one imbued, if ever so slightly, with affirmation. Certainly there may be political reasons why it is more important to address some allegations than others—in the case of Lakkis, the risk of Hezbollah’s retaliation may have been compelling—but the cost may be to suggest to some observers that a state tacitly accepts the publicly drawn narrative, when it does not deny it.

Governments naturally resist compulsory disclosures about covert activity—records relating to covert conduct are generally exempt from “freedom of information” laws—but may voluntarily, in their discretion, declassify information about covert activities well after the fact. The CIA has indicated that it continually reviews its materials for declassification and contribution to the Foreign Relations of the United States (FRUS) series published by the U.S.


132. In the United Kingdom, information supplied or relating to the SIS is exempted from the Freedom of Information Act. The Freedom of Information Act, 2000, c. 36 §23 (Eng.). In the United States, properly classified national security and foreign policy information, including that relating to covert action, is also generally exempt from disclosure through FOIA. 5 U.S.C. § 552(b)(1); Exec. Order No. 13,526, 3 C.F.R. § 1.4 (Dec. 29, 2009) (identifying covert action information as properly withheld under § 552(b)(1)). Litigation efforts by journalists and civil society groups to compel disclosure relating to U.S. covert conduct have historically been rejected, though recent litigation indicates that voluntary government disclosures can waive those protections. See infra Part II.B.
Department of State. Such declassification policies appear, at least sometimes, to bear fruit.

In the United States, engagement with the Congress yields significant disclosures, not only through congressional leaking but also through formal oversight investigations of covert action, which may be released publicly. The 1975 Church Committee Report, which led to the executive ban on assassinations, and the congressional investigation into the Iran-Contra affair are preeminent examples of extensive congressional investigations that yielded substantial public reports. The report of the Senate Select Committee on Intelligence on CIA detention and interrogation after 9/11, portions of which were released in late 2014, will likely be viewed as the contemporary analogue. Such congressional investigations have the benefit of information and access provided by the executive, though they nevertheless have limitations, due to both intentional and inadvertent evidentiary deficiencies. For example, the Church Committee noted that its fact-finding was impeded in part

133. The CIA and the State Department agreed to a “general presumption that [the FRUS series] will disclose for the historical record major covert actions undertaken as a matter of U.S. foreign policy” and that decisions not to declassify particular cases “will be made only if there is reason to believe that disclosure would cause damage to current national security interests or reveal intelligence sources and methods or otherwise reveal information protected by law.” Remarks of Brian Latell, Director, Center for the Study of Intelligence, CIA Support for Foreign Relations of the United States, in NAT’L ARCHIVES (July 24, 1996), available at http://fas.org/sgp/othergov/latell.html. The SIS is also generally exempt from legislation that requires government records to be transferred to the National Archive, though it has permitted disclosure of some material despite a general policy against doing so. See SIS Archive and Records Policy, SIS, https://www.sis.gov.uk/our-history/archive.html (last visited May 17, 2015).


135. See CHURCH COMMITTEE INTERIM REPORT, supra note 70; CHURCH COMMITTEE FINAL REPORT, supra note 89.


due to lapses of time, the challenge of distinguishing officials’ recollections from speculation, and that “ambiguities in the evidence result from the practice of concealing CIA covert operations from the world and performing them in such a way that if discovered, the role of the United States could be plausibly denied.”138 While such reports may not necessarily be viewed by the executive as definitive or impartial accounts, they are likely to be the most complete record available to the public.

Finally, former government officials often supplement the record in important ways. They can shed light on the facts as understood by government policymakers at the time, the political considerations and power struggles intrinsic to policy decisions, and the relevant understandings with other states. They are often willing not only to share their recollections with journalists to help produce “insider” accounts of secret government deliberations, but often also to address such matters explicitly in their own names.139 Drawing again from Operation Orchard, while earlier journalists’ accounts asserted that the United States and Israel acted jointly, or at a minimum that the United States consented to the Israeli strike given its proximity to Turkish military bases,140 more recent former official disclosures suggest that the United States balked at the operation and Israel ultimately acted unilaterally.141 Such variations in accounts are

138. CHURCH COMMITTEE INTERIM REPORT, supra note 70, at 3; see also IRAN-CONTRA REPORT, supra note 136, at xvi (noting that NSC shredding of documents and the death of CIA director Casey foreclosed crucial evidence that might have clarified discrepancies in witness testimony).


140. Follath & Stark, supra note 27; see also BERGMAN, supra note 116, at 360 (describing the affirmative decision to strike as being taken by both Israel and the United States).

141. In 2013, former deputy National Security Adviser Elliot Abrams wrote that “[t]he Israelis did not seek, nor did they get, a green or red light from us. Nor did they announce their timing in advance; they told us as they were blowing up the site. Olmert called the president on September 6 with the news.” ELLIOT ABRAMS, TESTED BY ZION: THE BUSH ADMINISTRATION AND THE ISRAELI-PALESTINIAN CONFLICT (2013), reprinted in Bombing the Syrian Reactor: The Untold Story, COMMENTARY, Feb. 1, 2013, http://www.commentarymagazine.com/article/bombing-the-syrian-reactor-the-untold-story/; GEORGE W. BUSH,
relevant not only to political history, but bear on fundamental legal questions of liability.

While according to some, the United States has a history of "permissive neglect" in sanctioning leaks,142 some states have taken more stringent measures to discipline unauthorized disclosure of classified material. In Israel, longstanding censorship laws require any media outlets that originate in Israel to vet publications addressing certain national security topics with the Office of the Military Censor. The government’s discretion was significantly limited in 1988, when the Israeli Supreme Court ruled that censorship must be based on "near certainty" that disclosure would tangibly harm national security.143 Censorship has reportedly decreased considerably since that ruling, though the procedures remain in place. In any event, many media outlets circumvent the censor by citing foreign media accounts of alleged covert conduct.144 The Israeli government has also been criticized for enforcing nondisclosure standards selectively to permit acknowledgment of covert conduct when it serves the government’s political interests.145

One consequence of a covert posture is that public factual narratives relating to an event are often shaped in the first instance by third parties, including critics and, if any, proxy defenders. The covert actor can compensate partially for public silence with

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145. See Oren, supra note 120. Another example of the government’s selective censorship is its apparent approval of a broadcast disclosing that Netanyahu had undertaken covert operations in Egypt. Following public criticism of Netanyahu as an indecisive and "reluctant" leader, an Israeli news channel (which would be subject to censorship rules), ran a flattering story which stated Netanyahu’s covert operations in Egypt "exhibited a great ability to take bold decisions in unusual circumstances." Netanyahu Ordered Covert Operations in Egypt After the Revolution, Report, MIDDLE EAST MONITOR (June 15, 2014, 1:54 PM), https://www.middleeastmonitor.com/news/middle-east/12123-netanyahu-ordered-covert-operations-in-egypt-after-the-revolution-report.
disclosures that are selective or surreptitious, but these will lack the weight, credibility, and impact of formal, thorough explanations. Reporters and non-governmental organizations must work with the information made available to them, and, acting in good faith, may become pawns for replicating partial truths or misinformation, or characterize allegations in ways that reflect their own agendas. A more comprehensive record of covert events may take years, even decades, to emerge. In the interim, however, the public record that takes shape—however flawed or incomplete—will form the basis for legal judgments by third states, the public, and even, in some cases, courts.

2. Court Adjudication of Covert Facts

For a variety of jurisdictional and evidentiary reasons, it is rare for covert conduct to be adjudicated in court. However, there is a small—and growing—body of cases in which litigation produces a factual record of covert action with the authoritative imprimatur of judicial decision. Covert actors facing such litigation, if they are not in a position to acknowledge and defend their conduct, forfeit their ability to shape the court’s factual and legal judgments.

The Nicaragua case in the International Court of Justice (ICJ) is the pre-eminent example and stands as a stark warning to any state that may think its covert conduct can be absolutely shielded from judicial scrutiny. The ICJ there had the unenviable task of adjudicating alleged U.S. covert activity in the wake of the United States’ withdrawal from proceedings before the merits phase. While the Court had been faced with non-appearing state parties previously, Nicaragua presented unusually complex factual challenges and the Court adopted evidentiary methodologies—including its reliance on media reporting and treatment of a

146. The United States was careful to separate discussion of intelligence matters from its explanation for withdrawing, but it pointed to the difficulty of adjudicating the case in light of the classified dimensions by stating that its evidence of Nicaragua’s aggression was “of a highly sensitive intelligence character,” which it would not disclose to the public or before the two judges on the Court from Warsaw Pact nations. DEPT. OF STATE, DEP’T ST. BULL. NO. 2096, MAR. 1985, STATEMENT ON THE U.S. WITHDRAWAL FROM THE PROCEEDINGS INITIATED BY NICARAGUA IN THE INTERNATIONAL COURT OF JUSTICE, JAN. 18, 1985, at 64, reprinted in 24 I.L.M. 246, 248 (1985).

147. See Nicaragua Merits Judgment, supra note 44, ¶ 27 (noting non-appearing State parties in the Fisheries, Nuclear Tests, Aegean Continental Shelf, and Diplomatic and Consular Staff in Iran cases). For a comprehensive and detailed analysis of the Court’s evidentiary powers and practice through the Nicaragua decision, see Keith Higlet, Evidence, the Court, and the Nicaragua Case, 81 AM. J. INT’L L. 1 (1987).
government's refusal to comment as an admission—of particular significance to future litigation involving covert conduct.

Following the U.S. withdrawal from the litigation, the Court was permitted to render a judgment for Nicaragua so long as it could "satisfy itself . . . that the claim is well-founded in fact and law." U.S. nonparticipation "depriv[ed] the Court of the benefit of its complete and fully argued statement regarding the facts" and was widely viewed as having "forced the Court into an impossible corner." Nevertheless, the Court has broad evidentiary powers and discretion to make ad-hoc determinations about admissibility, suitability, and probative value of evidence. It stated that it sought to consider fairly the positions of both parties, without prejudicing Nicaragua or offering advantage to the United States.

Nicaragua's evidence consisted largely of U.S. sources, including witness testimony of a former CIA official, leaked classified U.S. government documents, and statements of U.S. officials reported in the media. The Court also drew upon submissions of the United States in the preliminary phase of proceedings and other public U.S. statements, and it accepted material transmitted by the United States to the Court outside of regular procedures. It recognized the need to exercise "necessary critical scrutiny" and sought to act as a "counter-advocate" to Nicaragua in order to test the evidence.

148. Statute of the International Court of Justice art. 53(2), June 26, 1945, 59 Stat. 1055. The Court interpreted this standard to require that the claims be factually supported by "convincing evidence." Nicaragua Merits Judgment, supra note 44, ¶ 29.

149. Id. ¶ 57.

150. Highet, supra note 147, at 36.

151. Id. at 9, 17.


153. Id. ¶¶ 66–68; Thomas M. Franck, Some Observations on the ICJ's Substantive and Procedural Innovations, 91 Am. J. Int'l L. 116, 117 (1987) (noting Nicaragua's allegations were substantiated "almost entirely with evidence provided by Americans, ranging from statements made by the President to assertions by members of Congress, a former CIA agent, journalists, academics and human rights investigators").


155. Id. ¶ 73 (U.S. representatives delivered a State Department report concerning U.S. policy toward Nicaragua to the Court's Registry "to be made available to anyone at the Court interested in the subject."). The Court observed such contributions were common among State parties who declined to appear: a non-appearing State party "frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules." Id. ¶ 31.

156. Nicaragua Merits Judgment, supra note 44, ¶ 69; Highet, supra note 147, at 2.
In evaluating the evidence, the Court relied on a sort of hierarchy of sources, with what it called “matters of public knowledge” at the top, identified largely through press reporting. A distinction that eluded clear application in its treatment of the evidence. Nicaragua’s counsel rightfully observed that “there is no rule, as Justice Frankfurter used to say, that judges must pretend to be ignorant of what everyone else knows.” When the conduct in issue is alleged covert activity, however, the public narrative that “everyone knows” is due a healthy skepticism.

The United States had raised concerns about the availability of reliable, probative evidence in its jurisdictional submission, arguing that neither party in an ongoing armed conflict can be expected to disclose sensitive information, and alluded to heightened complexity of source credibility and motives in situations where covert conduct is alleged. But the void created by a silent state compels courts to turn to other sources, with the perverse result that media accounts, which might not rate admission in a traditional

157. Nicaragua Merits Judgment, supra note 44, ¶ 63; Hight, supra note 147, at 33, n.160 (describing such matters to be “notorious or universally known,” of which the Court can effectively take judicial notice). The Court’s willingness to find facts of “public knowledge” based on press reporting had been applied to the favor of the United States in the Hostages case. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 9–10, ¶¶ 11–12 (May 24) [hereinafter Hostages Case]. In Nicaragua, the Court was less comfortable where it was asked to impute legal liability and, for example, declined to find the evidence sufficient to conclude that the United States exercised such control over the contras to impute U.S. liability, or that the CIA was responsible for publication of Freedom Fighter’s Manual based solely on press reports. Hight, supra note 147, at 41.

158. Id. at 20; Nicaragua Merits Judgment, supra note 44, ¶ 62.


160. See supra Part II.A; see also Counter-Memorial of the United States (Questions of Jurisdiction and Admissibility), 1984 I.C.J. Pleadings 3, ¶ 523 (maintaining “newspaper accounts concerning what may or may not be taking place are inherently unsatisfactory even as historical, let alone legal, evidence”) [hereinafter U.S. Counter-Memorial 3].

161. Id.

162. In recent FOIA litigation, a U.S. district court chastised the United States for failing to provide certain classified material about Anwar al-Aulaqi, which not only antagonized the judge by “[m]aking this case unnecessarily difficult,” but jeopardized the ruling, as the Court indicated it would have denied the government’s motion to dismiss, had it “not [been] able to cobbled together enough judicially-noticeable facts from various records.” Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 81 (D.D.C. 2014).
adversarial contest, were legitimated through the Court’s reliance on them.

Next in the hierarchy, the Court credited statements deemed to be admissions. It declined to treat the U.S. claim of collective self-defense in the preliminary phase as itself constituting a full admission of all the conduct alleged, as Nicaragua had urged. Rather, it recognized that while self-defense is typically asserted to excuse otherwise wrongful conduct, the United States had not identified the specific measures it had taken in self-defense and could not simply be deemed to have admitted any and all actions alleged. Nevertheless, the Court went on to note that the self-defense claim was “certainly a recognition as to the imputability of some of the activities complained of.”

In evaluating particular allegations, the Court held that statements against interest made by senior government officials could be considered admissions. The Court’s assessment of what constituted an admission included U.S. non-denials of allegations made by media or other public sources—an approach that rejects the neutrality of the no-comment posture and effectively forecloses its function. In its most astonishing inference, the Court treated a “no-comment” by President Reagan when asked about a specific alleged attack as an admission of U.S. involvement in the event.

The U.S. decision not to participate in the merits proceedings—a self-inflicted and likely decisive handicap, perhaps intended to delegitimize the entire proceedings—precluded it from presenting and challenging evidence directly. It is difficult to fault the Court’s increased reliance on circumstantial evidence and inference in these circumstances. While some commentators have


164. Id. The U.S. Counter-Memorial acknowledged that it had provided certain assistance, largely economic but including military assistance, to El Salvador, but nowhere addressed specific allegations of military or covert activities. U.S. Counter-Memorial 3, supra note 160, ¶ 195 n.2.

165. Nicaragua Merits Judgment, supra note 44, ¶ 74.

166. Id. ¶ 89; Hightet, supra note 147, at 33, 36–37, 37 n.177.

167. Nicaragua Merits Judgment, supra note 44, ¶ 83 (“[T]he President’s refusal to comment . . . can, in its context, be treated as an admission that the United States had something to do with the Corinto attack.”). The Court generally declined to credit either government’s official statements favorable to their claims, however. Hightet, supra note 147, at 38.

168. Hightet, supra note 147, at 30–31 (noting the ICJ’s finding against Albania in the Corfu Channel case based on circumstance evidence, in the “absence of any forthcoming explanation”).

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suggested that the Court gave an “uncharacteristically broad benefit of the doubt”\textsuperscript{169} to the United States, others—including the lengthy and detailed dissent of Judge Schwebel—found it applied its articulated methodology inconsistently, to prejudicial effect against the United States.\textsuperscript{170}

Tribunals faced with adjudicating allegations of covert conduct might well take cues from the \textit{Nicaragua} Court’s methodology—particularly those with broad discretion to fashion their own rules of evidence, such as the European Court of Human Rights (ECHR).\textsuperscript{171} Indeed, the ECHR, in its judgment in \textit{El-Masri v. Macedonia}, has cited \textit{Nicaragua}’s treatment of admissions in crediting statements by a former government official relating to alleged covert conduct.\textsuperscript{172} In that case, a German national brought claims against Macedonia, alleging violations of his rights arising from his apprehension and detention by the government, and transfer to and mistreatment by the CIA.\textsuperscript{173} The Court imposed a burden-shifting framework in which, “where the events in issue lie within the exclusive knowledge of the authorities,” an applicant’s establishment of government custody or control shifts the burden to the state to provide a “plausible and satisfactory explanation as to what happened.”\textsuperscript{174} The Court noted that it “attach[ed] particular significance” to material in the public record, including media and non-governmental organization reports.\textsuperscript{175} Finally, in contrast to common law jurisdictions, international tribunals and civil law jurisdictions generally do not automatically exclude leaked or otherwise unlawfully obtained evidence, though their provenance

\textsuperscript{169} \textit{Id.} at 32.

\textsuperscript{170} Schwebel Dissent, \textit{supra} note 21, ¶ 266–67 (“I find the Court’s statement of the facts to be inadequate, in that it sufficiently sets out the facts which have led it to reach conclusions of law adverse to the United States, while it insufficiently sets out the facts which should have let it to reach conclusions of law adverse to the Nicaragua.”). Judge Schwebel’s dissent runs 261 pages and includes a 227 paragraph factual appendix that painstakingly reviews and critiques the Court’s factual analysis.


\textsuperscript{172} \textit{Id.} ¶ 163. The former Minister of the Interior’s statements were the only direct evidence received by the Court. \textit{Id.} ¶ 161.

\textsuperscript{173} \textit{Id.} ¶¶ 1–36.

\textsuperscript{174} \textit{Id.} ¶¶ 152–53. The Court found the government had failed to meet that burden. \textit{Id.} ¶ 166.

\textsuperscript{175} \textit{Id.} ¶ 160.
may bear on the reliability of the material. 176

Both the Nicaragua Court's treatment of evidence and emerging case law from the ECHR suggest a waning tolerance for deference to state secrecy by international courts. 177 States acting covertly should not discount the potential legal import of press reporting, leaks, and even refusals to comment, as courts charged with adjudicating such conduct will necessarily work with the record accessible to them.

Jack Goldsmith has argued that intelligence activities are increasingly difficult to keep secret, in part due to an expanding "intelligence bureaucracy" which gives more people access to classified information, as well as technological developments that increase opportunities for unauthorized dissemination by insiders and facilitate the public's ability to synthesize relevant information. 178 Leaks have been so pervasive in recent years that in 2012 the U.S. House of Representatives proposed to amend the covert action statute to require the President to develop advance plans for responding to unauthorized public disclosure of all types of covert conduct. 179 Though defeated, the proposal reflects legislative concern with the extent of dissemination of highly classified information, and the perceived ineffectiveness of the executive in addressing unauthorized disclosures.

But others welcome the porous wall. James Reston observed with relief that "the United States wasn't very good at the cloak-and-dagger business. Government by dirty tricks went against the American grain. The Congress didn't like to be ignored or deceived, the press didn't like to be lied to, and some official, outraged by the deception, was always giving the game away." 180 These democratic


177. Adjudication of covert conduct in domestic courts is an area worthy of further study. U.S. courts have, to date, declined to adjudicate alleged covert activity on a variety of grounds, including state secrets. See, e.g., Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc), cert. denied. Courts have done so even when the U.S. government has later acknowledged the activity; see Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014) (finding "special factors," namely separations of powers and concern of interfering in national security operations and foreign affairs, precluded inferring a remedy against federal agents).

178. Goldsmith, supra note 31 (citing the example of public access to flight data supporting allegations of CIA renditions).


structures and sensibilities create an environment inhospitable to
secrecy, which should hearten its critics, even if, as Thomas Franck
observed in light of the Nicaragua judgment, such open societies are
disadvantaged in a contest of fact based on public discourse.181

B. Assessing the Legality of Covert Conduct

Once allegations of covert conduct receive public airing,
discussion of legality is rarely far behind. As the preceding sections
discuss, access to reliable information about covert allegations
relating to covert conduct may vary widely and create differing
factual narratives, which inform the basis for legal judgments. This
section considers how variously situated audiences develop and
disseminate legal opinions about covert conduct.

1. The Covert Actor’s Secret Legal Theories

In the areas of national security and international relations,
much government practice and lawyering “is for the most part utterly
invisible to the outside world,” though done “properly and
legitimately.”182 Internal, often confidential legal work extends far
beyond the area of covert programs to relatively routine matters,
including the interpretation of treaties, the content of customary
international law, and the legal consequences and risks of proposed
policies.183 Daniel Bethlehem compellingly likened the vast body of
internal, secret government practice to a black hole, invisible but
nevertheless perceptible in its effects on the public aspects of the
law.184

As discussed above, some states may view international law
compliance in their covert conduct as discretionary, at least in some
circumstances. But it is unlikely that most states simply ignore
international law in their covert practice; at a minimum, there are
prudential reasons to assess the possible legal consequences if covert
conduct becomes disclosed and credibly attributed. The extent to
which states actually do legally vet their covert activities is generally
as opaque as the extent of covert practice itself. The United States is

181. Franck, supra note 153, at 117.
182. Daniel Bethlehem, The Secret Life of International Law, 1 CAMBRIDGE J. INT’L &
183. Id. at 27.
184. Id. at 36.
action comply with the U.S. Constitution and statutes necessitates legal review. Indeed, U.S. government lawyers have affirmed that proposed covert actions are “thoroughly,” extensively lawyered, with input from multiple agencies.

As in all areas of government practice, legal opinions concerning covert activities are likely to accrete into a body of internal jurisprudence. The theory and judgments relating to a particular act will become incorporated, refined, and reinforced in the lawyers’ future decision-making about similar proposals. The substance of these secret theories may influence the government’s legal positions more broadly when the lawyers involved turn their sights on overt matters. Just as a government’s positions about overt conduct—for example, what constitutes an imminent threat that could justify measures in self-defense, or who qualifies as a targetable enemy combatant in an armed conflict—would inform the perspectives of lawyers analyzing covert proposals that implicate those questions, so may covert precedents dynamically shape future overt positions.

The body of covert practice on a particular legal issue is likely to be small relative to the overt practice, and only a small circle of government lawyers may be privy to it. For covert precedents actually to influence overt practice, certain conditions need to be in place. Pollination will occur only through government lawyers who have access to both areas of decision-making, and such points of overlap may be relatively few. (Covert programs are secret not only to the public, after all, but internally to most government officials who do not have appropriate clearances.)

The influence, if any, of a covert data point will also depend on its legal significance. Covert practice that is squarely within the established fold of a state’s traditionally held positions will offer no unique precedential value; at most, it would reinforce the existing

185. 50 U.S.C. § 3093(a)(5). Section 503(b)(2) of the National Security Act, as amended in 2010, requires that Congress be provided information about “the legal basis under which the covert action is being or was conducted.”

186. See Krass QFRs, supra note 86; Remarks by CIA General Counsel Stephen W. Preston, supra note 87 (covert operation against Osama bin Laden was “thoroughly” lawyered); Goldsmith, supra note 31 (intelligence actions receive “extensive lawyer approval” and congressional consultation, in part “to shield against recriminations once the action becomes public”); see also 9/11 COMMISSION REPORT, supra note 14, at 133 (discussing lawyers’ revisions to the scope of use of force authorized against Osama bin Laden in a draft 1998 Memorandum of Notification).

187. See, e.g., Preston Harvard Speech, supra note 87 (discussing legal analysis of a hypothetical proposed covert use of force, which could be justified under international law as an act in self-defense or as part of an armed conflict).
rule. But if the covert practice represents a question of first impression or progressive application of the rule, refining a gray zone or pushing a boundary in the law, then it has the potential to be more influential. Lawyers who opined on the covert matter will inevitably be guided intellectually by the example in their overt practice. Legal jurisprudence that develops internally around covert uses of force may thus dynamically, if incrementally, shape a state’s legal positions more widely.

In circumstances in which a state views its covert conduct as defensible under international law, government officials may find it useful, even necessary, to share their legal theories about covert activity, confidentially, with trusted allies and partners. Doing so might serve to legitimize the state’s conduct among its peers, or facilitate its requests for assistance in its covert programs. Confidential engagement with external interlocutors expands awareness of the legal case and may provide important feedback, potentially mitigating the risk of insular group-think that has been a recognized consequence of secrecy. It also increases the possibility of second-order dissemination, such as through leaks, or partners taking public positions that affirm or discount (explicitly or implicitly) the legal theory that would justify the covert conduct.

If allegations of covert conduct air publicly, the covert actor may in some circumstances be inclined to signal to the public a legal justification. Doing so while maintaining covertness—that is, not acknowledging responsibility—is, of course, a delicate act. One approach is simply to assert conclusions of legality; an example of this kind of statement would be the U.S. Secretary of State’s declaration in the Nicaragua litigation that the United States “considers its own policies and activities to be fully consonant with its international obligations.”

188. Critiques of the effects of secrecy on decision-making suggest that an expectation of covertness and future secrecy might lead to riskier, more aggressive positions, which an expectation of public scrutiny would discourage. See supra Part I.A; see also Ashley S. Deeks, Intelligence Communities and International Law: A Comparative Approach (unpublished manuscript) (on file with author).

189. If they are senior lawyers within their agencies, as those dealing with covert programs are likely to be, their views imported from the covert context may also be less likely to be challenged—both by virtue of their senior status and because classification restrictions in the covert context may preclude discussion and reconsideration of the precedent with other lawyers internally.

190. U.S. Counter-Memorial 2, supra note 45, Annex 1 at 188; see also id. at 177 (“the United States recognizes and respects the prohibitions concerning the threat or use of force set forth in the Charter of the United Nations, and . . . , considers its policies and activities in Central America, with respect to Nicaragua in particular, to be in full accord with the
a high level of generality, such as the U.S. assertion in the preliminary phase of the Nicaragua litigation that its conduct was justified in the exercise of individual and collective self-defense.\footnote{191} Nowhere did the United States acknowledge or address the specific allegations of covert conduct presented in that case.

Situations where a state is engaged in parallel or related overt operations present greater flexibility to make legal arguments that could also justify covert conduct, without actually acknowledging any concurrent covert activity. The United States has long acknowledged that its counterterrorism efforts against al Qaeda and associated forces entailed military operations in Afghanistan,\footnote{192} and in recent years in Yemen and Somalia as well.\footnote{193} Starting in 2006, U.S. officials have given a series of speeches presenting legal theories justifying these activities.\footnote{194} Such presentations do not address particular operations, though in some cases posit hypothetical factual scenarios, such as in a Justice Department’s “White Paper” that addressed the legality of targeting a U.S. citizen abroad.\footnote{195} Through these disclosures, the United States has presented legal theories that could serve to justify a range of conduct, while maintaining a posture that permits it to decline public engagement on specific allegations. These disclosures present in aggregate a “mosaic” of the U.S. government’s legal case justifying counterterrorism activities.\footnote{196} In some cases, an actor can maintain a covert defense while presenting piecemeal elements that observers,

provisions of the Charter of the United Nations.”).

\footnote{191} \textit{Id.} ¶ 202.

\footnote{192} See Permanent Representative of the United States to the U.N., \textit{supra} note 39.


by connecting the dots, can compile to adjudge its actions. Consider, for example, the staggered U.S. disclosures addressing elements of fact and law that taken together present a justification for lethal action against Anwar al-Aulaqi—each disclosed before the United States acknowledged a role in his death.\footnote{See President Obama, Remarks, \textit{supra} note 129 (addressing al-Aulaqi’s activities and status in al-Qaeda); Attorney General Holder, Northwestern Speech, \textit{supra} note 194 (addressing targeting of U.S. citizens); DOJ \textit{WHITE PAPER}, \textit{supra} note 195 (addressing lethal operation in a specific hypothetical scenario that might encompass the circumstances of Aulaqi).}

Legal disclosures serve many of the same purposes as factual disclosures,\footnote{See \textit{supra} Part II.A.1.} and likewise have a number of limits. They may offer general statements of law divorced from specific practice. They may posit hypothetical facts, as the Department of Justice’s White Paper does, but leave considerable room for interpretation and ambiguity. In addition, speeches and similar public statements serve many functions, including explaining policy and assuaging political constituencies; as a result, they may contain mixed statements of policy and law that can be difficult for audiences interested in distilling the legal claims to disentangle.\footnote{For example, on the issue of whether the United States considers infeasibility of capture options to be a legal precondition to the targeted use of force in some or all circumstances, or merely a policy consideration, compare Attorney General Holder’s 2012 speech at Northwestern, \textit{supra} note 194, with the White House fact sheet released in 2013 outlining presidential policy standards on counterterrorism targeting which states “the policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect.” \textit{U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities}, WHITE HOUSE, May 23, 2012, available at http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf.} Further, there may be legitimate skepticism about the credibility and weight that statements of legal principle can bear when sanitized of facts and divorced from acknowledged conduct—that is, whether they are merely “cheap talk.”\footnote{See Michael J. Glennon, \textit{How International Rules Die}, 93 GEO. L.J. 939, 976–77 (2005); \textit{infra} Part III.A.1.}

Selective official disclosures about classified legal theories also carry some risk, at least in the U.S. context, that too much will tip the scales toward waiver in the eyes of courts. In 2014, a U.S. appeals court found that the U.S. government’s \textit{official} disclosure of the White Paper—released by the government on the heels of its leak—amounted to a waiver of privilege about its legal theory related to certain lethal counterterrorism operations. It ordered the
government to disclose parts of a classified internal legal memorandum by the Department of Justice’s Office of Legal Counsel. This ruling will undoubtedly shape future government deliberations about whether and how to share its views—potentially discouraging official disclosures in favor of surreptitious ones, to avoid the risk of losing control over related internal, classified materials.

Moreover, the disclosure of general theories, sanitized of facts, has been met by calls from civil society groups for original, internal products. Release of original, internal products begets clamor for more original, internal products. The public’s interest in the government’s theories and application of the law is legitimate, but unwavering appetite for disclosure may leave policymakers with the sense that more will never be enough, and that the actors agitating for unfettered transparency fail to appreciate the legitimacy of any claim to secrecy in its conduct—including in the confidentiality of the deliberative process and legal advice—thereby discouraging policymakers’ efforts to seek reasonable compromises.

Finally, legal judgments from the other branches of government can contribute importantly to the public perception and discourse about the legality of covert conduct. The judgments of legislative oversight bodies may be particularly significant because they are likely to—indeed, their function presupposes that they will—have information about covert conduct not available to the public at large. Upon learning that the President had authorized

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204. While the acts of legislative bodies may have significance in international law, the acts of individuals rarely do, unless speaking for the state. INT’L LAW ASS’N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW,
covert mining of harbors in Nicaragua, then-chairman of the Senate Select Committee on Intelligence Barry Goldwater sent a letter—leaked almost immediately—to CIA director William Casey, decrying the operation as "an act violating international law. It is an act of war."205 More recently, senators on the Committee wrote to the Attorney General in a publicly released letter and, after reviewing the government’s classified opinions, they concluded "the decision to use lethal force against Anwar al-Aulaqi was a legitimate use of the authority granted to the President."208 They nevertheless urged greater disclosure by the administration, stating "we do not believe it is appropriate for the Executive Branch to rely on secret laws and standards."207

International law can be a powerful legitimating force for government conduct. Abram Chayes wrote in the aftermath of the Cuban Missile Crisis, during which he served as the State Department’s Legal Adviser, that "[f]ailure to justify in terms of international law warrants and legitimizes disapproval and negative responses" from other states.208 Compelling legal theories may permit decision makers to sleep soundly at night, but they cannot legitimize a state’s conduct or further its cause with the public or the international community if they remain locked inside secure government vaults. Bethlehem notes that "in very many cases one cannot make assumptions about what the law is, or reach considered conclusions on whether conduct is lawful or unlawful, until one has considered the invisible conduct as well as the visible."209 It is hard to deny that a state’s perspective of the legality of its conduct is privileged by its internal knowledge. But echoing Senator Wyden, a formidable public objection will be that it is simply democratically unacceptable not to know what the law is unless one is an insider.


205. Text of Goldwater’s Letter to the Head of C.I.A., N.Y. TIMES, Apr. 11, 1984, http://www.nytimes.com/1984/04/11/world/text-of-goldwater-s-letter-to-the-head-of-cia.html. Goldwater was furious both about the reported operation and that he had not been briefed earlier about it. He subsequently resigned from the Committee amid administration insinuations that he had in fact been notified. M OYNIHAN, supra note 12, at 210–11.


207. See id.


209. Bethlehem, supra note 182, at 36.
Bethlehem offers a partial response when he goes on to suggest that internal, secret practice can be discerned by careful scholars and observers. And, in the case of U.S. counterterrorism activity, there is a veritable industry of academics and commentators who seek to do so. But piecing together shreds of information with speculative glue is unsatisfactory to the public, and it should be to governments as well: it cedes the state’s role of articulating the law and characterizing its conduct to outsiders.

2. Legal Judgments by Third States and Other Actors

Public opinion about the legality of covert action tends to cluster around two positions: discomfited observers who denounce its unlawfulness and discomfited observers who, as Alston lamented, “namely accept that there is insufficient information in the public domain to enable existing policies and practices to be meaningfully assessed.” Observers might choose to turn a blind eye to allegations of covert conduct, depending on the politics of the situation and, to a lesser extent, the sanctity of the legal norms perceived to be violated. But there are a range of reasons why they might independently assess allegations of covert conduct. Against a backdrop of the covert actor’s silence, credible actors who do opine publicly are likely to have enhanced influence to shape the arc of public commentary.

An aggrieved state may wish to go on record with legal denunciations in protest of an action, with statements to the media, or by official state act, or through recourse to the Security Council.


211. Alston, supra note 52, at 299.

212. REISMAN & BAKER, supra note 9, at 67–73 (Reisman’s assessment of the factors conditioning the international community’s response finds greater tolerance for covert conduct where the activity did not substantially alter power relations among states, was diplomatic or economic in nature, or directed against a private party rather than a state (even where a state’s legal interests were incidentally compromised)).

213. For example, the Pakistani parliament has passed multiple resolutions condemning and demanding cessation of alleged U.S. covert drone strikes. See Richard Leiby, Pakistan
Positive signals of acquiescence, particularly by directly affected states, are rarer. \textsuperscript{213}

Third states may assess the legality of reported events in order to bolster political positions—either as a legal buttress to political condemnation of the conduct, or to evaluate whether statements of political support would cut against their legal values. Third states might also internally assess legality if they have been asked to cooperate in the covert activity. Although international law prescribes no general duty to inquire about the legality of conduct assisted,\textsuperscript{216} assisting states could be culpable for aiding and assisting unlawful conduct,\textsuperscript{277} may have domestic requirements that mandate compliance with certain laws, or may assess legality simply as a matter of prudence. For example, if an ally sought U.S. covert assistance for a use of force, the United States would need to ensure that its support would not constitute assassination or conspiracy to commit assassination, which is banned without exception by executive order.\textsuperscript{218} Covert cooperation does not necessarily imply

\begin{quote}
\textit{Calls for End to Drone Strikes, WASH. POST, Apr. 12, 2012, http://www.washingtonpost.com/world/pakistan-calls-for-end-to-us-drone-attacks/2012/04/12/gIqAN1ZFDT_ story.html.}
\end{quote}

\textsuperscript{214} Reisman counted 208 instances between 1969 and 1988 of alleged covert conduct brought to the attention of the Security Council. See \textit{REISMAN \\& BAKER, supra note 9, at 144–52.}

\textsuperscript{215} One such example is the statement of New Zealand’s prime minister in response to reports that a U.S. strike in Yemen killed an Australian-New Zealand dual national. According to press reports, he indicated both that he viewed drone strikes as legitimate counterterrorism tools in some circumstances, and that he “suspect[ed]” the particular strike reported was “legitimate.” \textit{Kiwi ‘foot soldier’ for al-Qaeda killed in Yemen by Drone, NEW ZEALAND HERALD, Apr. 1, 2014, http://www.nzherald.co.nz/nz/news/article.cfm?c_id =1\&objectid=11239185.}


\textsuperscript{218} EO 12,333, \textit{supra} note 75, § 2.11 ("No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."); see \textit{SANGER, supra note 23, at 144 (reporting that the assassination ban prohibited U.S. officials from providing information or other assistance for Israeli operations against Iranian nuclear scientists). The role of the assassination ban in legal review of U.S. covert action proposals may be reflected in the 9/11 Commission Report’s discussion of President Clinton’s December 1998 authorization of covert use of force to kill Osama bin Laden, where the administration took the position “that under the law of armed conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not an assassination.” 9/11 COMMISSION REPORT, \textit{supra} note 14, at 132 (2007)."
that states acting in concert share a position, much less theory, on
legality, so the public cannot assume that cooperation signals a
convergence of legal views.\textsuperscript{219}

Nongovernmental organizations, because of their perceived
impartiality and independent fact-finding efforts, are often among the
most publicly influential contemporary commentators. In addition to
factual reporting, they may opine on both the legal framework they
view as applicable to the conduct in issue and the legality of
particular acts.\textsuperscript{220}

Finally, the legal equivalent of former policy officials’
memos are former government lawyers’ academic contributions.
They are unlikely to disclose secret practice, but may discuss theories
that could have relevant application. For example, Daniel
Bethlehem, shortly after leaving the post of legal adviser to the U.K.
Foreign and Commonwealth Office, published an article in his
personal capacity that indicated that it reflected the convergence of
internal state views on principles relating to self-defense against non-
state actors. The principles, developed through confidential
discussions among unidentified states with relevant operational
experience, thus offered into the public discourse a composite sketch
of certain states’ internal legal views.\textsuperscript{221}

Third-party characterizations of the legality of particular,
alleged covert activity hold increased weight, if, in the covert actor’s
silence, they are the only legal opinions on specific factual
predicates. For example, with the exception of the 2011 operation
against Osama bin Laden, the United States has not acknowledged or
addressed specific allegations of covert counterterrorism activity in
Pakistan. But a range of other actors have opined about the legality
of alleged U.S. operations, importantly shaping the thrust of
prevailing public opinion. The Pakistani Ministry of Foreign Affairs
has publicized its diplomatic protests to the United States;\textsuperscript{222}
in May

\textsuperscript{219} See Bethlehem, supra note 182, at 31 (noting multiplicity of legal justifications for
use of force in Afghanistan). The legal theory chosen may entail some differences in the
scope of permissible use of force and the applicable rules of conduct, but there is no legal
reason that states acting in concert must share the same theory, so long as the operations
undertaken are permissible under each participant’s theory.

\textsuperscript{220} See, e.g., HUMAN RIGHTS WATCH, BETWEEN A DRONE AND AL-QUEDA: THE
CIVILIAN COST OF US TARGETED KILLLINGS IN YEMEN (2013), available at
http://www.hrw.org/sites/default/files/reports/yemen1013_ForUpload.pdf;
AMNESTY

\textsuperscript{221} Daniel Bethlehem, Notes and Comments, Self-defense Against an Imminent or

\textsuperscript{222} Press Briefing, Pakistan Ministry of Foreign Affairs (Jan. 23, 2014), available at
2013, the High Court in Peshawar issued a decision holding that drone strikes violated Pakistani sovereignty and the U.N. Charter, among other law;223 Pakistan’s National Assembly passed resolutions condemning drone strikes;224 a U.N. special rapporteur suggested that particular alleged conduct was unlawful,225 and human rights groups have raised concerns about the lawfulness of specific reported incidents.226

Whether or not the covert actor views its conduct as lawful, secrecy compromises its ability to shape the record effectively; it undermines informed public discourse by denying others the factual basis and legal theories (if any) underpinning the covert actor’s conduct. In that respect, secrecy also privileges and protects the covert actor’s position by frustrating the standing of others’ judgments: it leaves open the possibility that there may always be a game-changing—which is to say, legally decisive—fact known to the covert actor alone.

III. THE EFFECTS OF SECRECY AND COVERTNESS ON THE LAW

The processes of international law-making—the adversarial contest of litigation, the negotiation of treaties, the dynamic discourse of claim-and-response that shapes customary international law—presuppose that states will participate with a degree of transparency sufficient to protect their interests. Indeed, the discernable discourse among relevant actors has been conceived of as the essential mechanism of law-making, “a process of communication in which the mobilization of authority and control creates and sustains

http://www.mofa.gov.pk/pr-details.php?prID=1264 (reporting demarche of U.S. Charge d’Affairs and condemning “the drone strikes which are a violation of Pakistan’s sovereignty and territorial integrity”).


226. See supra note 220.
expectations about what types of behavior and what contingencies shall be deemed lawful and unlawful.”

In areas where international law is particularly ambiguous or contentious, state practice and publicly articulated interpretations are critical in defining the substantive content of the rules. The international law governing when force may be used in another state’s sovereign territory—the _jus ad bellum_—is such an area: its rules are notoriously (and intentionally) vague and flexible, with wide variation among states’ views about what they mean. What constitutes a prohibited use of force? Is an “armed attack” synonymous with a use of force? Does self-defense permit anticipatory strikes? Even—or especially—where states disagree, transparency of legal positions and practice both confirms the rules’ fundamental applicability and promotes stability by putting all states on notice of the differences in others’ interpretations.

But what if states do not make their practice or legal views public? Do the murky, fragmented public records of covert facts, and the legal opinions or inferences that become associated with them, matter to the law? Can a state’s unilateral dissociation from its conduct somehow cabin that conduct from impacting the dynamic international legal order? When state practice and legal interpretations are obscured by secrecy and non-acknowledgement, both the content and the relevance of the legal rules are called into question. Secrecy in international relations has long been both a strategic tool in formulating and an impediment to identifying international law.” This Part examines the impact of covertness and


228. Glennon, supra note 200, at 963 (“the Charter’s use of force rules are extraordinarily malleable . . . and vast differences of opinion exist as to what constitutes a violation”); REISMAN & BAKER, supra note 9, at 9 (“assessing the lawfulness of certain [even overt] actions is difficult given the ‘multiplicity of versions of contemporary international law’”). Certain aspects of the _jus in bello_, or the law of war governing the conduct of hostilities, are similarly vague and must be developed through state practice. One example would be the issue of what civilian conduct constitutes direct participation in hostilities within the meaning of the law of war to forfeit protection from attack. See Additional Protocol I, supra note 54, art. 51(3); see also Ryan Goodman & Derek Jinks, _The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum_, 42 N.Y.U. J. INT’L. L. & POL. 637 (2010).

229. Bianchi, supra note 36, at 18 (“The different epistemic communities that create the discourse in various areas of international law make use of transparency or of its opposite to shape their discursive policies.”).
secrecy on those processes.

A. Black Holes in State Practice

Bethlehem asked, "Does conduct need to be public in order to inform the law?" To count as a precedent in the interpretation of a norm or an instance of state practice that can contribute to the development of customary international law, it does.

The customary rules of international law are flexible, adaptive to continuously evolving state practice and legal theories. Through the iterative process of claim and response, customary international law is created, affirmed, altered, undermined, and in some cases, rendered obsolete and dispatched to the archives of history. In an archetypal case, the facts surrounding a state act and its corresponding opinio juris (assertion of legal obligation or right) would be detailed publicly, thereby providing all states a fully informed opportunity to consider and assert their legal positions. In reality, of course, states participate in this process with less than perfect information.

The International Law Association (ILA) has opined that for purposes of forming custom, "acts do not count as practice if they are not public." Moreover, if secret conduct is discovered, it "probably" only counts if the acting state asserts that the conduct was justified. Though the ILA cites no authority for these propositions, they flow logically from the nature of custom, which, "as evidence of a general practice accepted as law," requires identification of a legal proposition and its communal acceptance. As a result, evidence of the practice and the status of acceptance must be public.


232. See ILA Principles, supra note 204. The ILA report noted that state practice evidences the emergence of a rule, strengthens it, and serves as declaratory evidence of it. It is therefore somewhat artificial to distinguish too starkly between the formation of a rule and evidence of an existing rules. See id. at 9 n.21.

233. Id. at 15.

234. Id.


236. See Worster, supra note 176, at 476; see also Marty Lederman, Question on 2007 Strike Against Syria and Anticipatory Self-Defense, OPINIO JURIS (Apr. 3, 2012, 3:07 PM), http://opiniojuris.org/2012/04/06/question-on-2007-strike-against-syria-and-anticipatory-
Secrecy and covertness defeat the evidence of custom in different ways. Secrecy may obscure the practice itself or any related, internally held opinio juris. Covertness, in contrast, formally denies the attribution of particular practice to a state. Thus, even if the covert conduct is an open secret—the facts of an event widely and credibly reported, and a putatively responsible state has articulated a legal position that could justify it—non-acknowledgement precludes the responsible state from relying on that conduct as evidence that defines or shapes the law. Unless and until a state acknowledges its conduct, there is, in the process of custom, no “claim.”

What then are the consequences for the law, the costs and benefits, of a state of acting covertly or otherwise through secrecy denying the public a legal justification for its acts?

1. Internationally Lawful Covert Conduct

   Where a state views its covert conduct as legally justified, the principal legal cost of covertness is that the state cedes its voice and the weight of its practice in the development of the law. These omissions may render the articulated law less accurately reflective of actual (but obscured) state practice and legal positions.

   Imagine that State A views humanitarian intervention as a lawful exception to the prohibition on use of force, while recognizing that this position is not widely accepted. State A decides to intervene with limited strikes in a foreign civil war, justifying it internally as a humanitarian intervention. However, for political reasons or to avoid escalation, it acts covertly. Because covertness precludes it from publicly “claiming” its practice, State A would be foregoing the opportunity—unless and until it acknowledges its conduct—to establish through its conduct a precedent that supports the rule.

   Even when states acknowledge their conduct, a refusal to offer a legal justification undermines the law. Consider, for example, the legality of a state using force without consent in a foreign state to


237. Acknowledgment, after all, does not presume that all states will agree with the acting state's justification—only that normal law-making processes can be applied to evaluate and assimilate the conduct into the legal order, as evidence of a rule or of its breach.
rescue its nationals, which remains debated. Some states, like the United States, have historically asserted that it is a legitimate aspect of the right of self-defense; indeed, the United States notified the Security Council under article 51 following its attempt to rescue U.S. hostages in Iran in 1980. In recent hostage rescue operations, however, the United States has declined to assert an international law justification, even where it ultimately acknowledged its conduct. Without public claims of right under international law, however, its current conduct cannot stand for any specific legal proposition to which other states may react. Secrecy stalls the reinforcement or development of the norm.

Moreover, secrecy and covertness cede to third parties, including non-state actors, the state’s typically predominant role in articulating and developing the law. States historically enjoy “unique relevance in the formation and interpretation of international law.”

238. See Kristen Eichensehr, Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues, 48 Va. J. Int’L L. 451 (2008); see also Reisman & Baker, supra note 9, at 63 (noting divided expressions of legality after the Iran hostage rescue). Hostage rescue attempts, even if undertaken in secrecy to preserve operational security, are typically not covert actions because the rescuing state acknowledges—and expects to acknowledge—them after the fact.


240. In 2012, the United States disclosed a successful hostage recovery of two aid workers held in Somalia. Karen DeYoung & Greg Jaffe, Navy SEALs Rescue Kidnapped Aid Workers Jessica Buchanan and Poul Hagen Thisted in Somalia, WASH. POST, Jan. 25, 2012, http://www.washingtonpost.com/world/national-security/us-forces-rescue-kidnapped-aid-workers-jessica-buchanan-and-poul-hagen-thisted-in-somalia/2012/01/25/gIQA7WopPQ_story.html. Its war powers notification to the Congress did not address international law, nor did the United States submit an article 51 letter to the U.N. Security Council, leaving unclear whether it viewed the operation to be an exercise of self-defense, or done with the consent of Somali authorities, or whether there was another, or no, international law basis. See Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the War Powers Act for Somalia (Jan. 26, 2012), available at http://www.whitehouse.gov/the-press-office/2012/01/26/letter-president-speaker-house-representatives-and-president-pro-tempore. The United States also did not assert an international law basis for its 2014 attempt to rescue U.S. journalist James Foley in Syria, even though the facts of that case might have presented a particularly compelling case with which to reinforce a legal claim of right. See Shear, supra note 29.

Non-state actors have traditionally also had a role in articulating emerging customs,\textsuperscript{242} and there are an increasing number of actors on the international stage—from jurists to non-governmental organizations to treaty bodies to U.N. special rapporteurs—who opine about the substance and application of the law with varying claims of authority. When states decline to participate in these conversations, either to affirm certain views or to offer corrective disclosures, they risk abdicating their “special role.”\textsuperscript{243}

The roles of third parties are potentially further amplified—and the costs and risks to states of secrecy commensurately increased—when one considers trends in methodologies of identifying customary international law that assign greater weight to \textit{opinio juris} and input from non-state actors.

Ascertaining customary international law is an inherently challenging endeavor. As Reisman observed, “the always imprecise methods of inferring custom from a flow of practice have become more difficult to apply, when the behavior of more than 160 actors, each composite and incorporating many other actors, and much of the behavior, either unrecorded or inaccessible, must be accounted for.”\textsuperscript{244} And states may hold genuinely competing, legitimate views of what the law is.\textsuperscript{245} As a result, the process has always been more art than science, conclusions not uniform, and methodologies of assessing custom themselves disputed and changeable.

In the sixteenth and seventeenth centuries, the emergence of customary international law as a scientific discipline favored a naturalist, deductive method for assessing its content.\textsuperscript{246} The

\begin{footnotesize}


\textsuperscript{243} Sean Watts has decried the recent dearth of official government statements of \textit{opinio juris} about the law of armed conflict, noting particularly a “retreat” by the United States in this area that results in an “impoverish[ed]” public dialogue. Watts, supra note 241.

\textsuperscript{244} Reisman & Baker, supra note 9, at 18.

\textsuperscript{245} Rules on the use of force have always been “unstable,” characterized by “vast differences as to what conduct is prohibited by international rules governing the use of force, as well as the lack of consensus about what those rules should be.” Glennon, supra note 200, at 986. Calls for “consensus” in this field, therefore, set unrealistically high expectations and bars for legitimacy. Where legal questions are so entangled with politics and policy, the allure of “definitive answers” will always be beyond reach; international law is “better understood . . . as a set of more and less ‘plausible’ interpretations, in a world of sovereign states in which there is no final adjudicator to say yes and no.” Anderson, supra note 19.

\textsuperscript{246} Georg Schwarzenberger, \textit{The Inductive Approach to International Law}, 60 HARV.
\end{footnotesize}
deductive method resulted in part from the effects of secrecy in obscuring state practice; secrecy was "a normal aspect of international relations that simply had consequences on the techniques for finding the law." The naturalist method, however, was unsatisfying; it produced vague principles and "was soon detected to be not so much law-finding as law-making in disguise."

In its stead, beginning in the eighteenth century, jurists influenced by positivism and the proliferation of public documentation from parliaments, courts, and conferences began to favor an inductive approach to deriving the law from the conduct of states. Inductive assessment of the law requires a "fair amount of case law from which plausible generalizations may be attempted." As a result, the identification and development of law was limited by the transparency of states. This approach—now viewed as the "traditional" approach—induces the law from state practice supported by opinio juris. It has been criticized, however, as anachronistic and inappropriate in the contemporary international legal architecture.

An emergent "modern" alternative, driven partly by the field of international human rights law, returns to the deductive method by crediting as custom high-level statements of rules that are supported by a smaller corps of state practice. In privileging opinio juris, "modern" custom enhances opportunities to "disguise"—as Schwarzenberg might say—statements of lex ferenda, the law as one thinks it should be, as lex lata, the law as it is.

L. REV. 539, 540 (1947).
248. Schwarzenegger, supra note 246, at 543.
249. Id. at 544–45.
250. Id. at 541. In its first study on customary law in 1950, the International Law Commission recognized the importance of public statements and state transparency "to make evidence of their practice more accessible," and recommended the publication of national digests relating to conduct with respect to international law. This led to the creation of several important publications of practice, including U.N. Legislative Series and Reports of International Arbitral Awards. Rep. of the Int'l L. Comm'n, First Report on Identification of Customary International Law, 65th Sess., May 6–June 7, July 8–Aug. 9, 2013, U.N. Doc. A/ CN.4/663, ¶ 9 (May 17, 2013).
251. Roberts, supra note 242, at 759.
252. Id. at 758, 765.
253. The distinction between lex lata and lex ferenda is never so crisp as would be analytically convenient; states seeking to change the law assert their new claims of customary right in the language of lex lata, hoping to push the law in that direction. ILA
The International Court of Justice’s judgment in the Nicaragua case is often cited as a notable application of modern custom. Though the Court recited the methodology of the “traditional” test for finding customary law, it followed a more modern approach in its actual assessment of the law on the use of force and nonintervention. It largely dispensed with any review of state practice, and relied on treaty text and U.N. General Assembly resolutions—including those containing legally nonbinding language—as evidence of opinio juris reflecting customary law. Its approach has been criticized for failing to give even “minimal deference” to state practice, with the result that the rules it purported to identify bear little relation to state behavior.

The emphasis on, and elevation of, opinio juris over state practice presents the possibility of amplifying the weight accorded to non-state sources of evidence, such as U.N. treaty body opinions, U.N. special rapporteurs, or other non-state actors, which purport to characterize the lex lata but may assert their own preferences of lex ferenda. For example, the seminal customary international humanitarian law study undertaken by the International Committee of the Red Cross, nearly 3,000 pages, is widely cited as an authoritative reflection of custom, though the United States has flagged serious concerns with the study’s methodology and objected to some of its

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Principles, supra note 204, at 56 (“it is quite common for States to assert that something is the law in the hope that this will help to bring about the desired state of affairs”); Charney, supra note 84, at 916 (“States will rarely, if ever, admit that they have violated customary international law, even in order to change it. Rather, they will argue that their behavior is consistent with the traditional law, or that the law has already changed.”).


256. Reisman has noted that “the international system produces documents in the legislatistic genre with promiscuous abandon,” and that “the scholar and practitioner must be able to distinguish effective law from the enormous legislatistic babble of international politics.” Reisman, International Law-Making, supra note 227, at 102.

substantive conclusions.\textsuperscript{258}

A state’s secrecy and silence compounds the risks that third state and non-state actors’ articulations of the law with which it disagrees will dominate international legal discourse and unduly influence the judgments of other states or courts assessing the law. A reversion to deductive methodology in identifying customary law is in one sense an effective compensation for contemporary secrecy in state conduct. If the deductive methodology continues to take root, states may see an opportunity to offset secrecy in practice with contributions of statements of the law—\textit{if} they can do so credibly, backed by practice sufficient to make their talk valuable.

For a covert actor or otherwise secretive state, secrecy represents a foregone opportunity to contribute to articulating and shaping the law. As a result, the law will less closely reflect state practice and legal positions than it would in a scenario of perfect information. Law-abiding states with a wealth of secret practice would be well served to develop more sustained, creative ways of engaging in public discourse. Incremental changes that favor transparency may have significant, positive repercussions over time.

For example, when acting covertly, states should consider whether there are disclosures that can be made that do not reach the ultimate target of covertness, such as classified disclosures of legal theory to trusted partner states, or relevant facts to the public that will not jeopardize sources and methods. They should also consider the long-term consequences of covert agreements on their ability to shape public legal discourse, particularly for covert programs with expansive temporal or geographic scope that may be difficult to keep secret. Finally, states should not discount the benefits of eventually acknowledging and justifying their acts, even years later, when the conditions requiring covertness—including covert agreements—may have abated.

2. Internationally Unlawful Covert Conduct

States violating the law covertly seek to avoid the institutional

\textsuperscript{258} The methodological objections raised included failing to cite “extensive and virtually uniform” practice; crediting written materials excessively relative to actual operational practice; and “giving undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States.” John B. Bellinger, III & William J. Haynes, II, \textit{A U.S. Government Response to the International Committee of the Red Cross study} Customary International Humanitarian Law, 89 INT’L REV. RED CROSS 443, 444–45 (2007).
consequences of their breaches. But what are the consequences of shallowly secret covert violations of law on the law? By refusing to acknowledge its conduct, a state is declining to endorse or defend it. A covert event cannot serve as a legitimizing precedent for other states’ behavior, and in that respect, it may be less destructive than an overt, acknowledged violation.

Consider the 1999 NATO intervention in Kosovo, where the United States asserted that the air campaign was “legitimate” but did not advance a legal justification, effectively conceding that it did not square with Article 2(4) of the U.N. Charter. Although intended to provide political justification in a way that would not be precedential, it presented the pernicious possibility of unlawful but politically legitimate exceptions to the Charter and customary rules on the use of force for “special cases.” Unsurprisingly, the exceptional “special case” has proven over time to be an attractive precedent. Not only was it invoked by Russia with respect to its intervention in Crimea, but its precedential potential was reportedly revisited within the U.S. government as a “possible blueprint for acting without a mandate from the United Nations” in Syria.

States seeking to justify their behavior naturally look for legitimating, historical examples to demonstrate that their acts are not outside the normative standards of the international community. They will consider both the plausibility of a rationale and the precedential value that their justification may have. Indeed, in the Kosovo case, the United States presumably viewed non-legal justification as preferable to endorsing an inchoate legal norm of

259. Glennon, supra note 7, at 382 (“Anonymity makes violation cost-free . . . because the assignment of responsibility and the imposition of penalties are impossible.”).


261. Falk might have been writing about the legality of the Kosovo intervention rather than covert activity when he stated, “[a] country like the United States is especially important; its noncompliance influences the whole climate within international society and undermines any effort to take international law seriously as a restraint on others.” Falk, supra note 34, at 44.

humanitarian intervention. Because covert behavior remains normatively illegitimate, effectively disowned by the responsible state, it cannot become a legitimizing reference point. Consequently, a state that wishes to preserve an existing rule of law but in a particular case breaches it may do less damage to the rule’s stature by acting covertly than by acknowledging its violation.

While flouting the law covertly may be inherently less corrosive to the rule than doing so overtly, from the perspective of international law, a breached norm is rehabilitated most fully through accountability. A state’s dissociation from its conduct through non-acknowledgment does not assure impunity, of course, and on rare occasions, states have been held liable by the international community for brazen, covert breaches of international law. One example is the international community’s response to the 1960 abduction of the Nazi war criminal Adolf Eichmann in Argentina, which Israel, maintaining the thinnest of covert veneers, claimed had been conducted by Israeli “volunteers.” Although many states were sympathetic to the political motivations behind the abduction, the Security Council, while mild in tone, characterized the act as a violation of international law and called on Israel to make reparations to Argentina. The Security Council's formal judgment on covert violations of law reinforces the vitality of the breached legal rule by affirming that the international community broadly values the norm and will exact a penalty to foster compliance.

263. The United Kingdom, for example, advocated a humanitarian intervention justification. See Adam Roberts, NATO’s “Humanitarian War” over Kosovo, 41 Survival 102 (1999).

264. A third alternative—seeking to justify the conduct through recourse to strained, non-credible interpretations—risks the worst of both worlds: effectively conceding violation and setting an undesirable precedent. Recounting the internal U.S. government deliberations about how to justify the blockade of Cuba during the Cuban Missile Crisis, then State Department Legal Adviser Abram Chayes noted the United States ultimately declined to advance a self-defense rationale because to do so could not credibly have legitimated U.S. conduct, and “would have signaled that the United States did not take the legal issues involved very seriously . . . .” Chayes, supra note 208, at 66.

265. Reisman & Baker, supra note 9, at 51, 56; Louis Henkin, How Nations Behave 270 (2d ed. 1978). The United States maintained a similar posture on attribution after the Bay of Pigs invasion. Attorney General Robert Kennedy, in his defense of the legality of the operation under U.S. law, maintained that it was undertaken by refugees, acting in their private capacity, asserting their right of self-determination.


267. This is not to suggest that the Security Council’s practice in addressing alleged
B. Secrecy and Desuetude

Regardless of whether a state internally views its conduct as compliant with international law, its refusal to acknowledge and justify reported covert conduct casts doubt on whether it views itself as having complied with the relevant international rules. This uncertainty about the acting state’s legal position is itself corrosive to the law.

The legal pragmatist Michael Glennon has argued that international legal rules lose their binding character though repeated violation. When a critical mass of states “emit conflicting signals as to whether they have become unaccustomed to, or intend no longer to be bound by, a given rule,” that rule can no longer be said to have obligatory force as law and falls into desuetude.268 In turn, the rule will either be superseded by an alternative directive or replaced by the freedom principle, the default permissive condition of the international environment.269 A rule that has thus lost its obligatory character—its legal character, in the pragmatist sense of law as those norms that effect compliance—may still influence government decision-making as a diplomatic or strategic consideration, but cannot be considered law. It becomes a “paper rule” rather than a “real rule.”270 Thus, although no state has abrogated the U.N. Charter, the prohibition on the use of force in Article 2(4) has, as a result of many violations over the years, famously been declared “dead.”271

In assessing the legal vitality of a rule, evidence of noncompliance—that is, overt violations—carries greater weight than instances of compliance. After all, how does one identify a salient non-use of force, much less causally show that its non-occurrence was effected by the rule? The fact that Canada did not attack Mongolia last year, Glennon observes, and similar non-events, hardly validate that Article 2(4) commands compliance.272 The most significant reflection of a rule’s status, therefore, will be the disconfirming evidence.

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268. Glennon, supra note 200, at 942.
269. Id. at 940.
270. Id. at 953, 956.
272. Glennon, supra note 200, at 972.
Covert uses of force may present genuinely ambiguous legal cases. Consider, for example, reports of unconfirmed Israeli strikes against Hezbollah in Syria in recent years.\textsuperscript{273} One can imagine legal theories that could be offered to justify such conduct. Perhaps Israel considers itself in an ongoing armed conflict with Hezbollah, and the strikes were directed against legitimate military targets? Or Israel was responding in self-defense to an imminent threat from Hezbollah, identified through classified intelligence, which the Syrian government was unable or unwilling to address? A fair assessment of the legal plausibility of either theory would require more information than is in the public record. Of course, it may be that the government did not believe it had a credible legal justification and—allegedly—acted anyway. Secrecy and covertness call into question whether the putative state actor felt bound by the prohibition on the use of force in a particular case, and thus whether it views Article 2(4) as obligatory.\textsuperscript{274}

This Article has argued that illegality cannot be imputed from covertness, but it does not deny that a suspicion of illegality hovers around allegations of covert conduct. The instinct that a state would admit and defend its conduct if it were defensible is powerful.\textsuperscript{275} When a state declines to do so, observers are likely to count alleged covert incidents—if, perhaps, in pencil—as instances of presumed noncompliance. Allegations about covert uses of force that remain unconfirmed, un-defended, and un-reconciled with the law cast lingering doubt about whether Article 2(4) was heeded or viewed as a


\textsuperscript{274} The ambiguities are compounded when reports about attribution for an alleged covert act conflict. Consider media reports on strikes against Islamist militias in Libya in August 2014. U.S. sources attributed them to Egypt and the United Arab Emirates; Libyan sources attributed them to the United States; and a local Libyan anti-Islamist faction publicly claimed credit, though others doubted the credibility of its assertion. David D. Kirkpatrick & Eric Schmitt, \textit{Arab Nations Strike in Libya, Surprising U.S.}, \textit{N.Y. Times}, Aug. 25, 2014, http://www.nytimes.com/2014/08/26/world/africa/egypt-and-united-arab-emirates-said-to-have-secretly-carried-out-libya-airstrikes.html. A military operation by a party within the context of a civil war would raise significantly different international legal issues than non-consensual intervention by foreign states.

\textsuperscript{275} See, e.g., Alston, supra note 52, at 438 ("If the United States firmly believes, as the State Department’s Legal Adviser insists it does, that it is acting in full compliance with the international law, it should not hesitate to provide the evidence thereof.").
“paper rule.” In a world in which states never acknowledged or justified their use of force, the relationship between international law and states’ actual conduct would be unknowable. International law would no longer guide and reflect states’ expectations of mutual behavior; it would quickly become irrelevant in international relations. The accumulation of allegations about covert uses of force inch the international order toward this unstable world.

For those who view Article 2(4) as already extinct, ambiguous covert uses of force may simply confirm its disqualification as law. But Article 2(4) still has believers, who defend its status despite its incontestable historical breaches. David Wippman has pointed out that all states “still accept it as a general standard of expected conduct powerful enough to constrain state behavior”; whether the norm is described as “social” or “legal” is a semantic distinction without much practical salience.

Defenders of 2(4)’s legal vitality also emphasize that the trajectory of a norm is not necessarily linear, with violations constituting a “one-way ratchet” toward its demise. Instead, the meaning of a rule can adapt over time in ways that facilitate its core relevance in evolving contexts. For example, communal understandings of the right of self-defense reflected in Article 51 of the U.N. Charter, such as what constitutes an armed attack that may permit measures of self-defense, or interpretations of the concept of imminence in assessing a threat of armed attack, have not been static. Such adaptation, however, occurs only when states develop, assert, and persuade others of new interpretations—processes which secrecy and non-acknowledgement generally foreclose. When a state that views its conduct as lawful acts covertly, it forgoes an opportunity to reinforce the rule, or to persuade others of its evolving interpretations.

Legal signaling—such as through conclusory assertions of lawfulness or disclosure of potentially applicable legal theories at a high level of generality—may, in some cases, mitigate the


278. Id. at 390.

279. Id. at 395 (noting the evolution of views on whether an “armed attack” can be perpetrated by non-state actors).


281. See supra Part II.B.
presumption of noncompliance. But the effect and weight of such signals will depend on the credibility of the state actor—a perception that may vary widely among audiences. Such signals cannot in any event fully dispel the corrosive effects of ambiguous covert conduct both because they remain suggestions attenuated from specific conduct by non-acknowledgment, and because they cannot demonstrate compliance.

Finally, the proliferation of allegations of covert conduct may well beget more unacknowledged, unjustified conduct. Glennon observed that a “self-amplifying” littering effect may accelerate the erosion of a legal rule through fostering violations. Just as littering increases when would-be litterers see litter and decide that the costs of violating anti-littering laws are low, so do “observable incidents of noncompliance” deteriorate the “psychological threshold” to violation of legal rules by other actors. 282 Shallowly secret covert activity that is tolerated by the international community encourages in both the covert actor and third states the practice of covert behavior, as it confirms that the political costs of covertness are low.

Where is the accumulating litter? Covert litter is, of course, by its nature not entirely “observable” or quantifiable. But there are assessments that covert behavior is on the rise. 283 And media reports of repeated, ongoing patterns of alleged covert activity suggest that the putative state actor perceives its conduct, even if shallowly secret, to be tolerated. Ambiguity about lawfulness, as it erodes general respect for compliance with the law, may also facilitate political tolerance by the international community.

C. Perpetually Deep Secrets

Finally, although this Article focuses on covert conduct that is shallowly secret, it is worth noting that perpetually deep covert secrets leave virtually no trace on the law. Covert conduct that remains undiscovered—that is, unknown to the public and international community, or without any suspected link to the covert actor—simply leaves no residue of practice on the international scene. Its influence on the development of public international law, if any, will be incremental through effects on the acting state’s internal legal views and policies.

For example, if the covert actor believes the action was lawful, its internal legal justification might become assimilated more

282. Glennon, supra note 200, at 956.
283. See Stavridis, supra note 33; Wagner, supra note 32.
broadly into its internal legal thinking, and eventually filter into public legal discourse. If the responsible state views the covert act as inconsistent with international law, however, its internal legacy may be to vindicate the policy of acting covertly, by validating that co vertness can successfully circumvent the political and legal repercussions of breaching the law. In either case, a covert “success”—in the sense of achieving the state’s policy goal—that remains deeply secret may increase the responsible state’s confidence that it can act covertly cost-free, emboldening it to favor covert options in the future.

D. The Example of Cyber Activity

It is admittedly difficult to ascertain the magnitude of these hypothesized effects on the vitality of the law, and impossible to project what the substantive content of the law would have been had there been greater disclosure and engagement by states on particular topics. It seems logical, however, that in areas where the law is nascent and practice sparse, the impacts of secrecy and co vertness are magnified. Nowhere are the consequences of secrecy for the law more apparent today than in the context of state cyber activity.

States’ cyber practice is almost wholly shrouded in secrecy. To date not a single state has acknowledged conducting specific cyber-attacks on another country, and the challenges of establishing an authoritative factual record of states’ cyber activity are difficult to understa te. They include the technical challenges of accurate attribution and the use of private proxies to attenuate and obscure state responsibility; the fact that the some effects of cyber operations may never be publicly observable; the reluctance of states to risk jeopardizing their cyber sources and methods; the unwillingness of victim states to admit publicly that they have suffered an attack (or perhaps to reveal to the attacker that they detected its conduct); and the variable incentives for states to misrepresent—depending on the circumstances, either deny or aggrandize—their capabilities, among others. It is easy to imagine that states have undertaken cyber activities that could remain perpetually deep secrets, and difficult to see how such practice could ever inform the law.

Allegations about cyber-attacks, such as the virus dubbed Stuxnet that reportedly disrupted Iranian nuclear facilities and has been attributed in media reports to Israel and the United States, illustrate the difficulty of establishing facts in these circumstances.

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284. See supra Part II.B.1.
285. See, e.g., Ralph Langner, Stuxnet’s Secret Twin, FOREIGN POL’Y, Nov. 19, 2013,
Iran formally objected to cyber-attacks on its nuclear facilities in the U.N. Security Council, asserting that nuclear terrorism, including "sabotage in nuclear facilities," is "a grave violation of principles of the U.N. Charter and international law." The relevant facts remain uncertain, however, and no actor has advanced a legal justification. Public commentary has generally coalesced around the view that the operation was likely unlawful as a matter of international law.

Concerning as reports of such cyber-attacks may be, the legal precedent that would have been set by such a cyber-operation—assuming *arguendo* the accuracy of facts widely alleged—would likely be significantly more dangerous had it been overt. As it is, the reported conduct relating to Stuxnet does not establish a legitimizing precedent for future state conduct, or count as state practice evidencing the law, at least unless and until a state were to acknowledge responsibility for it. Nevertheless, the general tolerance by the international community of the alleged incident may embolden actors to pursue covert cyber practice.

In light of the paucity of verified practice of cyber uses of force, states' *opinio juris* becomes an increasingly important indicator of states' views about the international law applicable to cyber conduct. But while there has been much clamor to develop international norms for cyber conduct, states' public discussion of international law has remained at a fairly high level of generality. Moreover, even if state discussion of the law develops in greater specificity, it may seem like "cheap talk" unless backed by verifiable practice. There have been indications that at least some elements of the U.S. government are willing to risk greater transparency in cyber


practice,\textsuperscript{289} though it is far from certain that other states would follow such a lead in any event.\textsuperscript{290}

In light of the resounding silence of states, the most comprehensive and detailed application of international law in cyber contexts is an academic treatise, the Tallinn Manual, which presents ninety-five "black letter rules" of international law governing cyber warfare.\textsuperscript{291} Most states reportedly informally welcomed the manual as a resource, though none has clearly affirmed or rejected its substantive claims; however, Russia, voiced concern that the rules facilitate the militarization of cyber conduct.\textsuperscript{292} In the absence of comparably detailed state articulations of the law, it is likely to be the resource of first resort in its field to practitioners and scholars alike.

The law in this area cannot be significantly clarified or developed without a pool of publicly acknowledged state practice. Indeed, there is growing awareness of the need to drive the development of norms through state practice; there have been calls, for example, for cyber tools to be used in support of humanitarian intervention in Syria.\textsuperscript{293} It is possible, however, that some powerful states' interests may in fact favor ambiguity in the law governing cyber conduct.\textsuperscript{294} If that is the case, secret and covert engagement in


\textsuperscript{291} \textit{Tallinn Manual on The International Law Applicable to Cyber Warfare}, (Michael N. Schmitt ed., 2013), available at http://www.cccdcoe.org/tallinn-manual.html. The manual was developed by a group of independent experts, including scholars and government practitioners acting in their personal capacities.


cyber activities will serve states well by impeding the development of both the law and a culture of legality in cyberspace. The price, however, may be that actors who take a more prominent public role can shape legal obligations of those who are reticent.

CONCLUSION

Secrecy changes the dynamics of how state practice can be assessed. It alters the quality and culture of international legal discourse, which in turn shapes the law in indirect and incremental—but non-negligible—ways. States will continue to engage in conduct that they do not intend to acknowledge publicly. Governments considering the costs of secrecy and covert action in their national policies should be wary both of impoverishing international public discourse and of isolating internal legal theories from the reflective and corrective process of international engagement. If the law no longer reflects states’ shared understandings, it fails to serve the purpose of organizing mutual expectations of conduct, and becomes only a tool of political rhetoric.
May 22, 2013

PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES

This Presidential Policy Guidance (PPG) establishes the standard operating procedures for when the United States takes direct action, which refers to lethal and non-lethal uses of force, including capture operations, against terrorist targets outside the United States and areas of active hostilities.

Any direct action must be conducted lawfully and taken against lawful targets; wherever possible such action will be done pursuant to a [redacted] plan. In particular, whether any proposed target would be a lawful target for direct action is a determination that will be made in the first instance by the nominating department’s or agency’s counsel (with appropriate legal review as provided below) based on the legal authorities of the nominating department or agency and other applicable law. Even if the proposed target is lawful, there remains a separate question whether the proposed target should be targeted for direct action as a matter of policy. That determination will be made pursuant to the interagency review process and policy standards set forth in this PPG. The most important policy objective, particularly informing consideration of lethal action, is to protect American lives.

Capture operations offer the best opportunity for meaningful intelligence gain from counterterrorism (CT) operations and the mitigation and disruption of terrorist threats. Consequently, the United States prioritizes, as a matter of policy, the capture of terrorist suspects as a preferred option over lethal action and will therefore require a feasibility assessment of capture options as a component of any proposal for lethal action. Lethal action should be taken in an effort to prevent terrorist attacks against U.S. persons only when capture of an individual is not feasible and no other reasonable alternatives exist to effectively address the threat. Lethal action should not be proposed or pursued as a punitive step or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. Capture is preferred even in circumstances where neither prosecution nor third-country custody are available disposition options at the time.

CT actions, including lethal action against designated terrorist targets, shall be as discriminating and precise as reasonably possible. Absent extraordinary circumstances, direct action against an identified high-value terrorist (HVT) will be taken only when there is near certainty that the individual being targeted is in fact the lawful target and located at the place where the action will occur. Also, absent extraordinary circumstances, direct action will be taken only if there is near certainty that the action can be taken without injuring or killing non-combatants. For purposes of this PPG, non-combatants are understood to be individuals who may not be made the object of attack under the law of armed conflict. The term “non-combatant” does not include an individual who is targetable as part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Moreover, international legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on the ability of the United States to act
unilaterally — and on the way in which the United States can use force — in foreign territories.

As reflected in the procedures contained in this PPG, whenever possible and appropriate, decisions regarding direct action will be informed by departments and agencies with relevant expertise, knowledge, and equities, as well as by coordinated interagency intelligence analysis. Such interagency coordination and consultation will ensure that decisions on operational matters of such importance are well-informed and will facilitate de-confliction among departments and agencies addressing overlapping threat streams. Such coordination is not intended to interfere with the traditional command and control authority of departments and agencies conducting CT operations.

Lastly, when considering potential direct action against a U.S. person under this PPG, there are additional questions that must be answered. The Department of Justice (DOJ), for example, must conduct a legal analysis to ensure that such action may be conducted against the individual consistent with the laws and Constitution of the United States.

Based on the principles and priorities described above, Section 1 sets forth the procedure for establishing a plan for taking direct action against terrorist targets. Section 2 sets forth the approval process for the capture and long-term disposition of suspected terrorists. Section 3 sets forth the policy standard and procedure for designating identified HVTs for lethal action. Section 4 sets forth the policy standard and procedure for approving lethal force against terrorist targets other than identified HVTs. Section 5 sets forth the procedures for approving proposals that vary from the policy guidance otherwise set forth in this PPG. Section 6 sets forth the procedure for after-action reports. Section 7 addresses congressional notification. Section 8 sets forth general provisions.

SECTION 1. Procedure for Establishing a Plan for taking Direct Action Against Terrorist Targets

1.A Operational Plans for Taking Direct Action Against Terrorist Targets

Each of the operating agencies may propose a detailed operational plan to govern their respective direct action operations against: (1) suspected terrorists who may be lawfully detained; (2) identified HVTs who may be lawfully targeted for lethal action; or (3) lawful terrorist targets other than identified HVTs.

1.B Interagency Review of Operational Plans

All operational plans to undertake direct action operations against terrorist targets must undergo a legal review by the general counsel(s) of the operating

1 This PPG does not address otherwise lawful and properly authorized activities that may have lethal effects, which are incidental to the primary purpose of the operation.
agency executing the plan, and be submitted to the National Security Staff (NSS) for interagency review. All proposed operational plans must conform to the policy standards set forth in this Section. All proposed operational plans to undertake direct action against terrorist targets along with the conclusions of the General Counsel, shall be referred to the NSS Legal Adviser. The NSS Legal Adviser and the General Counsel of the proposing operating agency shall consult with other department and agency counsels, as necessary and appropriate. The NSS Legal Adviser shall submit the relevant legal conclusions to the Deputies Committee to inform its consideration of the proposed operational plan. All proposed operational plans to undertake direct action against terrorist targets will be reviewed by appropriate members of the Deputies and Principals Committees of the National Security Council (NSC) (defined in Presidential Policy Directive-1 or any successor directive) before presentation to the President for decision.

1.C Guidelines for Operational Plans

Any operational plan for taking direct action against terrorist targets shall, among other things, indicate with precision:

1) The U.S. CT objectives to be achieved;

2) The duration of time for which the authority is to remain in force;

3) The international legal basis for taking action;

4) The strike and surveillance assets that may be employed when taking action against an authorized objective;

5) 

6) Any proposed stipulation related to the operational plan, including the duration of authority for such stipulation;

7) Any proposed variations from the policies and procedures set forth in this PPG; and

8) The conditions precedent for any operation, which shall include at a minimum the following: (a) near certainty that an identified HVT or other lawful terrorist target other than an identified HVT is present; (b) near certainty that non-combatants will not be injured or killed; (c) and (d) if lethal force is being employed: (i) an assessment that capture is not feasible at the time of the operation; (ii) an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and (iii) an assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.

Operational disagreements shall be elevated to Principals. The President will adjudicate any disagreement among or between Principals.
1.D Additional Requirements When Requesting Authority for Directing Lethal Force Against Targets Other Than Identified HVTs

When requesting authority to direct lethal force against terrorist targets other than identified HVTs, the [INSERT] plan shall also include the following:

1) The types of targets that would qualify as appropriate targets pursuant to Section 4 (Terrorist Targets Other Than Identified HVTs) for purposes of the proposed operational plan; and

2) A description of the operating agency's internal process for nominating and approving the use of lethal force against terrorist targets other than identified HVTs.

1.E Policies and Procedures

The operating agencies shall establish harmonized policies and procedures for assessing:

1) Near certainty that a lawful target is present;

2) Near certainty that non-combatants will not be injured or killed; and

3) With respect to a proposal to take direct action against terrorist targets other than identified HVTs, whether the target qualifies pursuant to the policy standard set forth in Section 4.A of this PPG and in the specific operational plan.

1.F When Using Lethal Action, Employ All Reasonably Available Resources to Ascertaining the Identity of the Target

When the use of lethal action is deemed necessary, departments and agencies of the United States Government must employ all reasonably available resources to ascertain the identity of the target so that action can be taken, for example, against identified HVTs in accordance with Section 3 of this PPG. Verifying a target's identity before taking lethal action ensures greater certainty of outcome that lethal action has been taken against identified HVTs who satisfy the policy standard for lethal action in Section 3.A.


When considering a proposed operational plan, Principals and Deputies shall evaluate the following issues, along with any others they deem appropriate:

1) The implications for the broader regional and international political interests of the United States; and

2) For an operational plan that includes the option of lethal force against targets other than identified HVTs, an explanation of why authorizing direct action against targets other than identified HVTs is necessary to achieve U.S. policy objectives.
1. H Presentation to the President

1.H.1 If the Principal of the nominating operating agency, after review by Principals and Deputies, continues to support the operational plan, the plan shall be presented to the President for decision, along with the views expressed by departments and agencies during the NSC process.

1.H.2 An appropriate NSS official will communicate, in writing, the President’s decision, including any terms or conditions placed on any approval, to appropriate departments and agencies.

1. I Amendments or Modifications to Operational Plans

Except as described in Section 5, any amendments or modifications to an approved operational plan for direct action shall undergo the same review and approval process outlined in this Section.

SECTION 2. Approval Process for Certain Captures and the Long-Term Disposition of Certain Suspects

This Section sets forth the approval process for nominating for capture suspected terrorists or individuals providing operational support to suspected terrorists (in this section, together referred to as “suspects”); proposals to take custody of suspects, including pre- and post-capture screening; and determining a long-term disposition for suspects.

Unless otherwise approved in an operational plan under Section 1, the NSS shall coordinate for interagency review under this PPG, as described below, the following: (1) operations intended to result in United States Government personnel taking custody (through a capture or transfer) of a suspect located overseas and outside areas of active hostilities; and (3) long-term disposition decisions with respect to such suspects. The involvement of United States Government personnel in extraditions or transfers initiated for the purpose of prosecution in civilian court or those scenarios to which PPD-14 applies (i.e., circumstances in which an individual is arrested or otherwise taken into custody by the Federal Bureau of Investigation (FBI) or another Federal law enforcement agency) are not covered by this PPG.

Captures and Transfers by Foreign Governments: These procedures do not apply to U.S. law enforcement requests for foreign governments to arrest or otherwise take into custody a suspect.

3 “Custody,” as referred to here, it is anticipated that the United States Government will have temporary or transitory custody of the individual(s) without the presence of officials of the foreign government maintaining custody of the detainee(s).

4 Consistent with existing policy and practice, DOJ will, as appropriate, continue to notify the NSS, through the Counterterrorism Security Group (CSG), of plans to arrest, or seek the extradition or transfer of, a suspected terrorist, and where appropriate (e.g., to consider other potential disposition options) the NSS, in consultation with DOJ, may arrange for interagency consideration of a request for extradition or transfer.
or to United States Government provision of training, funds, or equipment to enable a foreign
government to capture a suspect. These procedures also do not apply to non-law enforcement
United States Government requests to capture a suspect who will remain in the custody of the
foreign government or to the provision of actionable intelligence to enable such captures. Every
6 months, departments and agencies shall notify the NSS of any requests made of a foreign
government to capture a suspect in the preceding 6 months. Unless covered by the exceptions
above or otherwise included in an operational plan under Section 1, if United States Government
personnel capture a suspect, or an operation is intended to result in United States Government personnel taking custody of a suspect, the department or agency must submit a proposal through the NSS for interagency review. Operational plans may include additional conditions requiring interagency review of capture operations involving United States Government personnel, depending on the policy consideration of the particular country or region in which the operations would occur. If United States Government personnel are expected to capture or transfer suspects in a particular country or region on an ongoing basis, the department or agency involved should seek to include a proposed plan for such activities in the operational plan approved under Section 1.

2.A Nomination Process

2.A.1 Any department or agency participating in the Deputies Committee review in Section 2.D
may identify an individual for consideration, but only an operating agency or DOJ ("nominating
agencies" for purposes of Section 2 of this PPG) may formally request that a suspect be
considered for capture or custody by U.S. personnel. Additionally, a department or agency that
has captured a suspect, or that plans to capture or otherwise take custody of a suspect, shall,
whenever practicable, propose a long-term disposition for such individual. Prior to requesting
that an individual be considered for capture or custody by the United States, the nominating
agency must confirm with its General Counsel that the operation can be conducted lawfully, but
it is not necessary to have resolved the long-term disposition plan prior to proposing a capture
operation.

2.A.2 Whenever possible, the nominating agency shall notify the Interagency Disposition
Planning Group prior to such a request.

2.A.3 A nomination for custody, including capture, or a proposed long-term disposition under
Section 2.A.1 shall be referred to the NSS, which shall initiate the screening process described in
Section 2.B.

2.A.4 In the event initial screening under Section 2.B has not taken place prior to U.S. personnel
taking custody of a suspect, the process for screening after capture described in Section 2.C shall
be initiated.
2.B Screening Prior to a Capture Operation

2.B.1 The nominating agency shall prepare a profile for each suspect referred to the NSS for review of their proposal to capture or otherwise take custody of the individual. The profile shall be developed based upon all relevant disseminated information available to the Intelligence Community (IC), as well as any other information needed to present as comprehensive and thorough a profile of the individual as possible. The profile should explain any differences of views among the IC and note, where appropriate, gaps in existing intelligence, as well as inconclusive and contradictory intelligence reports. At a minimum, each individual profile shall include the following information to the extent that such information exists:

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2.B.2 Once the profile has been completed, the nominating agency shall provide the profile to the NSS Senior Director for Counterterrorism.

2.B.3 Whenever time permits, the Interagency Disposition Planning Group shall assess the availability, including the strengths and weaknesses, of potential disposition options.

2.B.4 All nominations under this Section for capturing or otherwise taking a suspect into custody must undergo a legal review by the General Counsel of the nominating agency to determine that the suspect may lawfully be captured or taken into custody by the United States and that the operation can be conducted in accordance with applicable law. The General Counsel's conclusions shall be referred to the NSS Legal Adviser. The NSS Legal Adviser and the General Counsel of the nominating agency shall consult with other department and agency counsels, as necessary and appropriate. In addition, in the event that the suspect who has been
nominated is a U.S. person, DOJ shall conduct a legal analysis to ensure that the operation may be conducted consistent with the laws and Constitution of the United States. The NSS Legal Adviser shall submit the relevant legal conclusions to the Deputies Committee to inform its consideration of the nomination.

2.B.5 The NSS shall convene a Restricted Counterterrorism Security Group (RCSG)\(^6\) for the purpose of reviewing and organizing material and addressing any issues related to the nomination of an individual for capture, custody, or long-term disposition. Before forwarding to the Deputies the nomination of a suspect for capture or to otherwise be taken into custody, the RCSG shall identify whether any other material is needed for Deputies' consideration of the nomination and issue taskings to departments and agencies, as appropriate. For each nomination, the NSS will request, and the National Counterterrorism Center (NCTC) shall conduct, an assessment of the suspect and provide that assessment to the NSS prior to consideration of the nomination or proposed long-term disposition by the Deputies Committee, and where feasible, prior to RCSG review. The NSS will be responsible for ensuring that all necessary materials, including the profile developed by the nominating agency and the NCTC assessment, are included in the nomination package submitted to Deputies.

2.C Screening After Capture

2.C.1 Whenever feasible, initial screening by the United States of suspects taken into U.S. custody should be conducted before the United States captures or otherwise takes custody of the suspect, as set out in Section 2.B.

2.C.2 In the event initial screening cannot be conducted before the United States takes custody of the individual, immediately after capturing or otherwise taking custody of the suspect, appropriate U.S. personnel shall screen the individual to ensure that the correct individual has been taken into custody and that the individual may be lawfully detained. Such screening shall be conducted consistent with the laws and policies applicable to the authorities pursuant to which the individual is being detained, and

2.C.3

2.C.4 In the event that the suspect is detained pursuant to law of war authorities by the U.S. military and additional time is needed for purposes of intelligence collection or the development of a long-term disposition option, the Secretary of Defense or his designee, following appropriate interagency consultations coordinated through the NSC process, may approve an extension of the screening period subject to the following:

\(^6\) The RCSG shall be chaired by the NSS Senior Director for Counterterrorism and shall include the following departments and agencies: the Department of State, the Department of the Treasury, DOD, DOJ, the Department of Homeland Security (DHS), CIA, Joint Chiefs of Staff (JCS), and NCTC. Additional departments and agencies may participate in the RCSG meetings, as appropriate.
1) The suspect's detention must be consistent with U.S. law and policy, as well as all applicable international law;

2) The International Committee of the Red Cross must be notified of, and provided timely access to, any suspect held by the U.S. military pursuant to law of war authorities; and

3) When possible and consistent with the primary objective of collecting intelligence, intelligence will be collected in a manner that preserves the availability of long-term disposition options, including prosecution.

2.D Deputies Review

2.D.1 A nomination or disposition package for capture, custody, or long-term disposition forwarded to the Deputies shall include the following:

1) The profile, produced by the nominating agency pursuant to Section 2.B.1, for the suspect or suspects proposed for capture or long-term disposition;

2) Any assessment produced by NCTC pursuant to Section 2.B.5;

3) If appropriate, a description of the planned capture and screening operation and operational plan under which the capture would be conducted;

4) The department(s) or agency or agencies that would be responsible for carrying out the proposed operation, if not already conducted;

5) A summary of the legal assessment prepared under Section 2.B.4; and

6) An assessment, including the strengths and weaknesses, of potential long-term disposition options.

2.D.2 The Deputies of the Department of State, the Treasury, DOD, DOJ, DHS, the Office of the Director of National Intelligence (DNI), CIA, JCS, NCTC, and any other Deputies or officials a Deputy National Security Advisor (DNSA) may invite to participate, shall promptly consider whether to recommend to the Principal of the nominating agency that a capture operation be conducted in the context of the proposed plan at issue, that the United States Government otherwise take custody of the individual, or that a particular long-term disposition option be pursued.

2.D.3 When considering a proposed nomination, the Deputies shall evaluate the following issues, and any others deemed appropriate by the Deputies:
1) Whether the suspect's capture would further the U.S. CT strategy;

2) The implications for the broader regional and international political interests of the United States;

3) Whether the proposed action would interfere with any intelligence collection or compromise any intelligence sources or methods;

4) The proposed plan for the detention and interrogation of the suspect;

5) The proposed plan to capture the suspect, including the feasibility of capture and the risk to U.S. personnel;

6) In the event that transfer to a third party or country is anticipated, the proposed plan for obtaining humane treatment assurances from any country;

7) The long-term disposition options for the individual; and

8) [redacted]

2.D.4 When considering the long-term disposition of a suspect who is already in U.S. custody, or whom a department or agency has already been authorized to capture or take into custody, the Deputies’ discussion shall be guided by the following principles:

1) Whenever possible, third-country custody options that are consistent with U.S. national security should be explored;

2) Where transfer to a third country is not feasible or consistent with U.S. national security interests, the preferred long-term disposition option for suspects captured or otherwise taken into custody by the United States will be prosecution in a civilian court or, where available, a military commission. Consistent with that preference, wherever possible and consistent with the primary objective of collecting intelligence, intelligence will be collected in a manner that allows it to be used as evidence in a criminal prosecution; and

3) In no event will additional detainees be brought to the detention facilities at the Guantanamo Bay Naval Base.

Following consideration and discussion by the Deputies, departments and agencies shall submit the final positions of their Principals within a timeframe consistent with operational needs.

2.E Presentation to the President and the Principal of the Nominating Agency

2.E.1 If the nominating agency, on behalf of its Principal, continues to support taking action, a DNSA shall inform the President of the views expressed by departments and agencies. As appropriate, the nomination shall be presented to the President for a decision or the nomination will be provided to the Principal of the appropriate operating agency for a decision, along with any views expressed by the President.
2.E.2 An appropriate NSS official will communicate in writing the decision taken, including any terms or conditions placed on such decisions, to the Deputies who participated in the Deputies Committee review of the nomination.

SECTION 3. Policy Standard and Procedure for Designating Identified HVTs for Lethal Action

3.A Policy Standard for the Use of Lethal Action Against HVTs

Where the use of lethal action against HVTs has been authorized, an individual whose identity is known will only be eligible to be targeted, as a policy matter, consistent with the requirements of the approved operational plan, if the individual's activities pose a continuing, imminent threat to U.S. persons.

3.B Necessary Preconditions for Taking Lethal Action

Lethal action requires that the individual may lawfully be targeted under existing authorities and that any conditions established in the appropriate operational plan, including those set forth in Section 1.C.8, are met. The preconditions set forth in Section 1.C.8 for the use of lethal force are as follows: (a) near certainty that an identified HVT is present; (b) near certainty that non-combatants will not be injured or killed; (c) an assessment that capture is not feasible at the time of the operation;7 (d) an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and (f) an assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.

3.C Interagency Review Process

3.C.1 Any department or agency participating in the Deputies Committee review in Section 3.D may identify an individual for consideration, but only the operating agencies (also known as the "nominating agencies" for purposes of Section 3 of this PPG) may formally propose that an individual be nominated for lethal action following confirmation from the General Counsel of the nominating agency that the individual would be a lawful target.

3.C.2 The nominating agency shall prepare a profile for each individual nominated for lethal action. The profile shall be developed based upon all relevant disseminated information available to the IC, as well as any other information needed to present as comprehensive and thorough a profile of the individual as possible. The profile shall note, where appropriate, gaps

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7 Operational disagreements are to be elevated to Principals. The President will adjudicate any disagreement among or between Principals.

8 This process is designed to review nominations of individuals only where the capture of any individual at issue is not feasible. If, at any point during or after the approval process capture appears feasible, a capture option in accordance with Section 2 of this PPG (or the relevant operational plan) should be pursued. If the individual has already been approved for lethal action when a capture option becomes feasible, the individual should be referred to the NSS Senior Director for Counterterrorism and undergo an expedited Deputies review focused on identifying disposition options.
in existing intelligence, as well as inconclusive and contradictory intelligence reports. At a minimum, each individual profile shall include a summary of all relevant disseminated intelligence required to determine whether the policy standard set forth in Section 3.A for lethal action against HVTs has been met, and include the following information to the extent that such information is available:

3.C.3 The NSS shall convene a meeting of the RCSG for the purpose of reviewing and organizing material, and addressing any issues related to the nomination of an individual for lethal action.

3.C.4 Before forwarding the nomination of an identified HVT for lethal action to Deputies, the RCSG shall identify other materials needed for Deputies' consideration of the nomination and shall issue such taskings to departments and agencies, as appropriate. For each nomination, the NSS will request, and NCTC shall conduct, an assessment of the nomination and provide that assessment to the NSS prior to consideration of the nomination by the Deputies Committee, and where feasible prior to RCSG review. The NSS will be responsible for ensuring that all necessary materials, including the profile developed by the nominating agency and the NCTC assessment, are included in the nomination package submitted to Deputies.
3.C.5 All nominations for lethal action must undergo a legal review by the General Counsel of the nominating agency to ensure that the action contemplated is lawful and may be conducted in accordance with applicable law. The General Counsel's conclusions shall be referred to the NSS Legal Adviser. In all events, the NSS Legal Adviser and the General Counsel of the nominating agency shall consult with DOJ. The NSS Legal Adviser and the General Counsel of the nominating agency shall also consult with other interagency lawyers depending on the particular nomination. In addition, in the event that the individual proposed for nomination is a U.S. person, DOJ shall conduct a legal analysis to ensure that lethal action may be conducted against that individual consistent with the laws and Constitution of the United States. The NSS Legal Adviser shall submit the relevant legal conclusions to the NSS Senior Director for Counterterrorism for inclusion in the nomination package to be submitted to Deputies.

3.C.6 If the proposal may be conducted lawfully, the nomination shall be referred to a DNSA, or another appropriate NSS official, to facilitate consideration by the Deputies Committee.

3.D Deputies Review

3.D.1 Upon completion of a nomination package, the NSS shall forward the nomination package to the Deputies Committee for consideration. A standard nomination package to be forwarded to the Deputies shall include, at a minimum, the following:

1) The profile, produced by the nominating agency pursuant to Section 3.C.2, for the individual proposed for lethal action;

2) The assessment produced by NCTC pursuant to Section 3.C.4;

3) A description [Redacted] operational plan to which the nomination would be added, including the timeframe, if any, in which the operation may be executed;

4) The operating agency or agencies that would be responsible for conducting the proposed lethal action;

5) A summary of the legal assessment; and

6) The determinations made by the nominating agency that capture is not currently feasible and that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons, as well as the underlying analysis for those determinations.

3.D.2 The Deputies of the Department of State, DOD, JCS, DOJ, DHS, DNI, CIA, and NCTC shall promptly consider whether to recommend to the Principal of the nominating agency that lethal action be taken against the proposed individual in the context [Redacted] operational plan at issue. [Redacted] shall participate in the review process as observers. A DNSA may invite Deputies or other officials to participate as appropriate. Following consideration and discussion by the Deputies, departments and agencies shall submit to the NSS the final positions of their Principals within a timeframe consistent with operational needs.
3.D.3 When considering each proposed nomination, the Deputies shall evaluate the following issues, and any others deemed appropriate by the Deputies:

1) Whether the Deputies can conclude with confidence that the nominated individual qualifies under the policy standard in Section 3.A for lethal action, taking into account credible information that may cast doubt on such a conclusion;

2) Whether the threat posed by the individual to U.S. persons can be minimized through a response short of lethal action;

3) The implications for the broader regional and international political interests of the United States;

4) Whether the proposed action would interfere with any intelligence collection or compromise any intelligence sources or methods;

5) Whether the individual, if captured, would likely result in the collection of valuable intelligence, notwithstanding an assessment that capture is not currently feasible; and

6) [Redacted]

3.E Presentation to the President and the Principal of the Nominating Agency

3.E.1 The Principal of the nominating agency may approve lethal action against the proposed individual if: (1) the relevant Principals unanimously agree that lethal action should be taken against the proposed individual, and (2) the Principal of the nominating agency has notified the President through a DNSA of his intention to approve lethal action and has received notice from a DNSA that the President has been apprised of that intention. The Principal of the nominating agency may not delegate his authority to approve a nomination.

3.E.2 Nominations shall be presented to the President for decision, along with the views expressed by departments and agencies during the process, when: (1) the proposed individual is a U.S. person, or (2) there is a lack of consensus among Principals regarding the nomination, but the Principal of the nominating agency continues to support approving the nomination.

3.E.3 In either case, an appropriate NSS official will communicate in writing the decision, including any terms or conditions placed on any approval, to the Deputies who participated in the Deputies Committee review of the nomination.

3.F Annual Review: [Redacted]

3.F.1 The NSS, in conjunction with the nominating agency, shall coordinate an annual review of individuals authorized for possible lethal action to evaluate whether the intelligence continues to support a determination that the individuals qualify for lethal action under the standard set forth in Section 3.A. The NSS shall refer the necessary information for the
annual review to the Deputies for consideration. Following Deputies review, the information, along with any recommendations from Deputies, shall be forwarded to the Principal of the nominating agency for review. A separate legal review will be conducted, as appropriate. An appropriate official from each nominating agency shall inform a DNSA of what action, if any, the Principal of the nominating agency takes in response to the review.

3.F.2 The Deputy of any department or agency participating in the Deputies Committee review in Section 3.D may propose at any time that an individual be for lethal action. In the event that such a proposal is made, NCTC shall update the IC-coordinated profile for the individual at issue and, as appropriate, the Deputies shall consider whether to propose that the individual be removed by the Principal of the nominating agency.

3.F.3 Following consideration and discussion by the Deputies in accordance with 3.F.1 or 3.F.2, departments and agencies shall submit the final positions of their Principals within an appropriate timeframe determined by the NSS.

SECTION 4. Policy Standard and Procedure for Approving Lethal Force Against Terrorist Targets Other Than Identified HVTs

4.A Policy Standard for Directing Lethal Force Against Terrorist Targets Other Than Identified HVTs

This Section applies to the direction of lethal force against lawful terrorist targets, such as manned or unmanned Vehicle Borne Improvised Explosive Devices or infrastructure, including explosives storage facilities. Where an operating agency has been authorized to take direct action against terrorist targets other than identified HVTs, such a terrorist target may be acted against as a policy matter, consistent with the requirements of the approved operational plan, if the target poses a continuing, imminent threat to U.S. persons.

4.B Necessary Preconditions for Directing Lethal Force Under This Section

Directing lethal force under this Section requires that: (1) the target may lawfully be targeted and that any conditions established in the appropriate operational plan, including those set forth in Section 1.C.8, are met. The preconditions set forth in Section 1.C.8 for the use of lethal force are as follows: (a) near certainty that a lawful terrorist target other than an identified HVT is present; (b) near certainty that non-combatants will not be injured or killed; (c) operational disagreements are to be elevated to Principals. The President will adjudicate any disagreement among or between Principals.
threat to U.S. persons; and (f) an assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.

4.C Nomination and Review of Terrorist Targets Other Than Identified High-Value Individuals

Where an operating agency has been authorized to direct force against terrorist targets (including property) other than identified HVTs, it may nominate specific terrorist targets to target with lethal force consistent with the requirements of the approved operational plan, including the process required by the plan for nominating and approving such targets.

SECTION 5. Procedures for Approving Proposals that Vary from the Policy Guidance Otherwise Set Forth in this PPG

5.A Already Authorized Targets: Variations from Operational Plan Requirements When Fleeting Opportunities Arise

5.A.1 When direct action has been authorized under this PPG against identified HVTs or against terrorist targets other than identified HVTs, the operating agency responsible for conducting approved operations, as a result of unforeseen circumstances and in the event of a fleeting opportunity, may submit an individualized operational plan to the NSS that varies from the requirements of the operational plan. In that event, an appropriate NSS official shall consult with other departments and agencies, as appropriate and as time permits, before submitting the proposal to the President for his decision.

5.A.2 All such variations from an operational plan must be reviewed by the General Counsel of the operating agency conducting the operation and the conclusions referred to the NSS Legal Adviser. In all cases, any operational plan must contemplate an operation that is in full compliance with applicable law. Absent extraordinary circumstances, these proposals shall:

1) Identify an international and domestic legal basis for taking action in the relevant country

2) Mandate that lethal action may only be taken if: (a) there is near certainty that the target is present; (b) there is near certainty that non-combatants will not be injured or killed; (c) it has been determined that capture is not feasible; (d) the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and (e) no other reasonable alternatives exist to effectively address the threat to U.S. persons.

5.A.3 Any variation from an operational plan shall be presented to the President for decision, and an appropriate NSS official shall communicate the President’s decision, including any terms or conditions placed on any approval, to appropriate agencies.
5.B Extraordinary Cases: Variations from the Policy Guidance Otherwise Set Forth in this PPG

Nothing in this PPG shall be construed to prevent the President from exercising his constitutional authority as Commander in Chief and Chief Executive, as well as his statutory authority, to consider a lawful proposal from operating agencies that he authorize direct action that would fall outside of the policy guidance contained herein, including a proposal that he authorize lethal force against an individual who poses a continuing, imminent threat to another country's persons. In extraordinary cases, such a proposal may be brought forward to the President for consideration as follows:

1) A proposal that varies from the policy guidance contained in this PPG may be brought forward by the Principal of one of the operating agencies through the interagency process described in Section 1 of this PPG, after a separate legal review has been undertaken to determine whether action may be taken in accordance with applicable law.

2) Where there is a fleeting opportunity, the Principal of one of the operating agencies may propose to the President that action be taken that would otherwise vary from the guidance contained in this PPG, after a separate legal review has been undertaken to determine whether action may be taken in accordance with applicable law.

3) In all cases, any proposal brought forward pursuant to this subsection must contemplate an operation that is in full compliance with applicable law.

SECTION 6. Procedures for After Action Reports

6.A The department or agency that conducted the operation shall provide the following preliminary information in writing to the NSS within 48 hours of taking direct action against any authorized target:

1) A description of the operation;

2) A summary of the basis for determining that the operation satisfied the applicable criteria contained in the approved operational plan;

3) An assessment of whether the operation achieved its objective;

4) An assessment of the number of combatants killed or wounded;

5) A description of any collateral damage that resulted from the operation;

6) A description of all munitions and assets used as part of the operation; and

7) ____________________________.
6.B The department or agency that conducted the operation shall provide subsequent updates to the NSS on the outcome of the operation, as appropriate, including any intelligence collected as a result of the operation. The information provided to the NSS under this Section shall be made available to appropriate officials at the departments and agencies taking part in the review under Sections 1 and 3 of this PPG.

SECTION 7. Congressional Notification

A congressional notification shall be prepared and promptly provided to the appropriate Members of the Congress by the department or agency approved to carry out such actions when:

1) A new operational plan for taking direct action is approved:

2) Authority is expanded under an operational plan for directing lethal force against lawfully targeted individuals and against lawful terrorist targets other than individuals; or

3) An operation has been conducted pursuant to such approval(s).

In addition, appropriate Members of the Congress will be provided, no less than every 3 months, updates on identified HVTs who have been approved for lethal action under Section 3. Each department or agency required to submit congressional notifications under this Section shall inform the NSS of how it intends to comply with this Section prior to providing any such notifications to Congress.


8.A This PPG is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

8.B

8.C Twelve months after entry into force of this PPG, Principals shall review the implementation and operation of the PPG, including any lessons learned from evaluating the information provided under Section 6, and consider whether any adjustments are warranted.
STUXNET AND ARTICLE 2(4)'S PROHIBITION AGAINST THE USE OF FORCE: CUSTOMARY LAW AND POTENTIAL MODELS

Lieutenant Andrew Moore, JAGC, USN*

I. Introduction

The customary interpretation of the United Nations (U.N.) Charter's Article 2(4) prohibition against the use of force is ill-suited for coercive uses of the cyber instrument, such as the Stuxnet cyberattack. Since its drafting, the U.N. Charter has been the relevant set of international conflict management principles—specifically Article 2(4). Drafted in the wake of World War II's destruction, the customary interpretation of Article 2(4), and the state practice surrounding its prohibition against force, has focused on restricting the use of the military instrument. Article 2(4)'s textual ambiguity and flexibility has allowed it to remain relevant in regulating weapons based in the physical domain. Unforeseen at the time of the U.N. Charter's drafting, the cyber domain and its use as a means of inter-state coercion pose a challenge to Article 2(4)'s prevailing instrument-based interpretation of force.¹

In order to remain relevant, the customary interpretation of Article 2(4)'s prohibition against force must evolve to address coercive uses of the cyber instrument by nation-states. The Stuxnet malware demonstrates the lacunae between the accepted "use of force" analysis for the use of the military instrument and the cyber instrument under Article 2(4). The destruction caused to the Iranian nuclear complex demonstrates that Stuxnet should be considered a use of force prohibited by Article 2(4), and, possibly, equivalent to an armed attack. In a six-month period from late 2009 until 2010, a malicious software, or malware, named Stuxnet infiltrated and attacked the control systems at Iran's largest nuclear fuel

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¹ The instrument-based interpretation of force categorizes actions taken by a nation-state against another nation-state based on the means used. See Michael N. Schmitt, Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework, 37 COLUM. J. OF TRANSNAT'L L. 885, 904 (1999) (stating that the determination of whether or not the standard has been breached depends on the type of the coercive instrument—diplomatic, economic, or military—selected to attain the national objectives in question).
enrichment facility, Natanz. During that time, Stuxnet destroyed ten percent of the centrifuges the facility. Despite the physical destruction, this act of coercion is outside of the ambit of Article 2(4) under the customary instrument-based interpretation.

Stuxnet provided an opportunity to evolve the customary interpretation of Article 2(4)'s prohibition against the use of force to include the coercive use of the cyber instrument. This paper will address the customary interpretation of force prohibited by Article 2(4), models for applying Article 2(4) to the use of the cyber instrument, and whether the Stuxnet malware attack on the Iranian nuclear complex reaches the level of a "use of force" in violation of Article 2(4) under these models. To focus on the legal issues of the use of the cyber instrument as a method of interstate coercion, the scope of Iran's response to Stuxnet is not addressed.

The following assumptions are used to focus the paper on the challenge of applying Article 2(4) to the coercive use of the cyber instrument, as evidenced by Stuxnet. First, it is assumed that a nation-state is responsible for deploying Stuxnet. Second, the analysis assumes that attributing Stuxnet to the responsible state has occurred. Third, the deployment of Stuxnet is assumed to have occurred.

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3 State practice and opinio juris have begun to evolve the interpretation of Article 2(4) to apply to uses of the cyber instrument. See The White House, International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World 9 (2011), http://www.whitehouse.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf [hereinafter White House Cyber Policy]; Harald Hontog Koh, Legal Advisor of the Dep’t of State, International Law in Cyberspace, Address to the USCYBERCOM Inter-Agency Legal Conference (Sep. 18, 2012), available at http://www.state.gov/s/rls/trs/remarks/197924.htm [hereinafter Koh speech]; INTERNATIONAL GROUP OF EXPERTS, NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael Schmitt ed., 2013) [hereinafter TALLINN MANUAL]. The Tallinn Manual consists of "rules" adopted unanimously by an international group of legal and technical experts that are meant to reflect customary international law, accompanied by "commentary" that outlines their legal basis and highlights any differences of opinion among the Experts as to their interpretation in the cyber context. Michael Schmitt served as the project’s director. Prof. Schmitt is one of the foremost writers on the application of the Law of Armed Conflict to the actions taken within the cyber domain.
4 This term refers to any hostile act in the virtual reality of cyberspace that has manifestations in the physical world, such as a cyberattack. The National Research Council (NRC) Report infra has distinguished cyberattacks, or offensive cyber operations, from other cyber activity as one that has a destructive payload.
5 The author recognizes attribution may be the most challenging, if not effectively impossible, technical aspect of analyzing the use of the cyber instrument, but this technical challenge does not change the use of force analysis.
6 To date, no country has publicly taken responsibility for Stuxnet. See, e.g., Iran: Computer Worm Could Have Caused Huge Damage, ASSOC. PRESS, Apr. 17, 2011, available at http://phys.org/news/2011-04-iran-worm-huge.html (citing Iranian officials who have determined that the United States and Israel were responsible); David E. Sanger, Obama Order Sped Up Wave of
outside of a U.N. authorized use of force, and was not conducted in self-defense under Article 51. Fourth, the state responsible for deploying Stuxnet is assumed to have intended to cause physical damage in the target state, specifically to critical infrastructure, such as telecommunications, electrical power systems, gas and oil storage and transportation, banking and finance, transportation, water supply systems, emergency services.\(^7\)

Given these assumptions, the paper will examine Stuxnet and the analytical models for determining whether it is or should be considered a use of force under Article 2(4). Part II is an overview of Stuxnet’s attack method, target, and effects. Part III examines the customary interpretation of which forms of coercion constitute a prohibited use of force under Article 2(4) and customary international law. Part IV outlines three proposed analytical models for applying Article 2(4) to coercive uses of the cyber instrument between states. Part V examines whether Stuxnet is a use of force in violation of Article 2(4) under each of the three models. Part VI is the conclusion, which stresses that the interpretation of Article 2(4)’s prohibition against force should evolve to include coercive uses of the cyber instrument that have destructive effects in the physical world such as Stuxnet.

II. Stuxnet

In June 2010, the discovery of a malware that targeted control systems at the Iranian nuclear facility Natanz was first publicly reported.\(^8\) Malware is malicious software that interferes with normal computer and Internet-based application functions.\(^9\) The malware’s name, Stuxnet, is derived from keywords buried in its code.\(^10\) Although malware has existed since the inception of computer networks, Stuxnet has been recognized as a *magnum opus* in terms of concept of its operation, elegance of its design, and effectiveness of its code.\(^11\) This sophistication

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\(^7\) See Exec. Order No. 13,010, 61 Fed Reg. 37,347 (1996) (defining which systems and infrastructure are critical, sensitive, and vital).


may be an indication that it was the result of a state-sponsored project to hamper Iran’s pursuit of nuclear technology.12

There are two classes of targeted malware attacks: attacks targeting a specific company or organization, and attacks targeting specific software or information technology (IT) infrastructure.13 Stuxnet falls in the second class of malware attacks targeting specific software and IT infrastructure.14 Moreover, Stuxnet was more precise than a targeted attack—it was designed and executed as a directed attack.15 Whereas a targeted attack is one that has been aimed at a specific user, company or organization, a directed attack is designed to attack a single system within a specific organization.16

Stuxnet targeted industrial software and equipment or Supervisory Control and Data Acquisition (SCADA) systems.17 SCADA systems monitor and control industrial, infrastructure, or facility-based processes.18 SCADA systems are usually built with proprietary software, and are often not connected to the Internet. A malware’s payload is the data or destructive effect that is transmitted to the target. Stuxnet’s payload was designed to target and deliver its payload only to the specific SCADA systems used at the Natanz uranium enrichment facility in Iran.19

Stuxnet was a well-designed attack20 and had a promiscuous propagation, or aggressive growth pattern with limited controls.21 However, once Stuxnet came

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12 Id.
14 Id.
16 See Matrosov, supra note 13, at 5.
18 SCADA, TECH-FAQ, (last visited May 28, 2015), http://www.tech-faq.com/scada.html. Although the potential for collateral damage of releasing malware targeted at SCADA systems into the open became a reality, the code only deployed the destructive payload on a specific target.
20 It is unclear at what point Iran completely eliminated or even stopped Stuxnet. See Thomas Erdbrink and Joby Warrick, Iran: Country Under Attack by Second Computer Virus, WASH. POST,
into contact with the target system, it automatically deployed its attack. Stuxnet was able to surreptitiously remain undetected because it used digital signatures to gain access privileges and maintain anonymity in a secured network. The malware used the highest level of privileges available in order to take any action it wanted on the infiltrated computer. In instances when Stuxnet did not have the requisite privileges, it used one of four self-launching, zero-day attacks, which exploit vulnerabilities in software that are unknown to others including the software developer. These zero-day attacks were used to install undetected, malicious programs onto the system and gain access to networks.

Stuxnet’s infiltration plan consisted of two steps, each with its own payload: one exploitative and the other destructive. The first step, called a dropper, issued to compromise a laptop computer that is running regular Microsoft Windows to configure the SCADA systems at Natanz. Second, after the dropper has gained control of the laptop, it exploits the laptop as an entry point into the SCADA system. During this second step, the malware searches for a specific configuration only found in the SCADA system being utilized at Natanz. If Stuxnet does not find the specific configuration, it does nothing. If it does recognize the configuration, then it begins the next phase of the attack by launching the destructive payload.

After Stuxnet infiltrated the targeted SCADA system at Natanz, it worked at the same target from two different avenues of approach while manipulating data being sent to the control room and safety systems. One approach took control of the centrifuge systems and began to spin them slower and faster in order to crack and destroy them. The second approach took control of the nuclear fuel cascade process, and began to manipulate the process causing damage to the system. In addition to attacks from two approaches, Stuxnet was designed to deceive the

31 See Matrosov, supra note 13, at 10.
33 See Matrosov, supra note 13, at 7.
34 See Symantec, supra note 17.
35 See Matrosov, supra note 13, at 7; Symantec, supra note 17; see also Keizer, supra note 12 (according to O Muchu, the four zero-day attacks are unprecedented for a single piece of malware).
36 See Symantec, supra note 17.
37 See Langner speech, supra note 15; IISS supra note 22.
38 Id.
39 Id.
40 Id.
41 See Symantec, supra note 17.
42 See IISS, supra note 22.
43 Id.
engineers in the control room by sending false data that is consistent with regular centrifuge and cascade processes. Further, Stuxnet malware compromised digital safety systems preventing the automated systems from halting an unsafe process.

Stuxnet was able to accomplish what U.N. economic sanctions have not been able to do—hamper the Iranian nuclear program. Stuxnet had a detrimental effect on the Iranian nuclear complex, specifically the Natanz fuel enrichment plant. One report indicates that Stuxnet has set the Iranian nuclear program back by as much as two years. According to reports by the International Atomic Energy Agency and other nuclear watchdogs, Iran dismantled and then replaced more than ten percent of the 9,000 centrifuges at the Natanz facility during a six month period from late 2009 until the spring of 2010, including all 984 centrifuges in six cascades. The destruction of the centrifuges may not appear significant since Iran was able to increase its amount of low enriched uranium (LEU) during the time of the attack, but Stuxnet was able to delay Iran from increasing the number of enriching centrifuges. Although it appears Iran’s LEU production has recovered, it is unclear if Iranian leaders’ confidence or Iranian nuclear facilities’ computer systems have recovered from Stuxnet.

Stuxnet has significant implications beyond the direct physical effects on the speculated target, Natanz. Stuxnet’s complexity and sophistication indicate nation-state sponsorship of a well-coordinated, well-resourced, and highly-skilled team effort in creating, testing, and monitoring Stuxnet. As the Battle of Agincourt and the bombing of Hiroshima were examples of new means of violence and destruction, Stuxnet may signal an intensification of the coercive use of the cyber instrument between nation-states. Worse, the physical effects and legal

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34 See Langner, supra note 19.
35 See Langner Speech, supra note 15.
37 See IISS, supra note 22 (citing IT security analyst and Stuxnet expert Ralph Langner).
38 See id.
39 IISS, supra note 22 (the totality of Stuxnet’s effects on Natanz and the Iranian nuclear complex is unclear).
41 See, e.g., Langner, supra note 19; Keizer, supra note 11.
42 The Battle of Agincourt in 1415 is noted as one of the first battles to experience extensive use of the English long-bow, which led to an extremely lopsided victory for the outnumbered English forces that left almost 10,000 French soldiers dead. See, e.g., Hannah Ellis Peterson, Ten Reason Why the French Lost, THE TELEGRAPH, Jul. 20, 2011 available at http://www.telegraph.co.uk/news/8648068/Battle-of-Agincourt-ten-reasons-why-the-French-lost.html.
implications of Stuxnet are a harbinger of a form of international coercion unforeseen by Charter drafters and unsettled under prevailing international law.

III. International Law: *Jus Ad Bellum* and prohibited ‘Use of Force’ under Article 2(4) of the United Nations Charter

In order to analyze inter-state coercive uses of the cyber instrument such as Stuxnet, it is imperative to understand the prevailing legal framework, specifically the international law of armed conflict (LOAC). One of the questions LOAC addresses is “when is it legal for one nation-state to use force against another?” This body of law is known as *Jus Ad Bellum*. Until the advent of the U.N. and its Charter, unilateral use of force in inter-state relations was lawful. Now, *Jus Ad Bellum* is governed primarily by the U.N. Charter, interpretations of the U.N. Charter, other international conventions, and customary international law that has been formed by *opinio juris* and state practice.

The U.N. Charter attempted to codify how states could engage with each other. The Charter prohibits the unilateral use of force for any reason except self-defense. However, neither the U.N. Charter nor customary international law offers a clear definition for what constitutes a prohibited use of force by a state. Article 2(4) of the U.N. Charter is the most relevant section in determining a state’s ability to use force unilaterally outside of the self-defense context, prohibiting states from the unilateral threat or use of force. Although on its face these provisions appear plain, as discussed below, the interpretation and application of Article 2(4) in inter-state relations are uncertain, specifically the definition of a “use of force.”

Under Article 2(4), U.N. Member states are prohibited from “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The Charter allows for the use of force in only two situations: where it is authorized by

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43 See David E. Graham, *Cyber Threats and the Law of War*, 4 J. OF NAT. SEC. LAW & POL. 87 (2010) (referring to *Jus Ad Bellum* as a set of conflict management norms and procedures as opposed to a set of laws (*Jus in bello* is not addressed in this paper).  
46 Even then the U.N. Charter regulates the process of self-defense. See U.N. Charter art. 51.  
47 See U.N. Charter art. 51.  
the U.N. Security Council under Chapter VII and when it is done in self-defense to an armed attack under Article 51.49

Drafted in the wake of World War II’s destruction, Article 2(4) and state practice surrounding its prohibition against force focused on restricting the use of the military instrument. According to Reisman and Baker:

[b]oth the Charter, and its reformulations by the Assembly and customary conceptions of international law with regard to the use of the military instrument rested on a set of inherent assumptions about how military conflict is conducted: conflict is territorial, between organized communities . . . Changes in military technology and political dynamics made many of the key assumptions underlying the basic rules about when and how to use force obsolete.50

Article 2(4) does not define what constitutes a “use of force”,51 however, other U.N. provisions aid in determining what activities may constitute a use of force. Article 41 lists measures which are not uses of force, including complete or partial disruption of economic relations of rail, sea, air, telephonic, and other means of communication.52 Article 42 gives additional specific uses of force including “blockades and other operations by armed forces.”53

Article 2(4) is both direct and ambiguous in its prohibition of the use of force by states.54 The Vienna Convention on the Law of Treaties outlines that international instruments should be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and scope.55 A face value reading of Article 2(4) prohibits states from threatening or using force against other states.56 But, a face value reading of the article fails to provide an interpretation that is applicable without context. This ambiguity enables the U.N., regional organizations, and individual states more flexibility in applying the provision’s language to situations as they arise. As Prof.

49 See U.N. Charter arts. 42 & 51.
50 Reisman & Baker, supra note 44, at 41.
52 U.N. Charter art. 41.
53 U.N. Charter art. 42.
56 See, Graham, supra note 43.
Michael Schmitt states, “because the Charter is the constitutive instrument of an international organization, flexibility in interpretive spirit is apropos.”57 This flexibility does not mean “that the rules lack any content.”58

International legal scholars have debated the meaning of Article 2(4) and the term “use of force.”59 Historically, a “use of force” has been defined in terms of the instrument used, including ‘armed force’ within the prohibition, but excluding economic and political coercion.60 The customary interpretation of Article 2(4) determines a “use of force” using an instrument-based analysis. The U.S. and its international allies view Article 2(4) as applying to armed attacks of one state against another.61 A plain reading of Article 2(4) and other structural aspects of the Charter support this view.62 The purpose of the Charter is “to save succeeding generations from the scourge of war,” but does not ban other forms of coercion.63 Further, the travaux préparatoires indicated that the drafters did not intend to extend the prohibition on force to economic or political pressures.64

U.N. and other international pronouncements militate towards an instrument-based analysis in defining a use of force. The U.N. General Assembly’s definition of aggression requires the use of an armed force against another state, and provides a non-exhaustive list of acts that qualify as acts of aggression.65

57 Schmitt, supra note 1.
58 Schacter, supra note 51 at 121; Dinstein, supra note 51.
59 See, e.g., id.
60 Schmitt, supra note 1, at 919.
61 See NRC REPORT, supra note 45, at 253 (“Traditional LOAC emphasizes death or physical injury to people and destruction of physical property as criteria for the definitions of ‘use of force’ and ‘armed attack.’”); Albrecht Randelzhofer, Art. 2(4), in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 112, 117 (2d ed., Bruno Simma, ed., 2002) (noting that art. 2(4) is, “according to the correct and prevailing view, limited to armed force.”).
62 Waxman, supra note 54, at 428 (“[T]he Charter’s preamble sets out the goal that ‘armed force . . . should be used save in the common interest.’ Similarly, Articles 41 and 42 authorize, respectively, the Security Council to take actions not involving armed force and, should those measures be inadequate, to escalate to armed force. Moreover, Article 51 speaks of self-defense against ‘armed’ attacks. There are textual counter-arguments, such as that Article 51’s more specific limit to ‘armed attacks’ suggests that drafters envisioned prohibited ‘force’ as a broader category not limited to particular methods. However, the discussions of means throughout the Charter and the document’s negotiating history strongly suggest the drafters’ intention to regulate armed force differently and more strictly than other coercive instruments.” (ellipses and emphasis in original) (footnotes omitted)).
64 See id.; see also Charter of the Organization of American States art. 18, Apr. 30, 1948, T.I.A.S. No. 2361, 119 U.N.T.S. 3 (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.”) (distinguishing armed force from economic and political force).
Article 49 of Additional Protocol I of the Geneva Conventions defines attacks and scope of application to include "acts of violence against the adversary," and specifies that it applies to "any land, air, or sea" warfare.66

As demonstrated by post-Charter practice, use of force analysis places coercive acts on a continuum.67 Along the coercive acts continuum, economic and diplomatic acts lie at one extreme and armed attacks lie at the other. Economic and diplomatic acts are not uses of force under the customary interpretation of Article 2(4). Armed attacks are uses of force, and such attacks afford nation-states the right to use force in self-defense.68 In between these extremes is a "use of force" threshold.

Advocates of the instrument-based analysis categorize a use of force into one of three levels: aggression, self-defense, and sanctions authorized or ordered by the U.N. Security Council.69 With these categories, Article 2(4)'s prohibition against a use of force could be violated only by uses of the military instrument. However, these categories created by practice may fail to recognize other prohibited uses of force that have evolved since the drafting of the Charter.70

One example of the possible gaps caused by a strict adherence to the instrument-based analysis is found by examining the disparate treatment under international law for economic sanctions and blockades.71 Whereas an instrument-based analysis would classify a blockade as a use of force, an effects-based analysis would categorize both means as uses of force if they had similar effects on the target country.

The Declaration of Friendly Relations supports a more expansive reading of the text of Article 2(4) prohibiting more than armed force and adopting a more effects-based analysis. Such a reading would view Article 2(4) as a prohibition

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67 See Huntley, supra note 45, at 18 (posing "the use of force analysis as taking place on a continuum, where armed attacks, the existence of which gives rise to a right to use force in self-defense, lie at one extreme, and where coercive but permissible acts such as economic coercion... lie at the opposite end of the continuum.").
68 See Huntley, supra note 45, at 18. Schmitt refers to this as a "community values threat continuum.
Supra note 1 at 912.
70 See Schmitt, supra note 1.
against coercion. Mirroring the language of Article 2(4), the Declaration of Friendly Relations prohibits states from using any means of coercion to intervene in the affairs of another state, directly or indirectly. Under this analysis, the use of other non-military instruments of national power could rise to the level of a use of force.

The International Court of Justice (ICJ) did not directly adopt an instrument-based analysis for a violation of the Article 2(4) prohibition against the use of force in its advisory opinion on the Threat or Use of Nuclear Weapons. The ICJ found that Article 2(4) and other provisions related to the use of force “do not refer to specific weapons.” Further, the ICJ stated, “[t]hey apply to any use of force, regardless of the weapons employed”. The Charter neither expressly prohibits, nor permits, the use of any specific weapon.

In Nicaragua v. United States, the ICJ attempted to clarify what is a use of force. In its analysis, the ICJ looked to the scope and magnitude of the effects on the victim state. The ICJ held the U.S.’s laying of mines in Nicaraguan territorial waters was a use of force. According to the ICJ, Article 2(4)’s prohibition against the threat or use of force mirrored customary international law’s same prohibition. Further, the ICJ analyzed varying levels of U.S. activities in support of the contras. The ICJ’s examination included the U.S. provision of funds, the U.S. provision of extensive logistical military support, and U.S. participation in the planning, direction, and execution of a series of attacks on Nicaraguan facilities. The ICJ found the provision of funds was a violation of the principle of non-intervention, but did not violate the prohibition against the use of force. However,

72 See Waxman, supra note 54, at 428-29; Dinstein, supra note 51, at 18.
74 See generally Farez, supra note 59 (stating that it is highly unlikely that requisite conditions could be met for acts of political and economic coercion to rise to the level of aggression comparable to military aggression); JULIUS STONE, CONFLICT THROUGH CONSENSUS (1977) (stating that the consensus definition of aggression adopted by the U.N. prohibits infringements against nation-state’s sovereignty in addition to its territorial integrity and political independence; thus, evidences an evolution towards a broader definition of what coercive acts are prohibited).
76 See id.
77 Id.
79 Id.
80 Id. ¶ 147.
81 Id. ¶ 228.
82 Id. ¶¶ 141-46.
83 Id. ¶ 228.
the U.S. military’s logistical support and involvement in the attacks on Nicaraguan facilities violated the prohibition against the use of force, but did not rise to the level of an armed attack.\textsuperscript{84}

Although the ICJ adopted a more expansive view of the prohibition against force, states have repeatedly used economic and other forms of coercion without legal challenge.\textsuperscript{85} Expanding the definition for a “use of force” to include economic and political coercion has been criticized and not been reflected in state practice.\textsuperscript{86} Thus, the post-Charter practice indicates that the instrument-based analysis of a use of force prevails.\textsuperscript{87} Although military forces were involved in Nicaragua, the ICJ suggested that other forms of coercion should be deemed as prohibited uses of force under Article 2(4).\textsuperscript{88}

Despite the ICJ’s expanded interpretation of what constitutes a prohibited use of force, the customary instrument-based analysis is effective because of the congruence between the instrument used and its physical effects.\textsuperscript{89} Although use of force analysis focuses on the instrument used, it is the physically harmful and damaging effects, not the means of the instruments, that render them counter to the purposes of the U.N. Charter and international law.\textsuperscript{90}

The instrument-based interpretation of Article 2(4) set a threshold on the continuum of coercion where acts are categorized as force. The ICJ’s decisions expanded the zone of force by pushing that threshold away from armed attack and towards diplomatic and economic acts. The ICJ’s expansion of the definition of force beyond the ambit of an instrument-based approach creates uncertainty as to where exactly the use of force threshold falls on the coercion continuum until state practice and other means of norm formation are established.

\textsuperscript{84} Id. ¶ 195.
\textsuperscript{85} See Farer, supra note 69.
\textsuperscript{86} See generally IAN BROWNLEE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963) (“[s]ubversion and economic pressure will present really serious dangers to a state only in exceptional circumstances and it is not being realistic to deprive the law of its general efficacy by demanding a new legal regime based on vague criteria solely to deal with rare circumstances. In any case, states need not submit to subversion and economic pressure, but may take all possible counter-measures in their territory.”).
\textsuperscript{87} See, e.g., Schmitt, supra note 1, at 15.
\textsuperscript{88} See Sean D. Murphy, Proxen: Jus Ad Bellum, 27 BERKELEY J. INT’L L. 22, 30 (2009) (“More interesting was the Court’s conclusion that certain acts in violation of Article 2(4) might not rise to the threshold of being an ‘armed attack’ for purposes of Article 51, and therefore could not be responded to through the exercise of self-defense. This lack of symmetry between Articles 2(4) and 51 is well-grounded textually in the Charter, but it also rather unsatisfactorily invites coercive behavior that operates below the radar of ‘armed attack,’ and hence has been criticized.”); Schmitt, supra note 1, at 923.
\textsuperscript{89} See Schmitt, supra note 1, at 922.
\textsuperscript{90} See BROWNLEE, supra note 86, at 362.
Although Article 2(4) is the primary basis for governing acts of coercion and prohibiting force, a similar prohibition on force is found under customary international law and jure cogens. In Nicaragua, the ICJ did not base its decision on Article 2(4), but on customary international law. The ICJ acknowledged that the two interpretations, while similar, do not coincide. The interpretation of Article 2(4) can evolve based on state consent and contextual interpretation. Customary international law cannot evolve unless there is state practice and opinio juris. Thus, with state consent and contextual interpretation, an act of coercion could expand the interpretation of what level of coercion is prohibited as force under Article 2(4), and this interpretation can begin the formation of a new norm of customary law. Beginning with Article 2(4), an evolution of the interpretation of force is important to the international system because of the advent of new forms of coercion.

The customary interpretations of what constitutes a use of force should progress as technology advances bringing new instruments of national power, new domains for battle space, and new methods of coercion. As identified by Reisman, categories themselves are not determinative, but each threat or use of force should be evaluated based on the context in which it occurs. Coercive uses of the cyber instrument demand a more evolved use of force analysis.

IV. Applying Article 2(4) to Use of the Cyber Instrument

The question of whether a coercive use of the cyber instrument constitutes a use of force or an armed attack is significant in determining what responses would be legitimate under international law. With a destructive cyberattack on critical infrastructure, a coercive use of the cyber instrument could have effects in the physical world. The physical effects of coercive uses of the cyber instrument may be analogous, if not identical, to the physical effects of coercive uses of the military instrument. However, even without the problem of attributing cyberattacks to responsible states, coercive uses of the cyber instrument are outside the ambit of Article 2(4)'s prohibition against force under the customary interpretation. Similar

92 See id. at 903 (citing Nicaragua v. U.S.).
93 See id. at 903.
94 See id. at 904.
95 See id. at 899.
96 See Reisman, supra note 51, at 282; TALLINN MANUAL, supra note 3.
97 See, e.g., TALLINN MANUAL, supra note 3; Schmitt, infra note 100; Schmitt, supra note 1; Waxman, supra note 54.
to the application of Article 2(4) to the use of non-kinetic armed force,\textsuperscript{99} the context of the use of the cyber instrument analysis focuses on the effects of the act. The application of Article 2(4) to the use of the cyber instrument would be an evolution and expansion of its scope, but not an alteration of its spirit.\textsuperscript{100} In order for Article 2(4) to remain as the relevant regulation for inter-state coercion, the analysis below assumes an evolution of the customary interpretation of Article 2(4) to include the use of the cyber instrument. Three potential analytical models are presented for examining whether coercive uses of the cyber instrument violate Article 2(4).

Unlike uses of the military instrument that are easy to attribute to the responsible state, coercive uses of the cyber instrument are problematic, if not impossible, to attribute to the responsible state because of the nature of the instrument.\textsuperscript{101} With the problem of attribution, states that have and continue to use the cyber instrument as a tool in inter-state relations have limited incentive to support an evolution of the interpretation. By using the cyber instrument, states would be in violation of the new interpretation. Conversely, by not using the cyber instrument, states would be limiting themselves from using their full complement of tools for inter-state relations.

Even with attribution, states could employ the cyber instrument as a means of coercion causing harm to other states without violating international law unless the customary interpretation of Article 2(4) evolves; such a situation would be disruptive to international order and damaging to the relevancy of Article 2(4). Stuxnet may be the most elegant malware devised, but it is not the only example of a coercive use of the cyber instrument.\textsuperscript{102} As Stuxnet demonstrates, the use or threat


\textsuperscript{101} See Schmitt, supra note 100, at 17 (that “it became clear during the Tallinn project’s proceedings that interpretation of international law norms in the cyber context can be challenging.”)

of use of the cyber instrument by one state can have deleterious effects on another state’s critical infrastructure. Under accepted international law, it is unclear what response options a targeted state may have to remedy the situation.\textsuperscript{103} Given the recent coercive uses of cyber instrument by permanent members of the U.N. Security Council, it is unlikely that the Council will take any action under Article 39.\textsuperscript{104} As uses of the cyber instrument increase in frequency as a means of interstate coercion, failure to evolve the current instrument-based definition of force could be damaging to the relevancy of Article 2(4) and disruptive to the stability of international order because states will use, or threaten to use, harmful coercive means without violating international law.\textsuperscript{105} Although lawful, such coercive uses of the cyber instrument could trigger responses that would be in violation of Article 2(4) by targeted states.

Coercive use of the cyber instrument presents a challenge to the customary coercion continuum analysis because the instrument used is not a traditional military force, and both the direct and indirect consequences of its use can vary in severity. Despite these difficulties, recent state practice has demonstrated that the cyber domain is viewed as another platform for interstate coercion; essentially cyberspace is a new battle space. As Jensen observed, “it is unreasonable to conclude that coercive cyber activity will never meet the level of a use of force because the instrumentality does not destroy the target in the traditional sense or that a cyberattack will always meet the use of force threshold.”\textsuperscript{106} Moreover, recent

\textsuperscript{103} See DEPARTMENT OF DEFENSE OFFICE OF GENERAL COUNSEL, AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS 18-20, 25 (May 1999), available at http://www.au.af.mil/au/awc/awcgate/dod-ilo-legal/dod-ilo-legal.pdf [hereinafter DoD OGC MEMO] (“It is far from clear the extent to which the world community will regard computer network attacks as ‘armed attacks’ or ‘uses of force,’ and how the doctrines of self-defense and countermeasures will be applied to computer network attacks.”).

\textsuperscript{104} U.N. Charter art. 39 (“the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”).

\textsuperscript{105} See Roscini, supra note 63, at 109-10 (stating that the Russian Federation supports a cyber disarmament agreement banning the development, production and use of dangerous information weapons. Further, the Russian Federation has declared that “‘information weapons’ can have ‘devastating consequences comparable to weapons of mass destruction.’ Therefore, ‘the use of Information Warfare against the Russian Federation will categorically not be considered a non-military phase of a conflict whether there were casualties or not.’”). Compared to the military instrument, the cyber instrument is more accessible to both state and non-state actors. The cyber instrument presents the possibility of an asymmetric threat to inter-state relations because it could be used as a tool for states with fewer resources and less dependence on information technology and network infrastructure.

\textsuperscript{106} See Jensen, supra note 98, at 222; see generally White House Cyber Policy supra note 3; and TALLINN MANUAL, supra note 3 (these examples of opinio juris and international scholarship advance the notion that uses of the cyber instrument can rise to the level of a use of force).
state practice and international scholarship have advanced the notion that cyber operations in this new battle space can rise to the level of a use of force.\textsuperscript{107}

Coercive use of the cyber instrument has been defined as “the sub-set of information warfare that involves actions taken place within the cyber world, [where] the cyber world is any virtual reality contained within a collection of computers and networks.”\textsuperscript{108} Coercive cyber activities by states fall into one of two categories.\textsuperscript{109} First, a cyberattack would be a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.\textsuperscript{110} These operations are intended to penetrate another state’s computer and information systems or networks and have deleterious effects on those systems and the infrastructure they support, including altering, disrupting, or deceiving.\textsuperscript{111} Second, cyber exploitation would be one state’s penetration of another’s systems and networks without a destructive payload. The exploitation may be in anticipation of a future cyberattack, but the operation does not cause any harm to the system or network. Cyberattacks are the most likely cyber operations to fall within the ambit of Article 2(4) and provide context for the application of Article 2(4) to the use of the cyber instrument.\textsuperscript{112}

The lines of demarcation on the prevailing coercion continuum are also effective for categorizing coercive uses of the cyber instrument, such as cyberattacks. A cyberattack could be deemed to meet one of three categories: “first, as an action below the threshold of a use of force, second, an action that is equivalent to a use of force but short of an armed attack; or, third, as action that equates to an armed attack.”\textsuperscript{113} These lines of demarcation provide categories for characterizing coercive uses of the cyber instrument, but do not provide models or criteria to analyze and categorize any such uses.

\textsuperscript{107} Koh, speech supra note 3, at 4 (“cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force”); TALLINN MANUAL supra note 3, R.11 (“a cyber activity constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force . . . . acts that injure or kill persons or damage or destroy objects are unambiguously uses of force”).


\textsuperscript{109} See Lin, supra note 71; NRC REPORT supra note 45.

\textsuperscript{110} TALLINN MANUAL, supra note 3, R. 30.

\textsuperscript{111} Schmitt and Jensen refer to these operations as “Computer Network Attacks.” Schmitt, supra note 1, at 886; Jensen, supra note 98, at 208.

\textsuperscript{112} See, e.g., Schmitt, supra note 1; Richardson, supra note 100; Richmond, supra note 100.

\textsuperscript{113} See Jensen supra note 98 at 207; Sharp supra note 98; see also Nicol v. U.S., supra note 78 ¶ 195 (distinguishing categories of uses of force including "mere frontier incident" which does not rise to the level of an armed attack); Murphy supra note 88.
Similar to use of force analysis in the physical domain, there are multiple models for use of force analysis in the cyber domain. The cyber domain models for use of force analysis are anchored in examining the extent of destructive physical effects or potential effects of cyberattacks. Although these models examine the effects of cyberattacks, they do not distinguish whether the effects are direct or indirect. Unlike the models for examining the use of the military instrument, the models for examining coercive uses of the cyber instrument have little to no state practice to measure their levels of efficacy or international acceptance because of the simultaneous challenges of recognizing the cyber operation, attributing it to the source, and pace of developing state practice and customary international law.\textsuperscript{114} The three proposed models for analyzing coercive uses of the cyber instrument are: 1) the analogous-to-instrument model; 2) effects-based model; and 3) a model similar to strict liability.\textsuperscript{115} Proponents of all three models agree that cyberattacks can rise to the level of an armed attack.\textsuperscript{116}

First, using the “analogous-to-instrument model,” a cyberattack would be categorized as an armed attack if the effects of the damage in the physical domain could have been achieved only through the use of the armed instrument prior to the development of the cyber instrument.\textsuperscript{117} This model first examines the effects of the cyberattack in order to overlay the prevailing instrument-based model on the use of the cyber instrument. This “analogous-to-instrument” model would harmonize with the prevailing use of force analysis for traditional weapons.\textsuperscript{118} The U.S. and the legal experts who drafted the Tallinn Manual advocate for this model.\textsuperscript{119}

Under the analogous-to-instrument model, it is possible for a cyberattack alone to rise to the level of an armed attack.\textsuperscript{120} Koh and the Tallinn manual are

\textsuperscript{114} The White House Cyber Policy \textit{supra} note 3; Koh speech \textit{supra} note 3; and \textit{TALLINN MANUAL} \textit{supra} note 3 are the nascent formation of state practice reflecting customary international law.


\textsuperscript{116} See Koh speech, \textit{supra} note 3 (“we must articulate and build consensus around how it applies and reassess from there whether and what additional understandings are needed. Developing common understandings about how these rules apply in the context of cyberactivities in armed conflict will promote stability in this area”); Jensen, \textit{supra} note 98, at 228-231.

\textsuperscript{117} See Rosenzweig, \textit{supra} note 115; Graham \textit{supra} note 43 (under this model, effects analogous to the use of chemical, biological, and other non-kinetic weapons that were previously deemed instruments of force are also armed attacks).


\textsuperscript{119} See White House Cyber Policy, \textit{supra} note 3; Koh speech, \textit{supra} note 3; \textit{TALLINN MANUAL}, \textit{supra} note 3.

\textsuperscript{120} See Schmitt, \textit{supra} note 1, at 904.
correct in emphasizing that it is not an unlawful use of force, but an armed attack which gives a state the right to respond in self-defense under Article 51. To reach the level of an armed attack, a cyberattack must have results that are kinetic parallels, including direct physical injury or damage to tangible property. This model analogizes the commonalities of the consequences of the use of armed force with the consequences of the use of the cyber instrument to determine whether or not the cyberattack reaches the level of a use of force or, more specifically, an armed attack.

Both the U.S. and the Tallinn analogous-to-instrument assessment of cyber operations look at several factors in establishing commonalities between the consequences of coercive acts rising to the level of use of force. The U.S. would examine: "the context of the event, the actor perpetrating the action (recognizing challenging issues of attribution in cyberspace), the target and location, effects and intent, among other possible issues." Likewise, the Tallinn Manual outlines eight non-exclusive factors. Although not formal legal criteria, these factors would be examined on a case-by-case basis using a holistic assessment of the circumstances of the incident to make the characterization. First, and most importantly, severity examines the physical consequences of the cyber operation such as physical injury and destruction of property. For a cyber operation to reach the level of a use of force, the severity of the physical harm must be consistent with that of an armed attack, such as death, destruction, or significant damage. Second, immediacy tracks the speed with which the coercive act ripens to full effect. For a cyber use of force to rise to the level of an armed attack, the opportunity to achieve a peaceful resolution must be diminished because of the pace of the events. Third, directness examines the object of the use of force. As with a traditional use of force, the focus of the cyberattack

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11 Koh speech, supra note 3, at 4; TALLINN MANUAL, supra note 3, R. 13.
12 See Koh speech, supra note 3, at 4; TALLINN MANUAL, supra note 3, R. 13; Schmitt, supra note 1, at 904 (Schmitt points out that the "essence of an ‘armed’ operation is the causation, or risk thereof, of death or injury to persons or damage to or destruction of property and other tangible objects").
13 In the wake of the Nicaragua decision, the U.S. articulated the position that any illegal use of force can qualify as an armed attack triggering the right of self-defense. See TALLINN MANUAL, supra note 3, R. 11 cmt. 9 (citing Abraham D. Soffer, International Law and the Use of Force, 82 AM. SOC'Y OF INT'L. LAW PROCEEDINGS 420, 422 (1988)).
15 Koh speech, supra note 3, at 4. The U.S. has not further expressed the contours of these factors.
16 Schmitt, supra note 100, at 20.
17 TALLINN MANUAL, supra note 3, R. 11 cmt. 9.
18 See TALLINN MANUAL, supra note 3, R. 11 cmt. 9; see also Schmitt, supra note 1, at 899-900.
19 See id.
must be clear. Fourth, invasiveness examines the locus of the coercive act.\textsuperscript{130} Despite potentially having similar effects, lawful economic acts generally take place outside of the target state’s borders, but unlawful uses of armed force occur within the territory of the target state. The greater the intrusion on the rights of the target state equates to a greater disruption to international stability. Fifth, measurability examines the difficulty in determining the consequences of the attack.\textsuperscript{131} With the use of military instrument, measuring the consequences is much simpler than determining the effects of other coercive acts, such as economic sanctions. A use of the cyber instrument is more likely to be characterized as rising to the level of a use of force if the effects are more identifiable and quantifiable.\textsuperscript{132} Sixth, a connection between the cyber operation and military operations increases the likelihood of characterizing the cyber activity as a use of force.\textsuperscript{133} Seventh, similar to the military character of the operation, the greater the extent of state involvement in the cyber operation the increased likelihood that the operation will be characterized as a use of force.\textsuperscript{134} Finally, eighth, as the consequences of violent uses of the military instrument are presumptively illegitimate, the consequences of a use of the cyber instrument must be presumptively illegitimate to rise to the level of an armed attack.\textsuperscript{135}

Although using an “analogous-to-instrument” approach is consistent with the current instrument-based analysis, it would be a change to established interpretation, and more gray areas of interpretation would persist until state practice and opinio juris form.\textsuperscript{136} By examining the physical effects of a cyberattack, the analogous-to-instrument model is an evolution of the instrument-based understanding of force that is prohibited by Article 2(4). Although consistent with the customary interpretation in applying an earlier generation’s analysis to a new generation of weapons, a multi-factor model may be inefficient for states and the international community to analyze a coercive use of the cyber instrument. The time necessary to complete a full analysis may be purposeful in maintaining international stability and determining the proper course of action. However, the analogous-to-instrument model fails to address both the full-spectrum of the cyber threat and non-tangible consequences from the use of the cyber instrument, such as loss of confidence in an economy.\textsuperscript{137}

\textsuperscript{130} See id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} TALLINN MANUAL, supra note 3, R. 11 cmt. 9.
\textsuperscript{136} Id.
\textsuperscript{137} TALLINN MANUAL, supra note 3, R. 11 cmt. 9; see also Schmitt, supra note 1, at 899-900.
\textsuperscript{138} Id., e.g., Schmitt, supra note 100, at 20; Schmitt, supra note 1, at 902.
\textsuperscript{139} See Graham, supra note 43, at 91 (citing THOMAS WINEFIELD, THE LAW OF INFORMATION CONFLICT: NATIONAL SECURITY LAW IN CYBERSPACE 41-44 (2000)).
The second analytical model is an effects-based model, or consequence-based model. The effects-based analysis focuses on the overall effect of the cyberattack on the target state instead of the effect's parallel to armed attacks. The effects-based model addresses the broader spectrum of cyberattacks and their aggregate direct and indirect effects. This is an expansion beyond the prevailing definition of force in kinetic terms because it would include more than physical effects. Contrary to the customary model, where blockades and sanctions with similar effects are treated as disparate acts of coercion because of the instrument used, the effects-based model only examines the consequences of a cyberattack. The effects-based model looks at the scale and effects of the cyberattack on the target state. Although the effects-based model addresses the broader threat posed by the use of the cyber instrument, its inconsistencies with the customary interpretation of Article 2(4), the travaux préparatoires, and state practice are problematic.

The experts at Tallinn addressed instances where the effects of coercive use of the cyber instrument do not have a clear kinetic parallel. As highlighted above, the U.S. has asserted the position that any use of force rises to the level of an armed attack, triggering the right of self-defense. As outlined in the Tallinn Manual, however, a coercive use of the cyber instrument that lacks a clear kinetic parallel could rise to the level of a use of force without triggering the right to self-defense.

Dr. Walter Gary Sharp has advocated for a third analytical model similar to a strict liability approach. Under this model, any cyberattack conducted by a state actor "that intentionally causes any destructive effect within the sovereign territory of another state is an unlawful use of force that may constitute an armed attack." Any cyberattack on a state's critical infrastructure would be deemed an armed attack per se, regardless whether or not the attack is successful. Cyberattacks on non-critical infrastructure would be presumed to have hostile

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138 See Rosenzweig, supra note 115; Graham, supra note 43.
139 Id. (Graham cites a May 1999 Department of Defense Office of General Counsel memorandum as evidence that the U.S. has adopted this approach, which contrasts the U.S. approach to kinetic uses of force. But see DOD OGC MÉMO, supra note 103, at 18-20, 25 (analyzing potential scenarios similar to the analogous-to-instrument approach)).
140 This language tracks the Nicaragua decision. Schmitt, supra note 100, at 19.
141 See Koh speech, supra note 3.
142 See TALLINN MANUAL, supra note 3, R. 11 cmt 4 (this position is consistent with the Nicaragua decision).
143 See SHARP, supra note 98.
144 See id. at 95.
145 See Rosenzweig, supra note 115, at 14.
intent; thus, based on the scope, duration and intensity of the attack, the victim state may consider such actions an armed attack.\textsuperscript{146}

The strict liability model for the use of the cyber instrument is less consistent with state practice for determining prohibited force under Article 2(4) than the analogous-to-instrument model. Sharp’s model would be an alteration of the scope of Article 2(4) because it would examine both the instrument and the target. Although Sharp’s model seemingly establishes clear lines, its analysis would turn on other problematic determinations such as whether infrastructure is “critical to a state’s vital national interests.”\textsuperscript{147} This definition of critical infrastructure could capture economic and political coercion that is not traditionally prohibited as force under Article 2(4). As discussed above, economic and political coercion have gained acceptance through state practice as permissible forms of coercion.

The analogous-to-instrument and strict liability models would serve different purposes in international law. Evolving the interpretation of Article 2(4) towards the “analogous-to-instrument” model would be an easier evolution of Article 2(4) interpretation because it is the most consistent of the three models with the customary interpretation. Unless the customary interpretation evolves, it may lose favor in the near future as coercive use of the cyber instrument increases.\textsuperscript{148} Nevertheless, critics argue that the analogous-to-instrument model’s narrow construction may restrain a nation-state’s ability to respond aggressively, and will have the unintended consequence of encouraging more coercive uses of the cyber instrument in order to determine where the line of demarcation for triggering a forceful response falls on the coercion continuum.\textsuperscript{149} An effects-based analytical framework looks at the scope and magnitude of the effects on the victim state. Such an evolution would not be consistent with the customary interpretation of Article 2(4). Evolving the interpretation of Article 2(4) towards Sharp’s “strict liability” model would serve as a deterrent to other bad actors by lowering the threshold for what level of cyberattack would elicit a forceful response.\textsuperscript{150} However, Sharp’s model is the least consistent with the prevailing interpretation—thus a more difficult evolution.

All three of the above models for analyzing the coercive use of the cyber instrument would evolve the prevailing definition of force prohibited by Article 2(4). But international law and state practice are not static.\textsuperscript{151} A nation must have the right to respond to external threats, regardless of instrument. Article 2(4) and

\textsuperscript{146} See Sharp, supra note 98, at 132.
\textsuperscript{147} See Sharp, supra note 98, at 131.
\textsuperscript{148} See Jensen, supra note 98, at 228.
\textsuperscript{149} See id. at 228.
\textsuperscript{150} See id. at 228.
\textsuperscript{151} See, e.g., Koh speech, supra note 3; Tallinn Manual, supra note 3; Schmitt, supra note 100.
the U.N. Charter have maintained their value to the international system because of
the flexibility they provide to states in evolving accepted definitions and state
practice without breaking the spirit of the text or the integrity of the international
system. As the use of the cyber instrument continues to develop as a means of inter-
state coercion, state practice and international understanding of force will also
evolve.

Stuxnet provides an opportunity for the international community to evolve
the customary interpretation of Article 2(4)’s prohibition against the use of force to
include the coercive use of the cyber instrument. One step in the evolution of the
interpretation of Article 2(4)’s prohibition against force may be the international
response to Stuxnet. Although not a violation under the current instrument-based
definition, Stuxnet would be a use of force prohibited by Article 2(4) under each of
the above discussed models.

V. Stuxnet and Article 2(4) of the U.N. Charter

Stuxnet presents a challenge to the customary interpretation of what force
is prohibited under Article 2(4). This challenge may be an opportunity to maintain
the relevancy of Article 2(4) by evolving the customary interpretation of force to
include coercive uses of the cyber instrument. The purposes of the prohibition
against force include maintaining international peace and preventing destructive
intervention by one state into the affairs of another.

By targeting and destroying critical infrastructure in the Iranian nuclear
complex, Stuxnet was a coercive use of the cyber instrument that had effects in the
physical world. Under current state practice and definitions of what force is
prohibited under Article 2(4), however, Stuxnet was not a use of force. To remain
faithful to the purposes of the U.N. Charter, state practice and international
understanding must adapt to the realities of the destructive use of the cyber
instrument by evolving the definition of force prohibited by Article 2(4). Again, the
analysis below assumes Stuxnet has been attributed to the responsible state.

Coercive uses of the cyber instrument evade the customary interpretation
of Article 2(4). Despite the physical destruction to the Iranian nuclear complex,
Stuxnet would not be considered a use of force and would not enable Iran to
respond legitimately in self-defense.152

The previously discussed models offer a way to analyze uses of cyber
instrument that evolves the customary interpretation Article 2(4) to relevancy in the
cyber age while remaining consistent with the purposes of the U.N. Charter. Under

152 Legitimate within the parameters of Art. 51 of the U.N. Charter.
all three models, Stuxnet would be a use of force because of the physical destruction caused to Iran’s critical infrastructure.153 The Tallinn experts, however, could not agree that Stuxnet was equivalent to an armed attack triggering the right to respond with force in self-defense.154

Using the “analogous-to-instrument” model, Stuxnet is a use of force because the malware caused the destruction of centrifuges at Natanz that could have been achieved previously only through the use of the military instrument. The policy outlined by Koh, however, offers the U.S. the flexibility to characterize coercive uses of the cyber instrument to be consistent with both its stated policy and the diplomatic needs. Given the diplomatic and national security implications, however, the U.S. has not stated its position characterizing whether Stuxnet is a use of force.

Characterizing Stuxnet as a use of force is less complicated for the legal experts who drafted the Tallinn Manual who do not have the considerations of formalizing state policy having lasting ramifications. For the Tallinn experts, Stuxnet is a use of force, but they were unable to unanimously agree that it equated to an armed attack.155 Stuxnet satisfies the other criteria for showing the commonalities between a cyber use of force and an armed use of force, but, for some of the Tallinn experts, Stuxnet did not meet the immediacy requirement to characterize the cyber operation as an attack triggering the right to self-defense.156 For some of the Tallinn experts, there is difference in what meets the immediacy requirement between characterization as a use of force versus an armed attack.157 The sooner the effects of the cyber operation manifest in the victim state, the more likely the operation will be characterized as a use of force.158 According to some of the Tallinn experts, the target state must identify operation, injury, or damage contemporaneously satisfy the armed attack requirement.159 Immediacy is satisfied for characterization as a use of force because Stuxnet had infiltrated and destroyed Natanz centrifuges before Iran was even aware of the malware, or at least able to mitigate it. But if the cyber operation, injury, damage, or initiating state has not been identified by the target state, the immediacy requirement for characterization as armed attack is not met.160 Stuxnet satisfies the directness criteria because the malware was designed specifically for the fuel enrichment plant at Natanz, and it successfully deployed its destructive payload on that target. The malware infiltrated Iranian systems and networks en route to its intended target,

153 See TALLINN MANUAL, supra note 3, R. 10.
154 See TALLINN MANUAL, supra note 3, R. 22.
155 See TALLINN MANUAL, supra note 3, R. 13 cmt. 13.
156 See TALLINN MANUAL, supra note 3, R. 15 cmt. 10.
157 See TALLINN MANUAL, supra note 3, R. 15 cmt. 9.
158 See TALLINN MANUAL, supra note 3, R. 13 cmt. 11(d).
159 See TALLINN MANUAL, supra note 3 R. 15 cmt. 10.
160 Id.
satisfying the invasiveness criterion. The effect of Stuxnet is measurable by the number of centrifuges destroyed. Finally, the infiltration and exploitation of Iranian computer systems controlling critical nuclear infrastructure would be presumptively unlawful both amongst the international community and domestically within Iran.

As discussed above, the analogous-to-instrument analytical model is reflective of the current state of international law, but it may not be consistent with future state practice. Although the "analogous-to-instrument" model examines the commonalities of the effects of cyberattacks with the effects of armed attacks, states may desire to place uses of the cyber instrument on the coercion continuum based on the overall effects of the attack or the target of the attack. The "effects-based" model and the "strict liability model" would both characterize Stuxnet as a use of force equivalent to an armed attack.

Applying the effects-based model, Stuxnet would be a violation of Article 2(4)'s prohibition of the use of force because of the overall physical and economic effects of the malware on the Iranian nuclear complex. The effects-based model looks at the scope and magnitude of the cyberattack on the target state. With Stuxnet, the scope and magnitude of the effects include the infiltration and exploitation of computer systems and the destruction of more than ten percent of the centrifuges at Iran's largest nuclear fuel enrichment plant. Based on the scope and magnitude of the effects of Stuxnet on Natanz, the attack would be a use of force prohibited by Article 2(4) equivalent to an armed attack.

Sharp's model provides the clearest approach for categorizing Stuxnet as a use of force equivalent to an armed attack. Sharp's model would deem Stuxnet an armed attack because the malware targeted Iranian critical infrastructure. Deeming any use of the cyber instrument targeting critical infrastructure to be per se an armed attack is a departure from the current definition of force under Article 2(4). Despite this departure, Sharp's model offers a clear approach to categorizing interstate coercive uses of the cyber instrument under Article 2(4).

All three models would evolve the customary definition of force prohibited by Article 2(4), but further state practice will determine whether an evolution in the interpretation of the force prohibited by Article 2(4) will occur and how coercive uses of the cyber instrument will be viewed. From the perspective of states whose critical infrastructure is dependent on information technology systems, the customary interpretation is problematic because cyberattacks against critical infrastructure evade prohibition by Article 2(4). Conversely, for these technology-dependent states, the strict liability model is attractive because it

161 See DOD OGC MEMO, supra note 103 ("international law in this area [the use of the cyber instrument] will develop through the actions of nations and through the positions the nations adopt publicly as events unfold").
provides deterrence. Given the speed of cyberattacks, the multi-factor model is less attractive because it may be inefficient in analyzing and responding to cyberattacks. Contrastingly, states with offensive cyber capabilities may want the ability to use the cyber instrument as a coercive tool for inter-state relations because of the problem of attribution; thus, the diminished possibility of accountability or retribution. For states with offensive cyber capabilities, the customary interpretation is sufficient because it allows the coercive use of the cyber instrument while any evolution could restrict the use of a means of inter-state coercion. State practice, particularly by internationally powerful states, will determine whether an evolution of the customary interpretation of Article 2(4) occurs.\footnote{See DoD OGC MEMO, supra note 103. The DoD OGC MEMO could be read as state practice because it indicates how the U.S. Department of Defense would analyze coercive uses of the cyber instrument.}

The purpose of such an evolution would be to establish a norm for state behavior, and state practice will determine whether such an evolution becomes accepted as an international norm.\footnote{See White House Cyber Policy, supra note 3 (outlining the need to establish norms for the international community).} According to reports, powerful states, such as the United States, Russia, and China, are both dependent on information technology and have used the cyber instrument as a coercive tool.\footnote{See Elliott, Markoff and Traynor cited supra note 102, Jensen supra note 98, at 207-208; Todd Beamon, Rep Rogers: China and Russia Conduct ‘Vicious’ Cyberattacks on U.S., Newsmax (May 28, 2013), http://www.newsmax.com/newsfront/rogers-china-russia-cyberattacks/2013/05/28/id/506756. The difficulty of attribution makes advocating for an evolution seem wasteful for a number of reasons. First, states could agree to a revised interpretation and still use the cyber instrument with impunity without fear of identified. Second, states who still wish to use the cyber instrument coercively may be reluctant to agree to a norm they intend to violate.}

In the event that attribution of coercive uses of the cyber instrument becomes less difficult, internationally powerful states may be inclined to accept an evolution of the customary interpretation of force prohibited by Article 2(4) and establish a norm restricting the coercive use of the cyber instrument in order to protect their networks and critical infrastructure.\footnote{See generally White House Cyber Policy, supra note 3; Koh Speech, supra note 3.} But, these powerful states would likely still want the option to use the cyber instrument as a means of interstate coercion. Similar to how humanitarian intervention has been viewed by some as an “excusable breach” of Article 2(4) with regard to the use of the armed instrument,\footnote{See Jus Stromseth, Rethinking Humanitarian Intervention: The Case for Incremental Change, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J. L. Holmgren & Robert Owen Keohane eds., 2003).} states may determine that circumstances may warrant excusable breaches of the norm against the coercive use of the cyber instrument. To the state responsible for Stuxnet, the Iranian nuclear program may have presented sufficient circumstances for such an “excusable breach.”
Stuxnet presents an opportunity to evolve the customary interpretation of Article 2(4)'s prohibition against the use of force with respect to inter-state coercive uses of the cyber instrument because of the scope of the operation, nature of the target, and publicity of its effects, enabling study and discussion without attributing its source. The customary interpretation of Article 2(4) is ill-suited for the effects of coercive uses of the cyber instrument, but analytical models that address the lacunae are available. These models vary in methodology and consistency with current Article 2(4) understanding. Despite the differences in methodology, each of the models would deem Stuxnet and its effects on the Iranian nuclear complex as a use of force equivalent to an armed attack. State practice will determine whether the customary interpretation of Article 2(4) will evolve to include coercive uses of the cyber instrument.

VI. Conclusion

The Stuxnet malware attack is an evolutionary opportunity for applying Article 2(4) and international law of *jus ad bellum* to the use of the cyber instrument. The malware's complexity, sophistication, and destruction serve as a warning of the magnitude of this method of inter-state coercion unforeseen at the time of the drafting of the U.N. Charter.

The textual ambiguity and flexibility of Article 2(4) has enabled it to remain relevant in the regulation of international relations, even if its definition is unsettled. Article 2(4)'s prevailing definition turns on the instrument of coercion. If it is armed, then it is force. However, as the *Nicaragua* case demonstrates, a use of force and an armed attack are at different points on the coercion continuum, but exactly where on that continuum is unclear.

To remain relevant in response to coercive uses of the cyber instrument, the customary interpretation of force prohibited by Article 2(4) should evolve. Stuxnet provided the international community an opportunity to begin to evolve the customary interpretation of Article 2(4)'s prohibition against the use of force to include coercive uses of the cyber instrument. Three proposed analytical models present different approaches to evolving the definition of Article 2(4) to address the challenges posed by the use of the cyber instrument: the analogous-to-instrument,
effects-based, and strict-liability models. The analogous-to-instrument model has gained the most favor, but has not been firmly established as customary international law.\textsuperscript{170} While these models vary in their methodology and their consistency to the current state of international law, each of the three proposed models would deem Stuxnet as a use of force, and two would characterize it equivalent to an armed attack. Stuxnet could be an opportunity to evolve the prevailing interpretation of Article 2(4)’s prohibition against the use of force to include coercive uses of the cyber instrument, but such an evolution is unlikely to happen until attribution becomes less difficult. The model proposed by the Tallinn experts is the soundest of the three because of its consistency with the customary interpretation and application of Article 2(4) and its support amongst the international legal community. Technologically-dependent states would support an evolution of the interpretation in order to protect their critical infrastructure. Unless the problem of attributing coercive uses of the cyber instrument is solved, however, powerful states, even if technologically-dependent, are unlikely to support evolving the interpretation of Article 2(4) because they are likely to continue to use the cyber instrument as a means of inter-state coercion.

\textsuperscript{170} See, \textit{generally} TALLINN MANUAL, \textit{supra} note 3; Koh speech, \textit{supra} note 3.
The Presidential Policy Guidance for targeting and capture outside Afghanistan, Iraq and Syria

By Marty Lederman

Saturday, August 6, 2016 at 2:40 PM

Kudos to the ACLU for having compelled the government to release a fairly modestly redacted version of the May 2013 Presidential Policy Guidance, which “establishes the standard operating procedures for when the United States takes direct action, which refers to lethal and non-lethal uses of force, including capture operations, against terrorist targets outside the United States and areas of active hostilities.” (The Administration has recently clarified that its self-defined “areas of active hostilities” are Afghanistan, Iraq and Syria.) In conjunction with this release, the government also released four other documents, described, with links, on the ACLU site, reflecting notifications to Congress on the same subject matter. Those include the 2014 DOD Report to Congress on which organizations are considered to be “associated forces” for purposes of the AUMF. In addition, the judge in the ACLU FOIA case, Chief Judge Colleen McMahon of the District Court for the Southern District of New York, has written a memorandum opinion on the subject, and yesterday the government lodged the results of its classification review of that opinion, for the court’s in camera, ex parte review. Presumably we will see Judge McMahon’s opinion very soon.

For the most part, the PPG and other released documents do not reveal any major information that the government had not already disclosed. The principal value of the release is that it reveals the extraordinarily detailed and comprehensive procedural requirements the President and Congress have established for all uses of force, including capture operations, against terrorist targets outside the United States and areas of active hostilities. I can’t say for sure, but I suspect that there’s never been anything, in any nation, quite like the interagency and interbranch review reflected here. It is certainly leagues beyond what DOD is ordinarily required to do—in terms of interagency and congressional review and approval—when it uses force overseas. [UPDATE: Charlie Savage with more details here.]

I’ve only had time to review the documents quickly once, but here are some of the details that I think are most worthy of attention. I’ll update this list if and when others identify further important details:
— As the government has previously explained, at least as of 2014, the only possible “associated force” outside Afghanistan was AQAP, although, even there, the government considers that group to likely be part of al Qaeda itself. The only significant effect of the “associated forces” reading of the AUMF, therefore, is with respect to certain organized forces within Afghanistan—“notably including the Haqqani Network”—that are engaged alongside al Qaeda and the Taliban in hostilities against the United States or its coalition partners, and against which the U.S. Armed Forces conducts operations pursuant to the 2001 AUMF. (To the extent this changes, and the Administration concludes that new groups are “associated forces,” it ought to be forthcoming about that information, too, to the extent possible.)

— All operational plans to undertake direct action operations against terrorist targets outside Afghanistan, Iraq and Syria must be reviewed for legality by the general counsel(s) of the operating agency executing the plan, to ensure that the action contemplated is lawful and may be conducted in accordance with applicable law; must be submitted to the National Security Staff for interagency review; shall be referred to the NSS Legal Adviser (currently Chris Fonzone); and are subject to consultation with the Department of Justice by the NSS Legal Adviser and operating agency GC.

— If a proposed direct action would be against a U.S. person, DOJ must conduct a legal analysis to ensure that such action may be conducted against the individual consistent with the laws and Constitution of the United States.

— In addition to the several requirements previously announced for all uses of force outside Afghanistan, Iraq and Syria (i.e., that the target poses “a continuing, imminent threat to U.S. persons”; near certainty that the target is present; near certainty that non-combatants will not be injured or killed; an assessment that capture is not feasible at the time of the operation; an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and an assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons), the redactions indicate that there is one other, classified operational requirement, which appears to have something to do with interagency agreement. (An associated footnote reads: “Operational disagreements [several redacted words] shall be elevated to Principals. The President will adjudicate any disagreement among or between Principals.”)

— The PPG clarifies something that many observers have misunderstood: So-called “signature strikes” are not necessarily against persons whose identity is unknown (such as individuals at an enemy training camp, or (in 2001-02) in a cave at Tora Bora); what the
PPG calls “terrorist targets” can also include other military objectives, apart from individuals, such as “manned or unmanned Vehicle Borne Improvised Explosive Devices or Infrastructure, including explosives storage facilities.”

— Capture, if feasible, is to be preferred “even in circumstances where neither prosecution nor third-country custody are available disposition options at the time.”

— After using force, the department or agency that conducted the operation must provide the following preliminary information in writing to the NSS within 48 hours: (i) a description of the operation; (ii) a summary of the basis for determining that the operation satisfied the applicable criteria contained in the approved operational plan; (iii) an assessment of whether the operation achieved its objective; (iv) an assessment of the number of combatants killed or wounded; (v) a description of any collateral damage that resulted from the operation; and (vi) a description of all munitions and assets used as part of the operation.

— The operational agency must also prepare and promptly provide notice “to the appropriate Members of the Congress” whenever: (i) a new operational plan for taking direct action [redacted] is approved; (ii) authority is expanded under an operational plan for directing lethal force against lawfully targeted individuals and against lawful terrorist targets other than individuals; or (iii) an operation has been conducted pursuant to such approval(s).

Perhaps the most important questions that remain unanswered are those involving the Administration’s determination that the PPG rules shall not apply to Afghanistan, Iraq and Syria. For example:

What is it about those three nations that distinguishes them from all other nations, and that justifies a categorical exclusion of the PPG’s elaborate array of procedures and requirements to the use of force there?

Indeed, what, if anything, do those three nations have in common with one another? (At one point, many assumed that “areas of active hostilities” referred to nations in which U.S. ground forces are present in significant numbers. But that does not describe, e.g., Syria.)

What are the internal rules (procedural and substantive) that apply to operations in those three nations, in lieu of the PPG? Are the substantive rules similar to those in the PPG? What about NSC oversight? (It’s hard to imagine DOD has to go through the entire PPG interagency procedures with respect to, e.g., each one of its operations in Iraq.)

The Administration would do well, before the end of the President’s term, to provide more transparency and detail on these questions about operations within Afghanistan, Iraq and Syria, just as it has done with respect to operations elsewhere.
ABOUT THE AUTHOR

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The government’s treatment of civilian casualties in counterterrorism operations [updated]

By Marty Lederman

Friday, July 1, 2016 at 2:05 PM

The government has just released two important documents. One is an assessment by the Director of National Intelligence of the cumulative civilian casualties from U.S. counterterrorism “strikes” outside areas of active hostilities — which it defines as all nations apart from Afghanistan, Iraq, and Syria — from January 2009 through 2015. The other document is an Executive Order issued by the President that requires more robust protection of civilians than international law demands in all U.S. operations, and that requires publication of an annual report assessing civilian casualties.

“Areas of Active Hostilities”[updated]

Before turning to a brief description of these new documents, it’s worth flagging that the DNI’s definition of “areas of active hostilities” is noteworthy, because it presumably clarifies as well the nations in which the Presidential Policy Guidance (PPG) of May 2013 presumptively applies. Recall that the PPG limits U.S. uses of force outside “areas of active hostilities” to targets that pose “a continuing, imminent threat to U.S. persons,” and that these criteria must be met before lethal action may be taken:

1) Near certainty that the terrorist target is present;
2) Near certainty that non-combatants will not be injured or killed;
3) An assessment that capture is not feasible at the time of the operation;
4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
5) An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.

The DNI’s release indicates that the PPG generally applies to all uses of lethal force outside Afghanistan, Iraq, and Syria — something that had been unclear until now, especially with respect to possible operations in the FATA. A “Fact Sheet” also released today, confirms this. It indicates that a U.S. use of lethal force falls outside the PPG in two settings: (i) “when the United States is taking action in ‘areas of active hostilities,’ such as it is today in Afghanistan, Iraq, and Syria”; and (ii) in certain “force protection” situations — presumably even outside such areas of active hostilities — where there is no time to ensure the limitations of the PPG, namely, “when the United States is acting quickly to defend U.S. or partner forces from attack.” (And even in those non-PPG settings, the Administration represents that “the United States goes to
extraordinary lengths to minimize the risk of civilian casualties.” I think, therefore, it is safe to infer that if and when the U.S. uses lethal force in the FATA, it is bound by the PPG, except that some or all of the PPG’s limitations (particularly the requirement of a threat to U.S. persons) do not apply in cases where “the United States is acting quickly to defend U.S. or partner forces from attack.”

**The DNI Release**

The DNI release states that over the almost seven years in question, 473 strikes have resulted in the deaths of 64 to 116 “non-combatants,” i.e., civilians who could not themselves be targeted, and 2,372 to 2,581 combatants. These numbers are based upon “review processes have evolved over time to ensure that they incorporate the best available all-source intelligence, media reporting, and other information and may result in reassessments of strikes if new information becomes available that alters the original judgment.” The DNI refers to a “large volume of pre- and post-strike data available to the U.S. Government,” including “video observations, human sources and assets, signals intelligence, geospatial intelligence, accounts from local officials on the ground, and open source reporting” to determine whether those killed by strikes had “undertaken certain acts that reliably connote meaningful integration” into an enemy armed force.

The DNI acknowledges that these numbers differ markedly from those reported by some nongovernmental organizations. The DNI explains the discrepancy principally by pointing to the “combination of sources” available to the United States that “is unique and can provide insights that are likely unavailable to non-governmental organizations.”

There is, I think, no reason to doubt that the government is following the President’s standards for determining who is and who is not a nontargetable civilian, or that the Administration is acting in good faith in making its assessments of collateral harm. Even so, in the absence of granular details about specific strikes, many observers will naturally remain skeptical of the Administration’s numbers. Unfortunately, there might not be much that can be done — not retrospectively, in any event — to breach this gap, and to alleviate much of the skepticism, for two reasons. First, many of the strikes remain operations that the United States believes it still may not acknowledge at all, either as a matter of law or of diplomacy, or some combination thereof. Thankfully, this practice appears to be changing somewhat, however, at least going forward — the Executive branch appears to be making efforts not to put itself, as often, in a position where it cannot acknowledge its use of lethal force. (The new Executive Order, for instance, generally requires agencies that carry out strikes to acknowledge U.S. responsibility for civilian deaths.)

Even where operations can be acknowledged, however, the second, and larger, barrier to more granular transparency is that much of the U.S.’s information about the identity of those killed or injured depends upon intelligence — especially human intelligence — that cannot be shared without burning sources and methods. I honestly don’t know that there’s any easy solution to this particular aspect of the problem.
[UPDATE: One other thing: The cumulative totals do not distinguish between strikes that preceded issuance of the PPG in 2013 and those that followed it. It would be very useful for the Administration to provide such a breakdown, if only to offer some sense of the practical effects of the PPG.]

**The Executive Order**

Section 1 of the new Executive Order states that “[a]s a matter of policy, the United States ... routinely imposes certain heightened policy standards that are *more* protective than the requirements of the law of armed conflict that relate to the protection of civilians,” and requires that the government “shall maintain and promote best practices that reduce the likelihood of civilian casualties.” Section 2 describes some of those “best practices,” which are *not* limited to areas outside active hostilities — that is to say, they appear to govern U.S. uses of force generally. [The Fact Sheet expressly notes that the Executive Order “applies to all of our operations, regardless of where they are conducted.”] In particular, Section 2 requires that “relevant agencies* shall . . . , as appropriate and consistent with mission objectives and applicable law, including the law of armed conflict,” do the following things to prevent civilian casualties:

— “train personnel, commensurate with their responsibilities, on compliance with legal obligations and policy guidance that address the protection of civilians and on implementation of best practices that reduce the likelihood of civilian casualties, including through exercises, pre-deployment training, and simulations of complex operational environments that include civilians”;

— “develop, acquire, and field intelligence, surveillance, and reconnaissance systems that, by enabling more accurate battlespace awareness, contribute to the protection of civilians”;

— “develop, acquire, and field weapon systems and other technological capabilities that further enable the discriminate use of force in different operational contexts”;

— “take feasible precautions in conducting attacks to reduce the likelihood of civilian casualties, such as providing warnings to the civilian population (unless the circumstances do not permit), adjusting the timing of attacks, taking steps to ensure military objectives and civilians are clearly distinguished, and taking other measures appropriate to the circumstances”;

— “conduct assessments that assist in the reduction of civilian casualties by identifying risks to civilians and evaluating efforts to reduce risks to civilians”;

and, importantly, take these measures *after* strikes are conducted:

— “review or investigate incidents involving civilian casualties, including by considering relevant and credible information from all available sources, such as other agencies, partner governments, and nongovernmental organizations, and take measures to mitigate the likelihood of future incidents of civilian casualties”; and
― "acknowledge U.S. Government responsibility for civilian casualties and offer condolences, including ex gratia payments, to civilians who are injured or to the families of civilians who are killed."*

Section 3 requires the DNI to release a public report by May 1 of each year that shall provide the government’s "assessments of combatant and non-combatant deaths" resulting from "strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities" during the previous calendar year, "consistent with the need to protect sources and methods." That report "shall also include information obtained from relevant agencies regarding the general sources of information and methodology used to conduct these assessments and, as feasible and appropriate, shall address the general reasons for discrepancies between post-strike assessments from the U.S. Government and credible reporting from nongovernmental organizations regarding non-combatant deaths resulting from strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities."

The documents released today do not explain why the DNI’s assessment of casualty numbers from 2009-2015 does not also provide an annual breakdown, as will be required going forward.

* I’m reliably informed that the reference to “relevant” agencies is not intended to suggest that any agencies are not bound by the E.O. — all agencies are bound — but instead is simply to reflect the fact that some of the obligations in the E.O., such as performing investigations or making ex gratia payments, are naturally fulfilled by some agencies rather than others.

Tags: Drones, Executive Orders, IHL, Law of Armed Conflict, Presidential Policy Guidance, Targeted Killing, Transparency

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SEND A LETTER TO THE EDITOR
[UPDATED—Now with VIDEO] ASIL Speech by State Legal Adviser Egan on international law and the use of force against ISIL

By Marty Lederman

Monday, April 4, 2016 at 6:06 PM

Brian Egan, the new State Legal Adviser — and until recently the Legal Adviser to the National Security Council — just delivered this speech to the American Society of International Law. [UPDATE: The video is now available here and below.] As Egan notes, there is not much that is new or pathbreaking in it, yet I still strongly recommend reading [or listening to] it, because it is a very clear and useful summary — perhaps the best articulation — of the United States’s understanding of the international law basis for, and limitations on, its use of force against ISIL. Egan stressed that “the United States complies with the international law of armed conflict in our military campaign against ISIL, as we do in all armed conflicts” — with no hint of any exceptions. [UPDATE: In the Q&A, Egan referred to such LOAC compliance as a “lodestar,” and that the U.S. applies the LOAC “across the board.”] His speech also included many important explications of the U.S.’s understandings of how international law applies to the armed conflict with ISIL.

Jus ad bellum

Article 2(4) of the U.N. Charter provides that states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”

According to Egan, the most common reason that the U.S.’s use of force overseas does not violate Article 2(4) is consent: “States generally rely on the consent of the relevant government in conducting operations against ISIL or other non-State actors even when they may also have a self-defense basis to use force against those non-State actors, and this consent often takes the form of a request for assistance from a government that is itself engaged in an armed conflict against the relevant group.”

In particular, “the United States’ actions in Iraq against ISIL have been premised on Iraq’s request for, and consent to, U.S. and coalition military action against ISIL on Iraq’s territory in order to help Iraq prosecute the armed conflict against the terrorist group.”

By contrast, when it comes to the use of force in Syria, the principal justification for U.S. operations is the collective self-defense of Iraq, which had already suffered armed attacks from ISIL. And this is true regardless of whether Syria is in some sense “responsible” for ISIL’s armed attacks. This is because, as Egan explains, “the inherent right of individual and collective self-defense recognized in the U.N. Charter” — which Article 51 preserves as an exception to the prohibition of Article 2(4) — “is not restricted to threats posed by States.” (Some academics question this conclusion; but, as far as I know, no states do so.) Egan notes that this has been the understanding of the right to self-defense “for at least the past two hundred years,” during which time “States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors.”

Egan stresses that the “armed attack” condition for the exercise of the Article 51 right of self-defense refers “not only . . . to armed attacks that have occurred, but also in response to imminent ones before they occur.” As I note at the end of this post, two or three aspects of this “imminence” notion are the most likely source of future debate about the U.S. views reflected in the Egan speech. On the other hand, this might be — thus far — merely a theoretical set of concerns, because it is not clear that the United States has actually ever relied upon the mere threat of imminent attacks (as opposed to threat of such attacks established by actual, completed attacks) as the basis for any Article 51 defense.

As Egan explained, the international law of self-defense requires that uses of force in self-defense, without host-state consent, are “necessary to address the threat giving rise to the right to use force in the first place. States therefore must consider whether unilateral actions in self-defense that would impinge on a territorial State’s sovereignty are necessary or whether it might be possible to secure the territorial State’s consent before using force on its territory against a non-State actor.”
It is in connection with the “necessity” requirement that the “unable or unwilling” test arises. As Egan correctly notes, the “unable or unwilling” inquiry is an important application of the necessity requirement. A state cannot use force against a nonstate actor without the consent of the host state unless “measures short of force have been exhausted or are inadequate to address the threat posed by the non-state actor emanating from the territory of another State.” If the host state were willing and able to address the threat, then this condition of the U.S.’s use of force would not be met.

With respect to Syria, in particular, Egan explained that the U.S.’s use of force in self-defense (including defense of Iraq) is necessary because Syria is “unable” to adequately deal with the threat from ISIL: “By September 2014, the Syrian government had lost effective control of much of eastern and northeastern Syria, with much of that territory under ISIL’s control.”

**Jus in Bello**

Egan also addressed the international law constraints on how the U.S. can use force in the armed conflict. He specified that the customary laws of war require the U.S., even in a noninternational armed conflict, to strictly comply with the requirements of distinction, precaution, and proportionality, and the prohibitions against indiscriminate attacks, attacks using inherently indiscriminate weapons, attacks directed against specifically protected objects such as cultural property and hospitals, and acts or threats of violence the primary purpose of which is to spread terror among the civilian population.

Egan spoke specifically about how the U.S. decides whether a specific individual may be made the object of attack, either as a member of enemy forces or as a civilian directly participating in hostilities. The United States, said Egan, “look[s] to all available real-time and historical information,” including indicia of “certain operational activities, characteristics, and identifiers.” “For example, with respect to membership in an organized armed group, we may examine the extent to which the individual performs functions for the benefit of the group that are analogous to those traditionally performed by members of State military that are liable to attack; is carrying out or giving orders to others within the group to perform such functions; or has undertaken certain acts that reliably indicate meaningful integration into the group.” Egan “emphasize[s] a point that we have made previously, [that] **it is not the case that all adult males in the vicinity of a target are deemed combatants.**” [UPDATE: Charlie Savage raises questions about whether DoD applied a presumption of this sort — properly or not — in the “Operation Haymaker” operation in northeastern Afghanistan from 2012 to 2013.]

**U.S. Policy Constraints Beyond What the Laws of War Require**

Toward the end of his speech, Egan further explained that “[i]n many cases, the United States imposes standards on its direct action operations that go beyond the requirements of the law of armed conflict.” For example, “ although the United States is not a party to the 1977 Additional Protocol II to the 1949 Geneva Conventions and therefore not bound to comply with its provisions as a matter of treaty law, current U.S. practice is already consistent with the Protocol’s provisions.”

Most importantly, outside of designated “areas of active hostilities,” U.S. operations are further governed, over and above international law, by the President’s 2013 policy guidance (PG), based upon the President’s belief “that implementing such heightened standards outside of hot battlefields is the right approach to using force to meet U.S. counterterrorism objectives and protect American lives consistent with our values.” The PPG “establishes measures that go beyond the law of armed conflict in order to minimize risks to civilians to the greatest extent possible. In particular, the PPG establishes a threshold of ‘near certainty’ that non-combatants will not be injured or killed. . . . In addition, with respect to lethal action, the PPG generally requires an assessment that capture of the targeted individual is not feasible at the time of the operation.” [The President, of course, has the authority not to apply the PPG in a given case, as long as the conduct is consistent with the laws of armed conflict.]

The PPG rules do not apply to what the Guidance itself identifies as “areas of active hostilities.” Egan stated that “[t]he Administration currently considers Afghanistan, Iraq, and Syria to be ‘areas of active hostilities’” in which the PPG does not apply. [UPDATE: In the Q&A, in response to a question from Charlie Savage about whether the Federally
Administered Tribal Areas of Pakistan are also "areas of active hostilities" in which the PPG does not apply, Egan stated: "Sometimes others have referred to the Afghanistan/Pakistan border region as being part of what we talk about with respect to Afghanistan."

**Actual and imminent threats of armed attack for purposes of Article 51**

There are three passages in the Egan speech that might, I think, engender the most questions and pushback. All of them relate to the Article 51 "inherent right of individual or collective self-defence if an armed attack occurs."

**First.** Egan states that "[w]hen considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against a particular non-State actor, the United States analyzes a variety of factors," including "the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent."

I imagine that this list of factors will be the most discussed and debated passage in the speech. [UPDATED: In my humble opinion, just as it is accurate to consider "unable or unwilling" as a function of the *ad bellum* requirement of necessity (see above), so, too, would it be more useful and accurate to think of "imminence" not as a distinct requirement, but as an application of the necessity requirement (which is the context in which it was discussed in the canonical *Caroline* case).]

It is noteworthy, however, that it is not clear the United States has ever acted in reliance upon these "imminence of future armed attack" factors. As far as I am aware, at least since the Cuban Missile Crisis, every time the U.S. has invoked self-defense as the justification for the use of force in a nonconsenting state, it has been *after* an actual armed attack, either against the U.S. itself (e.g., the attacks of September 11, 2001), or against an ally in whose defense we are acting (e.g., ISIL's attacks on Iraq and France). That is to say, it's not clear that the U.S. has ever had to invoke self-defense in a purely anticipatory setting.

**Second.** Egan remarked that although the U.S. "has not relied solely" on its own self-defense as an international law basis for taking action against ISIL in Syria — collective self-defense of Iraq has been a sufficient justification — the United States "maintains an individual right of self-defense against ISIL," as suggested in its Article 51 notice to the United Nations. Because ISIL has not yet actually engaged in an armed attack against the United States, this assertion suggests that the U.S. believes that ISIL's presence in Syria presents an "imminent" threat of an attack on the United States. This might or might not be correct; but, as far as I know, the government has not (yet) publicly offered any specific evidence — any assessment of the "factors" listed above — to support such an "imminent threat of attack on the U.S." theory.

**Finally,** Egan stated that "[i]n the view of the United States, once a State has lawfully resorted to force in self-defense against a particular armed group following an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group, provided that hostilities have not ended."

That statement might be true as a formal, technical matter, but the *ad bellum* requirements of necessity and proportionality would prohibit or limit continuation of the operations in the nonsenting state if the threat of attack from the nonstate actor diminishes or disappears. (Egan's speech does not suggest otherwise.) In other words, once the threat is removed, there would no longer be a need for continued nonconsensual use of force, and therefore the Article 2(4) prohibition would then kick in, even if the initial use of force was a legitimate act of self-defense.
Panel VI:

Legal Issues in Civilian/Military Relations for the 21st Century

Moderator:
William Banks
Soldiers on the Home Front
The Domestic Role of the American Military

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CHAPTER EIGHT

Soldiers at Home in the Age of Terrorism

The cliché that "everything changed after 9/11" says as much about a mind-set as it does about actual changes in American daily lives. We suddenly began to worry more about domestic than foreign attacks, internal rather than external threats. Riveted by images of the collapsing icons of American strength, we dreaded the next act of terrorism. It is hardly surprising that we asked the Defense Department to provide additional security on the home front.

In the years since, the role of the military in America has been transformed, partly by the enactment of new laws and sometimes by presidential fiat. Whether that transformation is fundamental and enduring, or merely temporary, remains to be seen. Also unclear at this point is whether this change has actually made us safer and how, precisely, it has affected cherished civil liberties. But for now, military forces have become much more deeply involved in countering terrorism at home—aiding civilian law enforcement, gathering intelligence, even imprisoning terrorist suspects.

These developments raise several important questions, both practical and philosophical:

- Does the Pentagon's increased involvement in domestic counterterrorism require the sacrifice of interests protected by the Bill of Rights?
- Does any added security justify such sacrifices?
- How does all of this relate to our deep-seated tradition of avoiding military involvement in American society whenever possible?

In this chapter we briefly review this newest interaction of soldiers and civilians, and seek answers to these questions.

THE MILITARY'S DOMESTIC ROLE RECONSIDERED

When President George W. Bush learned of the terrorist attacks on the morning of September 11, 2001, he reportedly remarked to Vice President Dick Cheney that the United States was "at war." This characterization of events suggested an expanded role for troops on an expanded battlefield, which now included the American heartland. Indeed, while the attacks were still underway the Pentagon scrambled fighter jets in a vain attempt to intercept the hijacked airliners, then established combat air patrols over Manhattan and Washington, DC, with orders to shoot down any aircraft that posed new threats. National Guard and Reserve personnel rushed to Lower Manhattan to help care for the injured, assist local police, and provide logistical support. And in Virginia, military police from the Maryland National Guard arrived to help with security at the Pentagon.

Three days later, President Bush declared a national emergency, enabling him to expand the numbers of active duty military personnel. On the same day, Congress passed the Authorization for the Use of Military Force (AUMF), authorizing the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [9/11] attacks or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States." This statute would be cited as authority for a variety of domestic military activities in coming months.

Within days National Guard troops were deployed to provide additional security along U.S. borders and at more than 400 airports around the country. Additional guard and Reserve forces were ordered to protect critical civilian infrastructure such as bridges and power plants, and to guard large public gatherings. The Coast Guard was quickly transformed from a law enforcement agency—normally part of the Department of
Transportation focused on smugglers, drugs, and maritime safety—into an antiterrorism military force charged with providing security to ports and coastal waters.

Nearly a year after 9/11, even as the president proposed the creation of a new civilian-led Department of Homeland Security, he declared a need for "update plans to provide military support to domestic civil authorities in response to natural and man-made disasters." Meanwhile, the Pentagon had already begun reorganizing for greater involvement in domestic security efforts. Defense Secretary Donald Rumsfeld announced the formation of a new Northern Command (NORTHCOM) to protect the United States, and he lobbied hard for congressional approval of two new military secretariats—an under secretary of defense for intelligence and an assistant secretary of defense for homeland defense.

When the government's new color-coded threat level reached "code orange" in February 2003, Air Force Secretary James Roche, describing military efforts to prevent another terror incident, told an audience, "Ladies and gentlemen, it's our future. It's never going away." Two years later, the Pentagon concluded that a "new kind of enemy requires a new concept for defending the US homeland. . . . The [Defense] Department can no longer think in terms of the "home" game and the "away" game. There is only one game."

As for the presumption against military involvement in civilian law enforcement, a retired army officer wrote that "[p]resent policies and attitudes on the use of federal military forces to enforce the law in the United States are inappropriate for the Global War on Terrorism. What was done in earlier times is unlikely to be a good way to assure the security of the homeland against terrorist attacks."9

A SECRET LAW FOR DOMESTIC MILITARY OPERATIONS?

Six weeks after 9/11, a secret legal opinion from the Justice Department's Office of Legal Counsel (OLC) described circumstances inside the United States as "unprecedented in recent American history . . . [with] attacks on this scale and . . . consequences . . . more akin to war than terrorism."10 As a consequence, authors John C. Yoo and Robert J. Delahuntly concluded, military forces could play an expanded domestic role for which there was no recent precedent. Moreover, soldiers could operate without constraints imposed by either statutes or the Constitution.

According to the Yoo/Delahuntly opinion, Article II of the Constitution "directly authorizes use of the Armed Forces in domestic operations against terrorists."11 Although that authority is not enumerated in the text, they wrote, it has long been recognized as an aspect of the president's implied power to repel attacks on the homeland. They went on to assert that such a deployment would be unreviewable by the courts. Thus, the president would be empowered to use troops however he saw fit for as long as he alone thought appropriate.

The OLC opinion also asserted that the Authorization for Use of Military Force (AUMF), passed by Congress three days after the 9/11 attacks, provides statutory authority to use troops at home to fight terrorism: "this legislation recognizes that the President may deploy military force domestically and to prevent and deter similar terrorist attacks."12 It even described the AUMF as a statutory exception to the Posse Comitatus Act. But the statute makes no reference to domestic deployments, and there is no evidence that in its haste to pass this measure Congress even considered such a possibility.

Yoo and Delahunty also claimed that the Insurrection Act provides general authority to use troops to prevent future terrorist attacks. The statute clearly states, however, that military forces may be deployed only when the president finds an obstruction to the execution of federal laws and issues a public proclamation.13 President Bush did neither.

Regarding the protections of the Bill of Rights, the authors of the secret opinion wrote that the Fourth Amendment is "focused on police activity," so its demands are not well suited to conditions of war and military necessity; it simply "does not apply to domestic military operations designed to deter and prevent further terrorist attacks."14 The same rationale was used to justify the infamous general warrants, so despised by the Framers, that were exploited by the English Crown in colonial America to ransack homes and intimidate political dissidents. The founding era history and more than two centuries of judicial interpretation make it clear that the Fourth Amendment protects against all "unreasonable" searches and seizures undertaken by government personnel—civilian or military—at all times. But Yoo and Delahuntly insisted that "[t]he Government's compelling interest in protecting the nation from attack and in prosecuting the war effort would outweigh the relevant privacy interests, making the search or seizure reasonable."15

Similarly, the 2001 opinion indicated that "First Amendment speech and press rights may . . . be subordinated to the overriding need to wage war
The First Amendment contains no wartime exception, however, although its protections may, like those of the Fourth Amendment, be calibrated to accommodate exigent circumstances. The authors of the opinion would simply have placed constitutional protections for free expression and the media on indefinite hold.

The opinion also argued that statutory limits on domestic military activities would not apply. Citing a DOD regulation indicating that the Post-9/11 Comitatus Act bars against military involvement in law enforcement is inapplicable when troops act "for the primary purpose of furthering a military or foreign affairs function," Yoo and Delahunt concluded that the "domestic deployment of the Armed Forces to prevent and deter terrorism is fundamentally military, rather than law enforcement, in character." But while military and law enforcement activities may sometimes blend or merge, particularly in a fast-moving crisis, the statute continues to operate. In the absence of a specific statutory or constitutional exception, military personnel are forbidden to help "execute the laws"—for example, by conducting searches or arrests pursuant to the prosecution of terrorism-related criminal offenses. That is the job of civilian law enforcement officials.

In 2004, the Supreme Court unequivocally rejected the notion that the military could conduct domestic operations freed from the strictures of the Constitution and laws. *Hamdi v. Rumsfeld* was a case involving the capture in Afghanistan and military imprisonment in the United States of a terrorism suspect without charges. A plurality of the nation’s highest court declared, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. ..." While we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge."19

The secret 2001 Yoo/Delahunt opinion was repudiated in substantial part by a 2008 opinion written by a different OLC lawyer, Steven G. Bradbury.20 "[C]aution should be exercised before relying in any respect" on the earlier opinion, Bradbury wrote. He described the 2001 opinion as "the product of an extraordinary—indeed, we hope, a unique—period in the history of the Nation: the immediate aftermath of the attacks of 9/11," then went on to identify several of its provisions as "either incorrect or highly questionable."

Neither the deeply flawed 2001 opinion nor the 2008 renunciation of it was made public until March 2009, after the Obama administration took office. We simply do not know the extent of its influence on military planning or policy during the Bush administration. We hope it was dismissed as a hyperbolic overreaction to the 9/11 attacks. All we know for sure is that in the years following the terrorist attacks the military began to play a significantly expanded role at home.

EMERGING THREATS AT HOME

If, in the words of the 9/11 Commission, the terrorist attacks reflected a "failure of imagination" on the part of government planners,21 those attacks certainly prompted us to try to imagine new threats. Yet planning for the next attack, like planning for natural disasters, is complicated enormously by the impossibility of predicting its exact form, timing, and effect.

In an effort to prepare for the worst, the Department of Homeland Security, working with other federal agencies, including the Department of Defense, has developed a series of fifteen nightmare scenarios to simulate both kinds of crises.22 These include terrorist attacks using nuclear or conventional explosives, biological or chemical agents, contamination of food supplies, and cyber weapons, as well as major hurricanes, earthquakes, and pandemic influenza. The results are truly horrifying, in no small part because they seem credible.

In one scenario terrorists disperse pneumonic plague bacilli using an agricultural sprayer in a major city.23 This form of plague is highly contagious, and untreated it may kill most of those infected. Hospitals and pharmacies are overwhelmed, and government officials urge members of the public to stay at home, while supply chains for food and other necessities quickly fail. Many flee the city, and the disease spreads widely. The FBI and even the United Nations World Health Organization become involved. Some 9,500 people die, and another 28,000 are sickened. It is not hard to imagine an outbreak of civil unrest exceeding the capabilities of local law enforcement personnel. A quarantine of the entire city also seems likely, a drastic measure that only soldiers could implement.
Some of the events outlined in the fifteen scenarios might be handled by state or local civilian officials, and should be, depending on where they occurred and on their nature and severity. Others could not. A wildfire in Southern California, for example, is now a familiar occurrence for which federal intervention usually is not needed. A terrorist explosion of a large radiological weapon in an urban area, on the other hand, would call for technical expertise and equipment that only federal military forces possess, while as a matter of national security the federal government would want to interdict the perpetrators and prevent another attack.

A former assistant secretary of defense for homeland defense described some of the ways troops could help in the aftermath of a major terrorist attack:

Roads are buried or destroyed, bridges are dropped, homes and commercial buildings are severely damaged. Deaths and casualties are numerous, the injured are often buried in the rubble, local hospitals are unable to function, and special-needs patients . . . are trapped. First responders are often among the first casualties. Highway systems are clogged, and transportation nodes (airports, train stations, and port facilities) may be inoperable. Under such circumstances, the demand for unique military capabilities is almost limitless, including helicopters, high-wheeled vehicles, transport planes, aerial observation platforms, communications equipment, mobile medical personnel and emergency treatment facilities, veterinary care, firefighting equipment, search and rescue capabilities, mortuary services. . . assessment and decontamination (of the effects of a weapon of mass destruction), and local security.24

According to another expert, military assistance might not be limited to physical recovery from a terrorist attack. The "new threat to civil order is not only the terrorists themselves, but also criminal elements that will take advantage of panic and confusion." Federal troops might have to "stop, search, apprehend, and detain looters and rioters, sometimes in direct support of police officers but sometimes not." Soldiers also might be called on to repel "by force groups or individuals that attack key facilities"25—critical infrastructure "so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, [or] national public health or safety."26

**TAKING ON NEW ASSIGNMENTS AND REFINING OLD ONES**

Military assistance to civil authorities in responding to natural disasters is nothing new, but the military taking a significant role in fighting international terrorism at home is new. In writing the script for this role we need to determine whether the threat justifies the commitment of military resources that are partly duplicative of existing civilian services, like the FBI, and partly unique.

Only the Defense Department, after all, has so many personnel so widely dispersed. Troops are in principle highly disciplined, and they have considerable relevant training. The Pentagon also has a reliable nationwide communications network, a dedicated rapid transportation system, technical capabilities not available outside the military, and equipment that could be especially helpful. These special qualities might be indispensable in responding to a terrorist attack.

But our experience with the domestic use of soldiers suggests caution. We should rely on them only when civilian personnel cannot keep us safe, and even then only when the security they provide clearly outweighs any necessary sacrifices of liberties those soldiers are pledged to protect. We need to be very clear about the trade-offs. And in this democracy troops always need to remain under civilian control.

An Expanding Military Role

Three weeks after the terrorist attacks, Defense Secretary Donald Rumsfeld presented his 2001 Quadrennial Defense Review to Congress. In it he called on the Pentagon to engage in "enhanced inter-agency processes and capabilities to effectively defend the United States against attacks."27 Military leaders would "institutionalize definitions of homeland security, homeland defense, and civil support and address command relationships and responsibilities within the Defense Department."28 Shortly thereafter, President Bush established a new position, assistant to the president for homeland security, a sort of domestic security czar, and created a Homeland Security Council (HSC), a mirror image of the National Security Council.29

Not everyone in uniform was enthusiastic about the Pentagon's new homeland security role. Some senior military leaders worried that assigning new domestic duties to soldiers would divert limited military resources
from the overseas fight against the Taliban and Al Qaeda terrorists. They also expressed concern about a possible erosion of the Posse Comitatus Act’s presumption against military involvement in law enforcement. Support of civilian authorities was, they insisted, “a mission of secondary importance.” Delivering food and medical supplies, clearing fallen trees and power lines, and patrolling neighborhoods were not jobs for those trained to fight wars.

The Defense Department’s civilian leaders decided otherwise, however. In April 2002 the president approved the creation of NORTHCOM, a new combatant command whose head would be the first military leader since the Civil War charged exclusively with protecting the U.S. homeland. Headquartered in Colorado Springs, NORTHCOM’s job is distinctly domestic. It includes “homeland defense,” which for this purpose means protection of all U.S. territory except Hawaii and other Pacific islands. NORTHCOM acts as lead agency to safeguard “U.S. sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression or other threats as directed by the President”—in other words to fight wars on U.S. soil. Its responsibilities also encompass “defense support for civil authorities,” an element of “homeland security” wherein military forces act in a subordinate role to furnish personnel, equipment, and/or advice in various crises. Such support, which usually requires approval from the president or the secretary of defense, does not normally involve the use of force, and it is most likely to be provided when the president declares a “major disaster” under the Stafford Act.

NORTHCOM initially had no military forces of its own to command, other than its headquarters personnel. When troops were needed for a domestic assignment, it sought the approval of the secretary of defense, then drew them from Joint Forces Command, a functional rather than geographic unified command staffed primarily by National Guard and Reserve personnel, or from other commands. NORTHCOM was, in other words, a modestly sized management team, not a large standing army.

Fortunately, in the years since 9/11 NORTHCOM has not had to engage directly in fighting inside the United States. But in supporting civil authorities it has deployed troops to help respond to the loss of the Space Shuttle Columbia in 2003, the collapse of the Interstate 35 bridge in Minneapolis in 2007, and the Deepwater Horizon oil spill in the Gulf of Mexico in 2010. It has sent personnel and equipment to help fight wildfires and recover from floods and hurricanes. Most significantly, NORTHCOM directed the deployment of more than 22,000 troops to assist in the recovery from Hurricane Katrina in 2005.

A Parallel Civilian Response

While the military was gearing up for a fight on home ground, elaborate plans were underway for a huge new civilian organization with the ambitious title, Department of Homeland Security (DHS). Congress created the cabinet-level department in late 2002 by merging all or portions of twenty-two existing federal agencies with 180,000 employees. Among its primary responsibilities are to “prevent terrorist attacks within the United States, . . . minimize the damage, and assist in the recovery, from terrorist attacks that do occur, . . . [and] ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland.”

Within DHS, the Federal Emergency Management Agency (FEMA) is charged with building “a comprehensive national incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to [terrorist] attacks and [natural] disasters,” based on a “single, coordinated national response plan.” If an attack or disaster occurs, FEMA is responsible for managing the federal response.

Directives from two presidents have ordered the homeland security secretary to develop response plans for “the threats that pose the greatest risk to the security of the Nation, including acts of terrorism, cyber attacks, pandemics, and catastrophic natural disasters.” Additional directions are contained in the Post-Katrina Emergency Management Reform Act of 2006, enacted in the wake of the deeply flawed federal response to the 2005 hurricane.

The most recent plan is set forth in the National Response Framework, updated by FEMA in 2013, and a constellation of supporting annexes. The Framework describes in very broad terms federal responses to “all types of disasters and emergencies . . . to save lives, protect property and the environment, stabilize communities, and meet basic human needs following an incident.” Echoing the language of the Homeland Security Act, it declares that “the Secretary of Homeland Security . . . provides the Executive Branch with an overall architecture for domestic incident management and coordinates the Federal response, as required.”
Other DHS planning documents offer some details. They give the FBI lead agency responsibility for domestic intelligence and counterterrorism investigations. They also indicate that the secretary of defense “provides defense support to civil authorities for domestic incidents, as directed by the President, or when consistent with military readiness and appropriate under the circumstances and the law.” The Department of Defense is specifically charged with, for example, gathering relevant geospatial data, providing medical and public health care, and search and rescue. Lines of communication among agencies are also described in some detail.

Planning and coordination of responses to emergencies by authorities at all levels of government, as well as by nongovernmental organizations and members of the private sector, are the responsibility of the National Incident Management System (NIMS) operating through the Incident Command System. NIMS is designed to provide a standardized, predictable, yet flexible, response to crises, while the Incident Command System furnishes an organizational structure for managing the response.

While all agencies are supposed to “cooperate” with the DHS secretary, military forces may be committed only with the approval of the secretary of defense or the president. And when they are, they serve exclusively within the military’s chain of command. There is, in short, no guarantee that troops will necessarily work in harmony with other agencies, or even that soldiers will be part of the response. More detailed guidance about interactions between civilian and military agencies may be contained in DHS documents not available to the public.

SHARED RESPONSIBILITY FOR PROTECTING THE HOMELAND

For its part, the Defense Department is fully committed to doing whatever it can to help out in a great emergency. “Defending U.S. territory and the people of the United States is the highest priority of the Department of Defense (DoD), and providing appropriate defense support of civil authorities (DSCA) is one of the Department’s primary missions.” Yet while the military has always taken the lead role in homeland defense, “[t]he Department of Homeland Security is the lead Federal agency for homeland security.” The risk of confusion about responsibilities here is considerable. It is also dangerous.

Who’s in Charge?

Even before 9/11 it was suggested that the Department of Defense should be prepared to assume a leadership role in the federal response to any great emergency: “The Department of Defense’s ability to command and control vast resources for dangerous, unstructured situations is unmatched by any other department or agency. . . . In extraordinary circumstances, when a catastrophe is beyond the capabilities of local, state, and other federal agencies . . . the president may want to designate DoD as lead federal agency.”

One study called the department’s primacy inevitable: “[i]f some agency of the U.S. government learned that a large scale attack might actually be imminent, threatening tens of thousands of lives, we expect that [existing plans] for responding would almost instantly be pushed aside. The White House would . . . seek to use every bit of power at America’s disposal in order to avert or contain the attack . . . In this situation, the Defense Department’s capabilities would immediately become paramount.”

But another national commission argued that the president should “always designate a Federal civilian agency other than the Department of Defense (DoD) as the Lead Federal Agency.” It worried that “[m]any Americans will not draw the technical distinction between the Department of Defense—the civilian entity—and the U.S. Armed Forces—the military entity,” leading to the perception that “the military” is in charge. Unstated, yet palpable, was a reluctance to place the military in a position from which it could, on its own initiative, assume a lead role.

Officially, the Pentagon has never publicly claimed more than a supporting role, except under circumstances that would justify the invocation of martial law or the claimed immediate response or emergency authorities described in Chapter 7. The Pentagon’s 2013 Strategy for Homeland Defense and Defense Support of Civil Authorities emphasizes its “go big, go early, go fast” approach to saving lives and protecting property in the homeland. But it also stresses its role as supporting, rather than leading, in that effort.

Nevertheless, in 2005, Admiral Timothy J. Keating, head of NORTHCOM, remarked that in the event of a “biological, a chemical or nuclear attack in any of the 50 states, the Department of Defense is best positioned—of the various eight federal agencies that would be involved—to take the lead.” A more recent instruction from the DOD Joint Chiefs of Staff declares that in any incident involving weapons of mass destruction, “the military must be
prepared to support or lead domestic CM [consequence management] operations, as directed by the Secretary of Defense or President.\textsuperscript{56}

Thus, while the Homeland Security Act directs the administrator of FEMA to “lead the Nation's efforts to prepare for, protect against, respond to, recover from, and mitigate against the risk of natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents,”\textsuperscript{57} uncertainty persists about leadership for the military's role in both the anticipation and response to the next great emergency.

The failure of DHS and Pentagon planners to provide greater clarity in this matter is dangerous, for in a crisis government personnel in and out of uniform need to know where to look for authoritative direction. Equally important, every citizen must know that the recovery effort will be led by officials who are both authorized and accountable.

The National Guard

The National Guard plays a key role in plans for a military response to a great emergency, when state and local civilians are unable to keep the peace or enforce the law. Guardsmen typically are among the first responders, not least because they are so widely dispersed and therefore close to the scene of any disaster. They are therefore mentioned prominently in the National Response Framework, as well as in various DOD planning documents.

When called into service by a state or territorial governor acting as their commander in chief, guard personnel ordinarily act in what is known as “state active duty” status. If they are deployed in a “homeland defense activity”—one undertaken for the protection of U.S. territory, the domestic population, infrastructure, or other assets deemed critical to national security by the secretary of defense—a governor may ask for federal support. If the secretary approves, these state troops are said to serve in Title 32 status, referring to the federal statute that governs the guard when its personnel are commanded by the governor but paid by the federal government.\textsuperscript{58} This statutory arrangement may be especially helpful in supporting federal military response operations, because state forces are not subject to the Posse Comitatus Act and thus may provide direct support for local law enforcement.

All fifty states, three U.S. territories, and the District of Columbia have entered into the congressionally approved Emergency Management Assistance Compact (EMAC), which requires them to lend guard troops and equipment to each other in a natural or man-made disaster, civil disorder, insurgency, or enemy attack.\textsuperscript{59} Forces on loan are commanded by the governor requesting them. In this role state forces may perform not only traditional military functions, but also fight fires, enforce the law, provide medical care, and carry out search-and-rescue missions.\textsuperscript{60} The assisted state reimburses the assisting state for most expenses, unless the guardsmen are serving in Title 32 status or funding is provided by FEMA. Some 65,000 EMAC troops were deployed in 2005 to provide assistance to Gulf Coast states in the aftermath of hurricanes Katrina and Rita.

Even before 9/11, National Guard troops were given a critical counterterrorism role. In 1998 the Pentagon ordered them to create special teams to evaluate terrorist attacks involving chemical, biological, radiological, nuclear, or explosive weapons—weapons of mass destruction, or WMD for short—and help treat victims.\textsuperscript{61} At least one of these specialized twenty-two-person WMD civil support teams now exists in every state, the District of Columbia, and three territories, ready with mobile analytical laboratories and reliable communications gear to deploy on a moment's notice to the scene of an attack. Although these teams are trained and paid for by the federal government, they operate initially under local control.

National Guard troops may be called into federal service by Congress when they are "needed for the national security,"\textsuperscript{62} or they may, as we have seen, be federalized by the president in a domestic emergency. When they are, they, like active-duty military forces, serve under the national military chain of command for all purposes, although their operations may be coordinated by a civilian agency like FEMA.\textsuperscript{63}

NORTHCOM's Plans

In the midst of a crisis, the distinction between homeland defense and homeland security operations—the one led by the Defense Department, the other by FEMA—may be very difficult to make. In principle, the "characterization of a particular threat, and the designated response agencies and modes, ultimately rests with the President."\textsuperscript{64} Yet military forces might have to carry out their mission in a "simultaneous, near-simultaneous, or sequential fashion, across the threat spectrum, within or near the homeland. A full range of threats and hazards confronts the homeland."\textsuperscript{65} For example, a terrorist attack may require the interdiction and defeat of continuing national...
security threats, while at the same time overwhelming the capabilities of civilian authorities to restore order, save lives and property, and begin the process of recovery. The Pentagon has developed separate rules for each type of operation. Knowing which ones to apply, and when to apply them, may not be easy.

Similarly, the Defense Department has drawn up separate rules for what it calls “support of civil authorities” and for “civil disturbance” operations. Any catastrophe that justifies military intervention, because civilian officials cannot cope, may lead to domestic violence, just as any civil unrest—growing out of a political protest or a strike, for example—may surpass the capabilities of civilian officials to contain it. Again, however, the military operates under two distinct sets of guidelines. Still other protocols exist for military support of law enforcement and for the use of force.

This jumble of rules may create confusion, which could lead to dangerous delays or duplication of effort. The risk of mistake is also very substantial. A brief review of current NORTHCOM plans illustrates these potential difficulties.

Homeland Defense

The U.S. military has always been prepared to fight a war on its own territory. Today NORTHCOM is responsible for homeland defense, which, despite the name, may include distinctly offensive operations to counter threats and aggression inside the nation's borders. It may involve the same kinds of combat operations that occur on any battlefield. Plans for these operations are publically available only in broad outline. More detailed guidance is mostly secret.

The Pentagon claims that “when directed by the President, the use of military operations for [homeland defense] is a constitutional exception to the Posse Comitatus Act.” In this role, presumably, troops could engage in law enforcement, such as arrests or investigations of crimes. The reference here may be to the president's implied “repel-attack” power. But this claim is inconsistent with the act itself, which allows the use of troops only under “circumstances expressly authorized by the Constitution or Act of Congress.”

Defense Support of Civil Authorities

DOD operations in support of civil authorities “make up the bulk of the Army's contribution to homeland security.” Perhaps the most nearly cor-

herent publicly available description of these operations is prosaically labeled CONPLAN 3501. (CONPLAN stands for “contingency plan.”)

Published in 2008, it bases deployment of troops on several preconditions:

a. An incident severe enough to trigger a DSCA [Defense Support of Civil Authorities] response will occur with little to no warning and temporarily exceed local, state and tribal civil authorities response capabilities.

b. Title 10 forces [i.e., active-duty military or federalized National Guard] in the vicinity of the incident will respond under immediate response authority.

c. The National Guard will normally respond [initially] in a State of Active Duty or Title 32 status.

d. Agreements between and among the states, to include EMAC, will [first] be used for state to state assistance for large scale or catastrophic events.

CONPLAN 3501 repeats the following critical instruction from the National Response Framework: “When directed by the President or SecDef . . . the military Services provide forces . . . in support of requests from Federal Emergency Management Agency.” In other words, troops will assist only after the president, wearing his commander-in-chief hat, or the top civilian official in the Pentagon has approved their deployment. Once approval is given, regular army, National Guard, or Reserve personnel may be assigned to operate under NORTHCOM direction, depending on the scope of the mission and the nature of the situation.

Within the category of support for civil authorities, special DOD protocols dictate responses to several particular kinds of disasters that seem most likely to occur. One concerns terrorist attacks or accidents involving chemical, biological, radiological, or nuclear (CBRN) materials. The National Guard's twenty-two-member WMD civil support teams would be called out in any CBRN incident, as would one or more of seventeen regional CBRN Enhanced Response Force Packages, each including some 200 specially trained and equipped personnel. These troops, typically remaining under the control of state governors, could provide search-and-rescue, medical, and other mass casualty operations in a contaminated environment. In addition,
ten 570-member Homeland Response Forces, one for each of FEMA's ten geographical regions, stand ready to provide support, including command and control, for other CBRN units. They, too, would be drawn from National Guard forces in each region and operate under the command of state governors.

In the event of a very large CBRN incident, perhaps involving simultaneous WMD attacks in different locations, the Department of Defense might also send in its brigade-size Defense CBRN Response Force, consisting of 5,200 individuals with special training and equipment, and operating under NORTHCOM command. Additional federalized guard troops or active-duty military personnel could be deployed, as well. These various forces would be joined, as appropriate, by elements of the American Red Cross, the Departments of Energy and Health and Human Services, and other federal agencies.

How long would a CBRN operation last? According to one DOD document, ending it would be “both a military and political decision.” Presumably, this means that civilian and military leaders would decide jointly. Other specialized DOD plans focus on nuclear weapons accidents, other incidents involving nuclear weapons or radiological materials, pandemic influenza, even smallpox. The last of these contemplates the use of troops to enforce quarantines.

Either before or after a terrorist attack using nuclear or radiological weapons, troops might deploy to support the FBI in tracking down and neutralizing those responsible. In this role military personnel would carry out overlapping homeland defense and civil support missions.

Finally, federal military forces may help out during special events, such as annual meetings of the U.N. General Assembly, the Olympics, and inaugurations, for example by providing bomb-sniffing dogs and other security. Or they may be assigned to do jobs normally performed by civilians, as when soldiers filled in for striking air traffic controllers in 1981.

Civil Disturbance Plans

One predictable result of almost any catastrophic event, either natural or man-made, is a breakdown in law and order. If word gets out that plague has been released in a community, for example, we can expect some citizens to ignore official instructions to stay at home—probably breaking speed limits in the process. In the aftermath of hurricanes or floods, looting sometimes follows. The character and scale of the disorder will depend on the event.

Unrest may also be the product of anarchy, political protests, or even efforts to overthrow the government—“unruly and violent crowds,” as the army puts it. The practical results—loss of life, property damage, and a general failure of the rule of law—may be the same in each case. So are the tactics that may be employed to prevent such a breakdown or restore order.

The Pentagon recognizes the overlap between support of civil authorities, law enforcement, and civil disturbance operations (CDO): "The CDO mission is conducted to restore order or enforce federal law after a major public emergency (e.g., natural disaster, serious public health emergency, or terrorist attack) when requested by the state governor or when the President determines that the authorities of the state are incapable of maintaining public order." It is therefore surprising that the Pentagon has developed entirely separate protocols for the three types of operations.

Guidance for military responses to civil disturbances is contained in another CONPLAN that, after 9/11, replaced the decades-old contingency plan called GARDEN PLOT. The current CONPLAN provides the basis for all preparation, deployment, employment, and redeployment of Department of Defense component forces, including National Guard forces called to active federal service, for use in domestic civil disturbance operations, in support of civil authorities as directed by the President. This CONPLAN is classified "secret," although some detailed instructions are set forth in an army field manual, which is available to the public.

Acting in a civil disturbance mode, troops may be used to "disperse unlawful assemblies and to patrol disturbed areas to prevent unlawful acts. They may be used to assist in the distribution of essential goods and the maintenance of essential services. Soldiers may also establish traffic control points, cordon off areas, release smoke and obscurants, and serve as security or quick reaction forces." Statutory authority for their use may be found in the Insurrection Act, an exception to the Posse Comitatus Act. On paper at least, the Justice Department is the lead federal agency for coordinating the federal government response to restore law and order, and for advising the president on the use of troops. Yet here as elsewhere military forces in federal service remain under the command of the president and the secretary of defense at all times.
Support to Civilian Law Enforcement

Pentagon rules for military support to law enforcement have not changed significantly since 9/11, although they now include special instructions for terrorist incidents. While these rules continue to stress the importance of Posse Comitatus Act limitations on soldiers’ actions, they also declare that “active participation in direct law-enforcement-type activities (e.g., search, seizure, and arrest)” is permitted “for the primary purpose of furthering a DoD or foreign affairs function of the United States, regardless of incidental benefits to civil authorities.” This presumably means that troops may assist civilian law enforcement officials whenever they are deployed on a homeland defense mission, or to support civil authorities or abate a civil disturbance, or in the exercise of its “immediate response” or “emergency authority—all DOD “functions.” Such a cramped interpretation of the scope of the act is not supported by the statutory language, however. It also is at odds with other Pentagon guidance, which frees soldiers from the constraints of the act only when a statutory or constitutional exception is invoked.

Rules for the Use of Force

How much force may soldiers use in discharging their domestic duties? The answer is found in standing rules for the use of force, which apply to all active-duty or federalized troops engaged in either homeland defense or support of civil authorities, or in mission-specific rules. Unfederalized National Guard personnel are governed by state rules.

According to the standing rules, troops may use force generally to defend their units or themselves against hostile acts or demonstrated hostile intent. They may use deadly force to defend others as part of their assigned missions, to prevent the theft or sabotage of assets vital to national security (such as nuclear weapons), to protect inherently dangerous property (such as explosives), or to prevent the destruction of national critical infrastructure (such as public utilities). Ordinarily, soldiers may use lethal force under the same circumstances that cops may—for example, to interrupt a murder or armed robbery, or to stop a dangerous fleeing prisoner.

But force is normally used “only as a last resort, and the force used should be the minimum necessary...”. Deadly force is to be used only when all lesser means have failed or cannot be reasonably employed.” When force is used,

it must be “reasonable in intensity, duration and magnitude” under the circumstances. Courts, however, have ruled that the use of lethal force should be “reasonably necessary.” A verbal warning may be required before shots are fired.

In practical terms, soldiers conducting homeland defense may shoot to kill any identified enemy soldier or a terrorist. When they operate in support of civil authorities, however, they may not use lethal force except to prevent the loss of life or property as outlined above. They may not, for example, shoot protesters or unarmed looters. Whether they may kill civilians trying to break through a cordon surrounding a city quarantined with pneumonic plague is unclear.

Rehearsing for the Worst Case

Since 9/11 the Pentagon has participated in a series of complex annual training exercises, code-named Ardent Sentry, each based on one or more of the fifteen disaster scenarios developed by FEMA and described above. These drills are led by FEMA and include the FBI, the Coast Guard, the Department of Energy, and other agencies. In 2013 the exercise included three notional hurricanes, a theft of nuclear weapons, a train derailment, a tornado, the collapse of a high-rise building, and a federal call-up of National Guard troops. Ardent Sentry is in turn part of a larger set of biennial exercises conducted by FEMA to test emergency-response planning.

In 2005 NORTHCOM reportedly also began a series of secret military exercises, code-named Vital Archer, at least some of which have involved active-duty military in lead roles. These exercises are said to rehearse classified war plans for confronting fifteen attack scenarios that may or may not relate to the DHS scenarios, although some of them apparently contemplate simultaneous terrorist strikes in different locations. Military responses range from modest crowd-control missions to an assumption of total control if civilian resources are overwhelmed—if, say, a large radiological weapon is used. As many as 3,000 quick-reaction ground troops might be deployed to the site of each attack. The plans are said to include preventive as well as responsive measures. Details are set forth in two documents that have not been made public. Because these plans remain secret, it is not possible to assess either their legality or their practical implications.
Legal Justifications

The Constitution includes clear textual authority for Congress to provide for military forces to repel an invasion or suppress domestic violence. Congress has done so, giving the president "broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destruction, and these laws specifically authorize the President to use the Armed Forces to help restore public order." The most important of these statutory authorities are the Insurrection Act and the Stafford Act.

No statute tells the Department of Defense when and how it may deploy troops domestically in advance of authorization from the president or secretary of defense. The fear of showing up too late to help in an emergency has prompted the Pentagon to assert a nonstatutory "immediate response" or "emergency" authority for troops in the field to act quickly without approval from the chain of command, but only for a limited time, in order to save lives or property, or to restore governmental function and public order. A similar claim is said to be based inherently in the Constitution.

It is generally agreed that the president may exercise inherent power, using troops, to repel attacks on the United States, although the precise scope and limits of this power are unknown. Some say the president has even broader, unspecified powers as commander in chief to use troops at home in emergencies. Such a sweeping claim, echoed in the OLC opinion by John Yoo and William Delahanty outlined above, is based on no clear judicial precedent, and is legally extremely doubtful. And because it would involve an arrogation of power with no discernible limits, it is also dangerous. More importantly, except in a repel-attack scenario (and maybe even then), congressional acts in this area have the effect of limiting the president's power, either directly, as the Posse Comitatus Act does, or by implication. Thus, preconditions for the deployment of troops spelled out in the Insurrection Act also prevent deployments without first satisfying those conditions, unless permitted by another statute.

What should be clear from this brief description is that existing laws are at once both broad and narrow. The Insurrection Act, for instance, grants the president extremely broad powers to use military force domestically. But it conditions that use on the existence of certain specified criteria. And while it gives the president considerable latitude in interpreting those conditions, it imposes a deliberative process for invoking its authority, and it makes him politically accountable for the decision to do so.

What is not so clear in reviewing the various Defense Department protocols is which, if any, of these statutory authorities the president would feel bound to follow in the next great domestic crisis. Neither is it certain which of the welter of overlapping Pentagon regulations, directives, instructions, contingency plans, and manuals would guide military officials in a given emergency.

A New Functional Approach

We believe that Congress should prescribe the military's domestic emergency powers with much greater clarity, following the example of the first Congresses, and in keeping with the American tradition of avoiding the involvement of troops in civilian affairs except in cases of urgent necessity, when no viable alternative exists. In the current political climate of the nation, however, we regard such a legislative initiative as unlikely.

The Pentagon, meanwhile, could eliminate much of the existing uncertainty by rewriting its own plans and rehearsing them extensively. Instead of pigeonholing crises by applying decades-old labels, we think a better approach would be to focus on the practical effects of a given crisis and on the ability of various government agencies to respond. If terrorists release pneumonic plague in a large city, for example, military leaders might be tasked in advance to dispatch specially trained CRBN units immediately to work closely with officials from the Centers for Disease Control and the FBI to assess the damage, limit the spread of disease, and track down those responsible. They should not have to choose among varying protocols for homeland defense or civil support or law enforcement, and they should be directed by just one boss, not two. This potentially simpler process could preserve the flexibility needed to adapt to a highly unpredictable and dynamic threat, all while maintaining ultimate civilian control of the troops.

FEMA has pointed the way toward this kind of functional approach with its recent development of overlapping Federal Interagency Operational Plans (FIOPs). Each plan is directed at a mission area identified in PPD-8, the president's National Preparedness directive: prevention, protection, mitigation, response, or recovery. Each one describes "a detailed concept of operations
for Federal entities to integrate and synchronize national-level Federal capabilities" in implementing emergency plans. Each federal agency is supposed to develop operational plans to implement the FIOPs.

The Prevention FIOP aims to "unify[ ] the collective capabilities of the Federal Government to respond to an imminent threat, terrorist attack, and/or follow-on attack. In the instances of imminent terrorist threats and suspected acts of terrorism, prevention activities include the law enforcement response; public safety; crime scene security and preservation of evidence; render safe of chemical, biological, radiological, nuclear, or high-yield explosive (CBRNE) devices; tactical missions; and counterterrorism, counterintelligence, and criminal investigative activities." It is concerned with what DHS insiders refer to as "left of boom." The Mitigation FIOP seeks to reduce the loss of life and property by lessening the impact of a disaster after it occurs. The Recovery FIOP is designed to help communities affected by a catastrophe get back on their feet. The goal of the Protection FIOP is to protect people, communities, and vital facilities in the aftermath of a catastrophic incident. It is inextricably linked to the Response FIOP; the purpose of which is to "support[] local, state, tribal, territorial, and insular area efforts to save lives, protect property and the environment, and meet basic human needs following an emergency or disaster." The Response FIOP is meant to implement the National Response Framework.

These lengthy, ambitious plans focus on the practical functions of federal agencies in responding to great emergencies, rather than on the agencies themselves, and they acknowledge obvious overlaps in responsibilities, thus avoiding to some degree the balkanization that characterized earlier planning efforts. Still, they do not yet integrate or fully synchronize the actions of military forces, whether in a lead or supporting role, with those of other federal agencies.

The Response FIOP notes that "the President leads the Federal Government response effort to ensure that the necessary resources are applied quickly and efficiently to large-scale and catastrophic incidents. All Federal departments and agencies must cooperate with one another, and with local, state, tribal, territorial, and insular area governments, community members, and the private sector to the maximum extent possible." Yet it also declares that for "non-Stafford Act incidents, Federal response or assistance may be led or coordinated by various Federal departments and agencies consistent with their authorities." And while the Department of Homeland Security's 2014 Quadrennial Homeland Security Review indicates that its "all-hazards" plans for keeping the nation safe require "unity of effort—both across every area of DHS activity and among the numerous homeland security partners"—it continues to treat the Defense Department as a largely autonomous agency.

Whatever the aspirations of the Department of Homeland Security for seamless coordination of an efficient federal response to a great catastrophe, such a response can only become a realistic hope with a simplification and streamlining of DOD plans. But we should not expect any whole-government integration of emergency planning to win quick or easy acceptance at the Pentagon. The aphorism "old habits die hard" applies here. The army, for example, insists that "unity of command is potentially problematic due to split authorities, particularly when conducting simultaneous homeland defense and civil support missions."

If the greatest military force on Earth is to realize its full potential to keep Americans safe at home, it will need to abandon its old labels for organizations and missions, and work harder to collaborate with its civilian counterparts. The creation of NORTHCOM, with its distinctly domestic focus, and its close ties to the FBI, the Department of Homeland Security, and other agencies, is a big step in the right direction.

MILITARY DETENTION AFTER 9/11

Two months after the terrorist attacks of 9/11, President George W. Bush issued a military order declaring that any non-U.S. citizen whom he determined to be a member of Al Qaeda or to have been involved in international terrorism was to be "detained at an appropriate location designated by the Secretary of Defense outside or within the United States." That order was followed a short time later by an opinion from the Justice Department's Office of Legal Counsel stating, with unwarranted confidence, that it was "settled beyond peradventure" that the president could seize and detain "enemy combatants" in the United States, without regard for their citizenship, in an armed conflict. The opinion also maintained that the Posse Comitatus Act did not, and indeed could not, limit the president's exercise of such "plenary constitutional authority." Yet the Supreme Court had declared less than a year earlier that without a "special justification, such as harm-threatening mental illness," indefinite detention in the absence of a
"criminal proceeding with adequate procedural protections" violates the Due Process Clause of the Fifth Amendment.\textsuperscript{115}

Perhaps in reliance on such doubtful advice, several civilians were imprisoned without charges or legal process in a military jail for extended periods after 9/11. At no time, however, was the privilege of the writ of habeas corpus formally suspended.

Yasir Hamdi

Yasir Esam Hamdi was taken into custody by the U.S. military in late 2001 when he was handed over by Northern Alliance forces in Afghanistan. According to an affidavit from a Pentagon official, Hamdi was captured on the battlefield armed with a Kalashnikov rifle as a member of a Taliban military unit.\textsuperscript{116} The affidavit was largely based on hearsay, however, and it offered few details.

Initially confined at Guantánamo, Hamdi was transferred to navy brigs in Norfolk, Virginia, and Charleston, South Carolina, when it was discovered that he was a U.S. citizen. There he was held incommunicado and without charges for more than two years. His father, as next friend, filed a habeas corpus petition in a federal district court seeking his release. The Supreme Court eventually ruled that Hamdi could be imprisoned as an "enemy combatant" pursuant to the Authorization for Use of Military Force (AUMF) passed shortly after 9/11. Although the statute does not explicitly mention "detention," a plurality of the Court called the power to detain an "incident to war," in order "to prevent captured individuals from returning to the field of battle and taking up arms once again."\textsuperscript{117} It was clear enough, in the plurality's view, to satisfy the 1971 Non-Detention Act, passed in response to the groundless World War II internment of Japanese Americans, which states that no citizen may be imprisoned except pursuant to an act of Congress.

The Court was careful to base its holding on the assumption—never proved in Hamdi's case—that the prisoner was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States' there."\textsuperscript{118} The Court also pointed out that his detention was authorized only "for the duration of the particular conflict in which [he was] captured,"\textsuperscript{119} although it must have recognized that the war in Afghanistan could drag on for many years. It took pains to distinguish Hamdi's case from that of Lambdin Milligan, a civilian arrested at his home in Indiana, not on the battlefield, during the Civil War: "The [1866] Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen."\textsuperscript{120}

Harkening back to the debate spurred by Chief Justice Taney in \textit{Ex parte Merryman}, the \textit{Hamdi} Court's plurality indicated in a dictum that the power to suspend the writ of habeas corpus belongs to the legislative branch: "[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."\textsuperscript{121} Justice Scalia added, in a dissenting opinion, "The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal."\textsuperscript{122}

Although approving Hamdi's continued imprisonment, the Court ruled that he had to be given a "fair opportunity" to demonstrate before a "neutral decisionmaker" that he was not a Taliban combatant fighting the United States.\textsuperscript{123} Before he received that "fair opportunity," however, Hamdi was released when he agreed to return to Saudi Arabia, where his parents lived, and surrender his U.S. citizenship.\textsuperscript{124}

José Padilla

The case of José Padilla was quite different. Padilla, another U.S. citizen, was a member of a Chicago street gang who traveled to the Middle East for what the government claimed was training with Al Qaeda. When he returned to the United States in May 2002, he was taken into custody by FBI agents at Chicago's O'Hare Airport, then transferred to New York, where he was held for a month as a material witness in the inquiry into the 9/11 terrorist attacks. He was represented there by a public defender. Two days before a scheduled hearing on a habeas corpus petition, President Bush ordered the Justice Department to turn Padilla over to the secretary of defense. Padilla then was held in isolation for more than three years in the navy brig in South Carolina.

The Second Circuit Court of Appeals concluded that Padilla could not be detained. The president lacked inherent constitutional authority to detain
a U.S. citizen on American soil outside a combat zone, the court ruled, and the AUMF, said to justify Hamdi's detention, did not provide statutory authority to detain a citizen seized on U.S. soil. The Supreme Court then reversed, not on the merits but on the ground that Padilla should have filed his habeas petition in a federal court in South Carolina, rather than in New York.

In subsequent appeals the government insisted that Padilla represented "a continuing, present and grave danger to the national security of the United States." Moreover, the argument went, his criminal prosecution for violating laws relating to terrorism might interfere with an ongoing effort to obtain terrorist information from him—even after years in custody—or might enable Padilla to communicate with confederates. The Fourth Circuit Court of Appeals agreed that continued military detention was necessary.

Just before Padilla's case could be heard once again in the Supreme Court, however, the government transferred Padilla back to civilian custody, where he was tried and convicted of criminal conspiracy to commit murder and other offenses, and of material support to terrorists, and he was sentenced to twenty-one years in prison.

Ali Saleh Kahlah al-Marri

The third civilian taken into military custody after 9/11, Ali Saleh Kahlah al-Marri, was not a U.S. citizen, but a resident alien, a Qatari graduate student in Peoria, Illinois. Al-Marri was, like Padilla, initially arrested and held as a material witness. He was subsequently charged with credit card fraud and other financial offenses. Nearly a year and a half later, just before his trial was set to begin, the criminal charges were withdrawn and, as in Padilla's case, al-Marri was delivered into military custody. He, too, ended up in the navy brig in South Carolina, where he was held for another four years without charges or trial.

Like Padilla, al-Marri was said to represent "a continuing, present and grave danger to the national security of the United States." Also like Padilla, he was neither captured on a battlefield nor involved directly in hostilities against U.S. forces. For the first sixteen months of his military confinement, al-Marri was unable to communicate with his family, and he was denied access to counsel.

In 2008, six and a half years after he was arrested, a deeply divided Fourth Circuit Court of Appeals decided that al-Marri had not been given an adequate opportunity to challenge the factual allegations said to justify his detention, and it sent the case back to the district court. One appellate judge complained that the ruling allowed the president to "order the military to seize from his home and indefinitely detain anyone in this country—including an American citizen—even though he has never affiliated with an enemy nation, fought alongside any nation's armed forces, or borne arms against the United States anywhere in the world.... No existing law permits this extraordinary exercise of executive power. Even in times of national peril, we must follow the law, lest this country cease to be a nation of laws."

When al-Marri appealed to the Supreme Court for his release, the government delivered him instead to law enforcement officials, just as it had with Padilla. He then pleaded guilty to a single count of providing material support to a terrorist organization, and was sentenced to an additional eight years in prison.

What's Behind the Post-9/11 Cases?

More questions than answers remain about the Bush administration's decision to consign the three civilians to military detention after 9/11. Here are a few:

1. Was Hamdi actually a Taliban soldier? Did Padilla and al-Marri really engage in planning for terrorist attacks in the United States? Without trials to establish the facts or public release of relevant intelligence documents, it is impossible to know. For now, we have only the assertions of government officials to go on.
2. Why were these three individuals not imprisoned by civilian authorities, who could have kept them just as securely as the military? None of the courts that reviewed their cases addressed this possibility.
3. Why were they not prosecuted initially in the criminal justice system? While the three languished in the navy brig in South Carolina, hundreds of terrorists were tried and convicted in criminal courts and sentenced to lengthy prison terms. Criminal prosecutions of these three individuals would not, so far as we know, have depended on the appearance in
SOLDIERS ON THE HOME FRONT

4. Why were these individuals not tried before a military commission, where the rules of procedure and evidence would have been friendlier to the prosecution than in an ordinary criminal case?

5. Why were the three not treated as prisoners of war? While there was some uncertainty about the applicability of the Geneva Conventions to asymmetric warfare with terrorists, the conventions allow enemy POWs to be held for the duration of an armed conflict, but they also require humane treatment and other protections.

6. Who made the decisions to commit these civilians to military custody, when did they decide, what criteria did they apply, and how were their decisions documented?

7. Finally, why did the government fight so hard for the prolonged military imprisonment of such apparently insignificant alleged foot soldiers for the Taliban and Al-Qaeda?

Answers are elusive. One possibility is that evidence was lacking to mount successful criminal prosecutions in civilian court. If evidence existed, it might have been too sensitive to risk its exposure, or it might have been tainted by abusive interrogation. Bush administration officials might have feared that a habeas corpus petition would be successful, or they might have wanted to deny the detainees a public forum for criticism of its Middle East policies or of the detainee's treatment in custody.

It seems more likely that those officials were determined to establish a clear legal precedent that would simply allow suspected terrorists to be detained indefinitely, without having to justify their imprisonment in court or prove that they were guilty of a crime. Indeed, there were calls for new legislation to permit "preventive detention" without specific charges or trial.

Still another possibility is that these three individuals were imprisoned by the military to make a dramatic statement about the ongoing threat to national security, and to cultivate public support for other extraordinary measures. For example, when José Padilla was transferred from civilian to military custody more than a month after his arrest in Chicago, Attorney General John Ashcroft interrupted a trip to Moscow to proclaim the elimination of "a serious and continuing threat to the American people and our national security."132

SOLDIERS AT HOME IN THE AGE OF TERRORISM

Without access to records about decision making within the Bush administration, we cannot be sure what prompted these military detentions. Neither can we fairly judge the wisdom or legality of the detentions, or hold the responsible officials accountable. Lawsuits by José Padilla, claiming damages for wrongful imprisonment and mistreatment, might have provided some of those records. But they were dismissed on grounds of judicial deference to "the Constitution's parallel commitment of command responsibility in national security and military affairs to the President as Commander in Chief," or lack of judicial competence,133 or because the defendants were entitled to qualified immunity from liability in the performance of their official duties.134

Congress Gets Involved

President Obama abandoned the Bush administration's claim of inherent Article II power to detain terrorist suspects in the United States, relying instead on the 2001 AUMF invoked by the Supreme Court in Hamdi.135 In response, and in the midst of a tough presidential reelection campaign, Congress enacted new legislation in late 2011 that explicitly approves the detention of terrorist suspects "without trial until the end of the hostilities" authorized by the 2001 law.136

The new law applies differently to two kinds of "covered persons." The first group includes individuals who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks." This language mirrors that of the AUMF. The first group also includes anyone who "was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."137 Anyone in this group may be held in a military prison.

A second group is a subset of the first. It includes noncitizens (perhaps including lawful resident aliens) who are determined "(A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and (B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners."138 Members of this group are required
to be confined by the military, unless the president waives the requirement "in the national security interests of the United States."**139**

There is no indication of who should make the determination that a person is covered by the statute or what proof is needed to do so. Nor does the 2011 law resolve doubts about whether, without regard for the statute, individuals captured inside the United States, like Padilla and al-Marri, may be held by the military indefinitely without trial.**140**

In signing the legislation, President Obama announced that he would never authorize the indefinite military detention of American citizens without trial.**141** But of course another president might.

The president then waived the part of the law that mandates military detention of the second group of terrorist suspects, declaring that such a "rigid, inflexible requirement . . . would undermine the national security interests of the United States."**142** But his waiver applies only when military detention would interfere with counterterrorism efforts, or when the attorney general determines by "clear and convincing evidence" that an individual is not subject to the provision. In other words, even with the waiver a terrorist suspect, unlike a criminal defendant, is presumed guilty until proven innocent. Needless to say, the waiver may be revoked by another president.

The provision authorizing military detention of the first group was immediately challenged in court by journalists and political activists, who claimed that it violated their First Amendment rights of free speech and association, as well as their Fifth Amendment right to due process. The district court enjoined enforcement of the law, expressing concern that some legitimate political speech, especially that expressing extreme or unpopular views, might be condemned by it. The court also found the terms "substantially supported," "associated forces," and "directly supported" to be unconstitutionally vague, because they do not allow "the average citizen, or even the Government itself" to understand what conduct is forbidden.**143**

The district court's decision was reversed on appeal, not on any of the constitutional grounds just mentioned, but because the appellate court found that the plaintiffs lacked standing to sue, and the Supreme Court refused to hear the case.**144**

In 2008, the nation's highest court decided an important case involving military prisoners at Guantánamo. In *Boumediene v. Bush*, the Court emphasized that any prisoner within the jurisdiction of the federal courts, even one held by the military, must be allowed to seek judicial relief by applying for a writ of habeas corpus or a reasonable alternative.**145** In accordance with the Court's ruling, Congress passed a measure in 2013 stating that the 2011 statute does not "deny the availability of the writ of habeas corpus or . . . any constitutional rights" in an Article III court for anyone inside the United States who otherwise would be entitled to them.**146** The specter of indefinite imprisonment without any process whatever thus appears to have receded. But ambiguity remains about who in the United States may be imprisoned, upon what grounds, and pursuant to what process. Clarification may have to wait until the statute is invoked to confine someone in a military prison without charges or trial. In the meantime, the actual chilling effect of the statute, if any, on reporters or on individuals protesting government policies will be very difficult to judge.

**MILITARY TRIALS OF TERRORIST SUSPECTS**

Military commissions largely fell into disuse after the end of World War II.**147** The horrific events of 9/11, however, prompted a move to create new military commissions for the trial of terrorist suspects who could be characterized as unlawful enemy combatants. Vice President Dick Cheney called these suspects (even before they were tried) "the worst of the worst."**148**

On November 13, 2001, President George W. Bush issued a military order authorizing a military commission trial of any noncitizen if the president determined that there was "reason to believe" he was a member of Al Qaeda; that he had "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor" that harmed United States interests; or that he had harbored such a person.**149**

Although the Bush order does not extend to U.S. citizens, in several other respects it closely tracks President Roosevelt's 1942 order authorizing the military commission trial of eight German marines. Two-thirds of the commission members can convict and sentence the accused, evidentiary standards are reduced, and judicial review is foreclosed. President Bush did not seek congressional authorization for these military commissions. The Justice Department's Office of Legal Counsel advised that military commission trials could be lawfully conducted incident to the president's commander-in-chief power, as well as the same statutory language relied on by the Supreme Court in its 1942 Quirin decision.**150** It also maintained that terrorist suspects not believed to be acting on behalf of a sovereign state who were
on trial for law-of-war violations need not receive law-of-war protections, particularly those found in the Geneva Conventions, because the defendants were unlawful belligerents (again, presuming guilt before trial).

In 2004 Salim Hamdan was referred to a military commission at Guantánamo Bay Naval Base, charged with one count of conspiracy to commit various offenses based on his role as Osama bin Laden’s driver and bodyguard. Hamdan sought habeas corpus, arguing that the military commission process would not afford him a fair opportunity to contest his designation as an enemy combatant. When the government claimed that Congress had authorized military commissions in the UCMJ, Hamdan responded that the Bush commissions fell short of UCMJ and international law requirements.

The Supreme Court reviewed his habeas petition in 2006. In Hamdan v. Rumsfeld, the Court assumed without deciding that authority for military commissions might be found in the UCMJ. The Court went on to rule, however, that the Bush military order was at least partly unlawful, because its provisions deviated too far from the UCMJ’s rules for courts-martial, which it said included the protections of Common Article 3 of the Geneva Conventions. These protections include judgment by a “regularly constituted court,” a requirement that a plurality of the Supreme Court construed to mean that a military commission must, at a minimum, generally follow UCMJ procedures for courts-martial. The Bush military commissions also violated Common Article 3, the Court found, because they failed to operate independently of the president, and because an accused could be excluded from portions of his trial or prevented from hearing all of the evidence against him. A plurality of the Court decided that even if the president possessed independent authority to create the commissions without congressional authorization, he had to comply with existing statutory limitations.

Concurring separately, Justice Kennedy emphasized the critical role of the separation of powers in assuring personal liberty, in this instance requiring regularized procedures that check against executive overreach: “Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.”

Within a few months of the Court’s decision in Hamdan, the Bush administration persuaded Congress to approve the Military Commissions Act of 2006, which authorized military commissions to try “unlawful enemy combatants” for “violations of the law of war and other offenses triable by military commission.” The same measure amended the UCMJ to establish procedures and rules of evidence for military commissions. In effect, Congress authorized what the Court struck down in its Hamdan decision. In 2009, Congress made procedural enhancements to the 2006 legislation.

President Barack Obama declared early in his presidency that he intended to close the Guantánamo Bay prison facility and to prosecute several prisoners held there in civilian courts in the United States. Congress responded by enacting funding restrictions that bar any noncitizen Guantánamo detainee from being transferred into the United States for any purpose. The Obama administration then announced that it would try at least some of those prisoners by military commission instead, and commission proceedings have since been instituted against several additional suspected unlawful enemy combatants at Guantánamo.

Meanwhile, several hundred other persons accused of terrorism-related offenses have been arrested inside the United States or brought here from other overseas locations for trial in civilian courts. Thus far, an overwhelming majority of those indicted for such offenses have been convicted on at least one charge.

Administration officials claim, however, that it may not be possible to prosecute some individuals in civilian courts, because the evidence against them may be inadmissible in such courts (perhaps because it is based on hearsay or was obtained by torture), or because that evidence is classified. For some others, they say, military commissions are the proper forum for prosecution of war crimes.

The newly reimagined commissions have so far sat exclusively at Guantánamo. But the Bush military order permits military commissions to “sit at any time and any place,” and they could be relocated to the U.S. mainland at any moment. And while the Bush order, as written, applies only to noncitizens, it might be reissued by another president in a form that would satisfy the Supreme Court’s holding in Hamdan, to expose U.S. citizens to prosecution. Recall that U.S. citizenship was no bar to military commission
trial in *Ex parte Quirin*, although in that case the citizen-defendant was
associated with "the military arm of the enemy government."159

At this writing, courts are wrestling with the question of whether mil-
itary commission jurisdiction must constitutionally be limited to interna-
tional war crimes.160 But Congress might expand the jurisdiction of military
commissions to include other offenses or other accused offenders. If it did,
courts might refuse to entertain a challenge to the expansion on standing or
political question grounds.

Even if a court were willing to consider the merits of a prisoner's habeas
petition, the outcome is far from certain. In its 2004 *Hamdi* decision, the Su-
preme Court ruled that a prisoner characterized by the executive as an
"enemy combatant" need only be given a "fair opportunity" to prove other-
wise, even in an Article III court, and that other familiar guarantees of the
Bill of Rights could be truncated.161 Before a military commission a prisoner
might enjoy fewer protections still.

None of these developments is implausible in the current atmosphere of
anxiety about the threat of another terrorist attack at home. Any of them
would, however, signal a new military intrusion into civilian affairs at a time
when civilian courts are perfectly capable of determining the guilt of ter-
rorist suspects and protecting society from those convicted—all while up-
holding fundamental individual rights guaranteed by the Constitution.

A LARGER INTELLIGENCE ROLE FOR SOLDIERS?

With the terrorist attacks of 9/11, the Defense Department sought to expand
its role in internal security. It reorganized itself to place a greater emphasis
on homeland defense, and it created new tools for intelligence collection in-
side the United States. The efficacy of these efforts is uncertain. It also is
unclear that nonmilitary agencies could not have accomplished as much.
What is clear is that these activities raise important new legal and policy
questions about the military's involvement in civil society.

Reorganizing for a New Intelligence War at Home

The 9/11 Commission recommended that the activities of all U.S. intelligence
services be planned and overseen by a new civilian director of national in-
telligence.162 According to the commission, such a realignment would en-
able better coordination among all members of the intelligence community,
with common standards and priorities, and it would reduce wasteful redun-
dancies and interagency rivalries. That recommendation was adopted in
part when Congress enacted the Intelligence Reform and Terrorism Preven-
tion Act in 2004.163

At the insistence of Secretary of Defense Rumsfeld, however, direct day-
to-day management of DOD intelligence elements—especially the National
Security Agency, National Geospatial-Intelligence Agency, and National Re-
connaissance Office—remained with the Pentagon. This arrangement also
protected the turf of the House and Senate armed services committees,
whose members were eager to maintain control of such economically im-
portant activities.164 As future defense secretary Robert Gates observed at
the time, "In the real world of Washington bureaucratic and Congressional
politics, there is no way the secretary of defense or the armed services com-
mittees of Congress are simply going to hand those agencies over to an in-
telligence czar sitting in the White House."165

Rumsfeld also persuaded Congress to approve the creation of a new under
secretary of defense for intelligence. This civilian official is responsible for
coordinating and managing all DOD intelligence elements under what is
now called the Military Intelligence Program.166 The under secretary oversaw
the creation of several important new military programs with significant do-
meric impacts—among a flurry of acronyms and abbreviations.

The Joint Intelligence Task Force for Combating Terrorism

The Joint Intelligence Task Force for Combating Terrorism (JITF-CT) actu-
ally predates 9/11. It was created by the Defense Intelligence Agency in the
wake of the October 2000 bombing of the USS Cole. This new program was
designed to produce daily assessments of terrorist threats to DOD personnel,
facilities, and interests around the world—for force protection—and to serve
as the central repository for all DOD terrorism-related intelligence. After
9/11 Secretary Rumsfeld sought unsuccessfully to have it become the "fusion
center" for the entire intelligence community, collecting information from
every possible source at home and abroad, then turning that information
into "actionable intelligence."167

That job was eventually taken over by the National Counterterrorism
Center (NCTC), which is located within the Office of the Director of National
Intelligence.168 The center is responsible for "analyzing and integrating all
intelligence . . . pertaining to [foreign-based] terrorism and counterterrorism," and it serves as the "central and shared knowledge bank" for such information.\textsuperscript{169} The center is staffed by representatives of the various intelligence agencies, civilian and military.

Turf battles over intelligence functions continued, however. In 2005, for example, the Defense Department announced plans to "reorient[] its intelligence capabilities" to allow it to "[c]ollect homeland defense threat information from relevant private and public sector sources, consistent with US constitutional authorities and privacy law." It also said it intended to develop "automated tools to improve data fusion, analysis, and management, to track systematically large amounts of data, and to detect, fuse, and analyze aberrant patterns of activity."\textsuperscript{170} No details were offered. The following year, in an effort to impose greater order on otherwise chaotic counterterrorism efforts, the president reportedly issued a still-secret National Implementation Plan aimed at eliminating waste and duplication. The extent to which the president's plan has succeeded is unclear.\textsuperscript{171}

Today JTF-CT remains "the focal point for DoD's outreach and sharing of intelligence and information" with the FBI, NCTC, and other members of the intelligence community.\textsuperscript{172} Representatives from a number of nonmilitary law enforcement and intelligence organizations serve at JTF-CT, and JTF-CT personnel are deployed with those same organizations.

\section*{NORTHCOM}

Shortly after the Pentagon created its new domestic Northern Command in 2002, its first commander, General Ralph Eberhart, insisted that while NORTHCOM would compile and share data, "we are not going to be out there spying on people trying to get information on people, that's not our mission . . . . [W]e get information from people who do."\textsuperscript{173} Civil liberties advocates nevertheless expressed concern when he declared that the military and civilians needed to collaborate to develop "actionable intelligence." It is important, Eberhart said, to "not just look out, but we're also going to have to look in . . . . [W]e can't let culture and the way we've always done it stand in the way."\textsuperscript{174} He did not indicate how existing rules or procedures for domestic intelligence collection might change. In fact, they didn't.

More recently, NORTHCOM announced that it would "work at the leading edge of visionary, predictive intelligence fusion and analysis; stay ahead of adaptive, evolving threats; and facilitate seamless information sharing with partner organizations."\textsuperscript{175} What this means in practical terms has not been publicly revealed, beyond repeated declarations that NORTHCOM will cooperate closely with the FBI, CIA, Secret Service, and other agencies to share data on various threats.

\subsection*{Total Information Awareness}

Another surveillance program that grabbed headlines shortly after 9/11 was not strictly military, but was developed by the Pentagon's Defense Advanced Research Projects Agency, or DARPA. The Total Information Awareness program was supposed to capture vast amounts of personal information from the Internet, including credit card purchases, web browsing histories, bank deposits, medical records, even DNA profiles. It would then mine those data to help predict future terrorist attacks. Headed by John Poinexter, one of the principals in the Iran-Contra scandal, its official motto was scientia est potestas, which means "knowledge is power."\textsuperscript{176}

The program never became operational, but its goals and potential pervasiveness frightened many, and Congress shut it down less than a year after it came to light. Nevertheless, its "processing, analysis and collaboration tools" reportedly were allowed to continue under other unspecified programs, possibly for domestic use by the army.\textsuperscript{177}

\subsection*{Counterintelligence Field Activity}

In February 2002 the Pentagon created the Counterintelligence Field Activity, or CIFA. Its announced mission was protection of military forces against foreign threats by coordinating and overseeing all DOD counterintelligence activities. CIFA was also directed to operate as a "law enforcement activity" within DOD, but forbidden, confusingly, to investigate "individuals suspected . . . of criminal offenses." It was never clear, in other words, whether CIFA should be governed by Pentagon rules for collecting information about "non-affiliated persons" or by rules for intelligence components.\textsuperscript{178}

CIFA interpreted its ambiguous mandate broadly, with results that sometimes echoed the abuses of the Vietnam era. It came to the public's attention in 2004 when the \textit{Wall Street Journal} revealed that an army intelligence agent sought to identify three "Middle Eastern men" who made "suspicious remarks" at a University of Texas Law School seminar.\textsuperscript{179} The following year NBC News reported on a secret CIFA database that tracked hundreds of "suspicious incidents" across the country. One such incident involved a small
group of Quaker activists planning a protest of military recruiting at high schools in Florida. Another concerned an antiwar demonstration at Hollywood and Vine in Los Angeles featuring an effigy of President Bush.\textsuperscript{183} In Houston CIFA agents conducted surveillance of ten individuals wearing paper hats and handing out peanut butter and jelly sandwiches to protest overcharges by Halliburton, Inc. for military food services in Iraq.\textsuperscript{181}

Despite concerns about the worth and legality of such activities, a presidential commission recommended in 2005 that CIFA be given new powers to “investigate national security matters and crimes including treason, espionage, foreign intelligence service or terrorist-directed sabotage, [and] economic espionage.”\textsuperscript{182}

CIFA attracted more media attention than it might otherwise have because it was linked to bribes paid by a defense contractor, MZM Inc., to a California congressman named Randy “Duke” Cunningham. For the first year of its existence, for example, when CIFA lacked a general counsel, it relied instead on MZM for legal advice. CIFA’s top two officials resigned suddenly in 2006 in the midst of the scandal, Cunningham went to jail.

CIFA was finally shut down in 2008, largely through the efforts of lawyers inside the Pentagon. In other words, internal oversight worked. Neither CIFA’s exact size nor its budget was ever revealed. Its responsibility for countering foreign-based intelligence threats to the military, but not its law enforcement and counterespionage duties, was taken over by the new and still largely secret Defense Counterintelligence and Human Intelligence Center managed by the Defense Intelligence Agency.\textsuperscript{183}

The Threat and Local Observation Notice
CIFA roughly coincided with another new program called Threat and Local Observation Notice, also created in 2002. TALON, as it was ominously referred to, was designed to accumulate “raw information reported by concerned citizens and military members about suspicious incidents” suggesting possible terrorist threats.\textsuperscript{184} In fact, despite TALON’s characterization as a “neighborhood watch” program, almost all of the information submitted to it came from military personnel.

The information received by TALON was “not validated,” might be “fragmented and incomplete,” and might or might not have related to an “actual threat.” It could nevertheless be retained “as necessary” to allow various DOD components to “conduct their analysis missions”—maybe longer than the ninety days permitted by rules for information about nonaffiliated persons.\textsuperscript{185} Reports from the program were compiled in a CIFA database to which JITF-CT had access.

TALON reports were supposed to reflect a threat to military forces or facilities. Given the program’s broad sweep and lack of standards, however, it is hardly surprising that it also accumulated extensive data about individuals and organizations involved in peaceful protests against the Iraq War and the Pentagon’s don’t-ask-don’t-tell policy.\textsuperscript{186} One report, for example, based on intercepted email, concerned plans for a demonstration at a recruiting office in New York’s Times Square that would include peaceful civil disobedience, chants, distribution of leaflets, and a display of banners, followed by a march with coffins to Central Park. Another noted “suspicious activity by U.S. persons . . . affiliated with radical Moslems” in Big Bend National Park. Still others targeted Quakers reading the names of war dead in a park in Akron, Ohio, an Atlanta news conference by Iraq Veterans Against the War, and veterans planting hundreds of white crosses in a field in Las Cruces, New Mexico.\textsuperscript{187} None of the reports made available to the public indicate that local police could not have controlled any possible violence.

The TALON program was narrowed in 2006 to collect only information relating to international terrorism, then terminated in 2007. Its results, said one Pentagon official, did not merit continuing the program “as currently constituted, particularly in light of its image in the Congress and the media.”\textsuperscript{188} But at least some of the TALON reports were retained in DOD databases.

The Joint Protection Enterprise Network
TALON reports were distributed through the Joint Protection Enterprise Network, or JPEN. Adapted from a commercial database and operated by NORTHCOM, JPEN was located in facilities belonging to defense contractor Booz-Allen Hamilton. It was an “integrated, cross-domain, information sharing program” that allowed military, intelligence, and law enforcement agencies to share raw, unvalidated, unclassified data related to force protection and terrorist threats.\textsuperscript{189}

The chairman of the Joint Chiefs of Staff called it “too good to be true. . . . The beauty of it is, you can link anybody, and everybody can put in data.”\textsuperscript{190} The Pentagon’s official announcement of JPEN was more circumspect: Information could be shared outside the Department of Defense
only for the purpose of force protection, and only when “required in order for the receiving agency to discharge its assigned responsibilities.” When CIFA closed in 2008, JPEN did, too.

The Joint Regional Information Exchange System
The Joint Regional Information Exchange System or JRIES, established by the Department of Defense in 2002, appears to have overlapped JPEN to some unknown degree. It is an online database designed to facilitate the exchange of terror-related data with civilian law enforcement agencies nationwide. Now operated by the Department of Homeland Security and renamed the Homeland Security Information Network, it allows military personnel to ask cops for personal information about specific individuals, although they cannot require compliance.191

New Tools for Soldiers as Investigators
National Security Letters
After 9/11 the Pentagon ramped up its use of so-called national security letters in counterintelligence and counterterrorism investigations. These are documents delivered to nongovernment institutions to collect information about individuals without a court order.192 Unlike the FBI, which has statutory authority to compel the surrender of such data, military intelligence agencies may only request it. The requests are written on official stationery, however, and because they indicate no grounds for refusal, almost all recipients apparently have complied.193 The letters warn recipients not to reveal the requests to anyone.194

The letters may be directed to banks, brokers, credit card companies, travel agents, car dealers, pawnshops, or any business whose cash transactions might be deemed to have “a high degree of usefulness in criminal, tax, or regulatory matters.”195 The Defense Department says it needs the information to pursue counterintelligence targets who use nontraditional means to transfer money. Vice President Dick Cheney called the collection “perfectly legitimate.”196

It is not known how extensive this practice was or is. Targets are said to have included a military contractor with unexplained wealth and a Muslim chaplain at Guantánamo suspected—wrongly, as it turned out—of aiding prisoners there. But they have also reportedly concerned individuals not af-

filiated with the Defense Department. The collected records may be maintained in a Pentagon database for years.

Eyes in the Sky
Both the National Geospatial-Intelligence Agency (NGA), part of the Department of Defense, and the military service branches collect imagery from drones operating in civilian airspace.197 Some overhead surveillance is intended to support civil authorities, as in spotting New Orleans citizens clinging to rooftops to escape flooding in the wake of Hurricane Katrina. The secretary of defense must approve drone use in such missions or in any overhead reconnaissance directed at specific U.S. persons, however. As with other surveillance methods, information may be shared with a civilian law enforcement agency only if its collection was “incidental” to a legitimate military mission. Thus, surveillance by a drone diverted from a planned military mission to loiter over suspected criminal activities would not be incidental and could violate the Posse Comitatus Act.198 While no detailed public information is available about the extent of the Pentagon's current domestic use of drones, military leaders have sought approval from the Federal Aviation Administration to significantly expand that use in the future.199

The military uses satellites to collect intelligence worldwide. It also provides images from space to nonmilitary consumers to create maps, monitor volcanoes and wildfires, measure glaciers, and perform other peacetime tasks. We do not know how much the military relies on satellite imagery to target civilians. Critics suggest that satellite surveillance by the Pentagon's National Reconnaissance Office (NRO), which supplies data to a variety of government consumers, may violate the Posse Comitatus Act.200 Are images from space “collected during the normal course of military training or operations” if they are routinely shared with law enforcement officials?201 No official legal analysis of this question has come to light.202

Ears to the Ground
Another one of the Pentagon's constellation of intelligence organizations, the National Security Agency (NSA), has attracted fierce controversy in recent years. Shortly after 9/11, the NSA began to collect and store email and telephone records on millions of Americans without judicial warrants, secretly, and, for a time, probably in violation of the law. Whether any of the information has found its way into military intelligence files is unknown. In 2015
Congress limited the NSA’s collection authority, and at this writing challenges are underway in the courts to have at least some of the agency’s domestic targeting of civilians declared unconstitutional.

The NSA controversy is complicated by the growing prospect—some say the greatest threat currently facing the United States—of a cyber attack. Such an attack might, for example, shut down the Northeast electrical power grid for an extended period. In response, the Pentagon has organized a new Cyber Command, or CYBERCOM, which is involved with other government agencies in defending against electronic intrusions. According to the Department of Defense in 2014, “as the frequency and complexity of cyber threats grow, we will continue to place high priority on cyber defense and cyber capabilities.” These military efforts could depend to some unknown degree on the monitoring of civilian Internet traffic inside the United States.

Outsourcing

The military, beginning with General George Washington, has always purchased some of its intelligence from private sources. Spending on outside contractors by military intelligence elements mushroomed after 9/11, however, although it is impossible to say precisely by how much, because details are classified. But at one point seven of every ten individuals working for the Counterintelligence Field Activity reportedly were contract employees. The Department of Defense claims that it needs contractors to help make up for critical shortages of uniformed intelligence personnel, as well as to perform highly specialized tasks such as translation and cyber operations.

Most intelligence contractors are analysts or technicians, not collectors. But what could be wrong with “outsourcing” intelligence collection, either foreign or domestic? Advocates of privatization insist that contractors can perform the same tasks more effectively and inexpensively than government employees, but these claims are widely disputed and impossible to verify. What is clear is that while private firms are bound by their contract obligations, their staffs may not be subject to the same kind of training, supervision, and discipline as their public sector counterparts. These private employees also are answerable only to their private employers. As individuals they operate entirely outside of any chain of command and out of the public eye. A notorious example is Edward Snowden, an employee of NSA contractor Booz-Allen Hamilton who used his insider access to steal and publicize massive data about U.S. electronic intelligence methods.

Partly out of concern for their lack of accountability, government contractors are not supposed to perform “inherently governmental” functions. Unfortunately, the term “inherently governmental” is, according to one military insider, “open to broad interpretation.”

Information Sharing

The terrorist attacks of 9/11 were blamed in part on the intelligence community’s failure to “connect the dots.” While various agencies had bits of information about the attackers—dots—no one had enough of the data to be able to recognize the coming catastrophe. Or perhaps the dots simply were not connected in a meaningful way. Still another possibility is that there were not enough dots.

Although Executive Order 12,333 had long instructed all federal agencies to facilitate the “full and free exchange of information,” pressure mounted for military intelligence elements to expand their reliance on nonmilitary sources inside and outside of the federal government for information about terrorist threats, and to share information in military files as widely as possible. The Pentagon’s JPEN, TALON, and JRIES programs were direct results. In 2005 the Department of Defense announced that it had made great strides in reducing “existing cultural, technological, and bureaucratic obstacles to information sharing.” A 2007 DOD directive provides that defense intelligence and counterintelligence components have “an affirmative responsibility to share collected and stored information, data, and resulting analysis with other Defense Intelligence and CI Components, the Intelligence Community (IC), other relevant Federal agencies, and civilian law enforcement officials, as appropriate.”

Independently, the 2002 Homeland Security Act provided a legislative mandate for interagency cooperation in sharing data. The Department of Homeland Security’s Office of Intelligence and Analysis receives and processes data about possible domestic terrorist threats, then distributes that information to other federal agencies; to state, local, tribal, and territorial governments; and to private entities—but only information relating to the mission of the recipient. A military liaison serving in this office is both a supplier and a recipient of information.

The real push to share terrorism and homeland security information, regardless of its source, came from the Intelligence Reform and Terrorism Prevention Act of 2004, with the ungainly acronym IRTPA. That measure
directed the president to ensure that such information be shared "among all appropriate Federal, State, local, and tribal entities, and the private sector." It also provided a statutory charter for the National Counterterrorism Center, described above, where, according to the Department of Defense, information sharing is "aggressive and unprecedented." Here again, military officers sit side-by-side with agents from the FBI, Treasury, State, and other departments to exchange threat data.

As recently as 2013 the Pentagon declared its intention to ensure the "seamless flow of intelligence and actionable information among DoD and national security, intelligence, and law enforcement partners." Although IRTPA makes no distinction between military and nonmilitary agencies, it includes this important qualification: Information sharing must be consistent with "applicable legal standards relating to privacy and civil liberties." One set of legal standards is found in the 1974 Privacy Act, which forbids any federal agency to share Americans' personal information except for a "routine use" that is "compatible with the purpose for which it was collected." DOD rules implementing the Privacy Act, however, allow such sharing more broadly whenever it is "relevant and necessary to accomplish a lawful DoD purpose." These rules also describe disclosures of law enforcement or counterintelligence data to agencies outside of the department as "routine uses."

Even though the Privacy Act contemplates the transfer of personal information for "civil or criminal law enforcement activity," regardless of the purpose for which it was collected, that transfer could be regarded as "executing the law," in violation of the Posse Comitatus Act. Transfers to the FBI might be complicated further by the fact that the bureau performs both law enforcement and intelligence functions, and it might not be apparent why the bureau seeks certain information.

Clarification of the rules is urgently needed to show what kinds of information may be shared, by whom, with whom, and under what circumstances. These rules could then be more readily enforced if each entry in DOD and civilian databases were tagged to show its source and the purpose for which it was collected. Such tags could allow the erection of virtual walls to prevent DOD users from accessing information unrelated to their military mission and bar nonmilitary users from merely military data. The potential for misuse of information would be further reduced, as one military intelligence insider suggests, if each item in a database were marked to show the date of its collection and whether its accuracy had been verified. These procedures would create a record of personal accountability and leave an audit trail for improved oversight. Work is currently under way throughout the intelligence community to create procedures like these.

In the view of one knowledgeable commentator, restrictions on sharing are not justified by concerns that the military might assume too large a role in civilian government: "The potential harms are both slight and unlikely to materialize." History teaches that his optimism may not be justified.

No one suggests that the government as a whole should not use all reasonable efforts—within bounds set by the Fourth Amendment, statutes, and agency regulations—to detect terrorist threats. And if one government agency possesses information about a threat, it would be madness to prevent that agency from sharing it with another in order to stop an attack. The difficulty comes in describing the military's proper role in this intelligence process.

Some advocate an expansion of the Defense Department's role. Others say the military has already gone too far. The policy issues are both formal and practical. According to two longtime intelligence insiders, "The current state of DoD counterintelligence is one of dystopic evolution. . . . The operational culture . . . has assimilated the imperatives of force protection, homeland defense, and information fusion, but the legal culture that would balance these imperatives with the protection of civil liberties remains a pastiche of uninterested authorities." The rules, in other words, are a mess.

Uncertainty about the law is dangerous here, as in other contexts. Current DOD contingency plans, for example, say that the use of military intelligence assets for nonintelligence purposes, as in a mission in support of civil authorities in the wake of a suspected terrorist WMD attack, requires the specific approval of the secretary of defense. But the distinction between civil support and other kinds of missions may, as we have seen, be very difficult to make. And different missions evoke different authorities.

A 2006 manual for military lawyers puts it this way:

Military commanders' need for information and intelligence within the homeland is on the rise—they expect force protection information and
counterintelligence to be integrated into domestic and domestic support operations due to a heightened awareness of potential terrorist threats. DoD intelligence components are subject to one set of rules referred to as intelligence oversight. Everyone else in DoD is subject to a different set of rules. Therefore, the commander must direct his need for information or intelligence to the right component. Intelligence is the domain of the DoD intelligence component; information comes from non-intel DoD components. Figuring out the nature of the data and the right unit to gather it are areas that often require judge advocate input.

According to one authority, however, "from a practical point of view, this seldom happens." Faced with such ambiguous or conflicting instructions, an overly cautious soldier might hesitate to conduct surveillance or report discoveries that could help keep us safe, or to share them. Or she might interpret her authority too broadly, violating the fundamental rights she has sworn to defend.

Has the military's increased involvement in American society since 9/11 actually made us safer? The assistant secretary of defense for homeland defense during the George W. Bush administration recently asked, rhetorically, "Does NORTHCOM have the capacity to deliver support to civil authorities in response to natural disasters and CBRNE attacks in a manner consistent with the rhetoric of the department's own strategy and, more importantly, consistent with the reasonable expectations of the American people? Are sufficient forces available to NORTHCOM? Are they properly trained? Are they properly equipped? Can they be rapidly deployed?" His answer was that changes initiated by the Obama administration have left the U.S. homeland "dangerously vulnerable to catastrophic attacks."

The former assistant secretary did not ask whether nonmilitary government agencies might provide any needed protection as well as the armed forces. Nor did he ask whether increased reliance on the Defense Department for domestic security was consistent with the deep-seated American tradition of avoiding military entanglement in civilian affairs whenever possible. He also failed to inquire whether any reductions in danger were worth any trade-offs in civil liberties that might be required.

These questions would have been difficult to answer, but they are important for us to ask—and ask repeatedly. The growth in the military's domestic role since 9/11 demonstrates what we have observed again and again since the earliest days of the Republic, that in times of great crisis we have looked to the armed forces to help keep us safe at home. But it also reminds us that we should learn from our experience, and experience has taught us that troops, once deployed, may not always remain firmly in civilian control, that they may be misused for political purposes, and that they may sometimes forget their oath to uphold and defend the Constitution and the laws of the United States.

One lesson, then, is that the law really matters. Even though the law may not always be followed to the letter, it affects the way important decisions are made and how people behave. Another lesson from experience is that rules need to be as clear as they can be, taking into account the need for flexibility to meet unpredictable challenges. Both lessons urgently need to be rehearsed in considering the domestic role of the military in the age of terrorism.
CHAPTER NINE

The Military in Twenty-First-Century America: Leaning Forward

In a report entitled Global Trends 2030: An Alternative World, the National Intelligence Council provides a framework for thinking about possible futures and their implications for national security. It describes megatrends and tectonic shifts that the council believes may shape what the world will look like a decade and a half from now. It also cautions readers to be alert for potential “black swans”—outlier events beyond the realm of regular planning that might cause large-scale disruptions to American society.

The September 11, 2001, terrorist attacks were a black swan. A future black swan might take the form of an assault on the homeland using an electromagnetic pulse (EMP) or a bioengineered viral pandemic. It might come as a crippling cyber attack on the electric grid or water supply. Or we might be struck by unprecedented storms or earthquakes rippling across the Midwest.

Experts say that black swan phenomena are occurring more often of late, likely due to a combination of rapid technological advances, wider access to lethal and disruptive weapons, and climate change. The arrival of the next one is nearly impossible to predict.

When it comes, however, our capacity for resilience and recovery will be severely tested. City, state, and federal civilian authorities alone will most likely be unable to bring needed relief to victims, to keep the peace, or to re-

store civil society. Military forces will have to lend a hand. No other institution has the same depth and variety of relevant resources or more personnel distributed so widely across the nation, particularly when active-duty, Reserve, and National Guard troops are considered together. Meanwhile, we can expect to continue to rely on military personnel to respond to lesser, more familiar emergencies at home.

Experience teaches us, however, that any military involvement in civilian affairs carries risks to civil liberties, perhaps even to democratic government itself. The Framers of the Constitution took steps to minimize these risks. Courts and Congress have also tried to limit the domestic role of troops. Despite their efforts, in great crises in the past—in an atmosphere of fear and uncertainty—the law has sometimes failed to provide clear guidance for the military responses that followed. At other times a civilian commander in chief, a quiescent Congress, or a deferential judiciary has allowed troops to stray far beyond the limits established by the law.

Because we know that history has a way of repeating itself, we now face three fundamental challenges in shaping the future domestic role of the U.S. military. First, in response to black swans and other more nearly predictable crises, troops will be asked to perform new missions. Contemporaneous events will dictate the nature and scope of their assignments; the complexity and practical implications of each one will require careful, real-time evaluation. But in anticipation of those events, military forces at all levels must be given practical, adaptable legal guidance, and those forces may need to be reconfigured or realigned.

Second, the Defense Department may not always be the best government agency to help out in a crisis, and when it does it will rarely act alone. If troops do become involved, they should serve in a supporting, rather than a leading, role whenever possible. The Department of Defense must continue to cooperate with states in staffing, training, and equipping National Guard units. It should also redirect Reserve components and Coast Guard personnel to prepare for a variety of domestic missions. Equally important, it will need to improve coordination within the federal military, between federal and state troops, and between the military and various civilian agencies in order to ensure an effective, efficient military response.

Finally, our celebrated system of civilian control of the military needs fundamental reform. The military forces themselves require few additional restraints: soldiers and their commanders normally exercise consummate
professionalism and appropriate respect for civilian authority. Better controls are needed, however, for the military's civilian controllers. The Framers' worry that a large standing military might on its own initiative overwhelm and undermine democratic government has, fortunately, not been borne out. But civilian leaders have sometimes used the military to subvert democratic government and the rule of law, and they might again.

If these recommendations seem impractical or even perhaps impossible, many will recall that some of the reforms implemented after 9/11 would have seemed farfetched or even outlandish before the attacks. In retrospect, those changes were obviously needed. So now we have an opportunity to improve our responses to future crises by improvements in the law, in order to preserve both our security and the blessings of liberty.³

ANTICIPATING BLACK SWANS AND LESSER CRISES

The president takes an oath to "preserve, protect, and defend the Constitution of the United States."⁴ A similar oath for commissioned military officers binds them to "protect and defend the Constitution of the United States against all enemies, foreign and domestic."

Just what does it mean for the military to defend against "domestic enemies"? What could troops do to "protect and defend the Constitution" without undermining its core protections for citizens? These questions have been addressed only rarely, and never comprehensively, by the nation's courts. And Congress has responded only episodically and in very general terms.

The military's answer comes in part in the Pentagon's 2014 Quadrennial Defense Review, which states that the Defense Department's first priority is to deter and defeat attacks on the United States. But it does not say precisely what lengths it might go in defending the homeland. Nor does it indicate what the military would do if such an attack succeeded.⁵ President Obama's 2015 National Security Strategy acknowledges a variety of particular security threats—weapons of mass destruction, cyber attacks, and pandemics.⁶ It too, however, fails to describe possible military responses. For additional insights we must consult a welter of overlapping DOD and service branch rules and regulations.

A 2013 DOD strategy document mentions one possible black swan: the "convergence of a large-scale natural disaster and a resulting manmade crisis or technological failure" that could "overwhelm national response and re-

covery capabilities."⁷ A 7.7 magnitude earthquake along the New Madrid fault in the Midwest, for example, could cause massive casualties across several states, with cascading critical infrastructure failures of the electric grid, water supplies, and public health and transportation systems.

A different kind of catastrophe is spelled out in a 2012 National Level Exercise sponsored by FEMA.⁸ The exercise simulated a major cyber attack on key components of the electric grid and other critical infrastructure. An after-action review found that responders took too much time to make decisions, and that they had a hard time generating viable, prioritized action plans. Reviewers also found ambiguities in the roles and responsibilities of various agencies, as well as a lack of detail in their assignments. Government officials operated under a cyber response plan different from the National Response Framework and other crisis recovery plans.⁹ The cyber plan almost entirely bypassed state governors, and it failed to prescribe the military's role in keeping the peace and enforcing the laws in the midst of a predictable breakdown in civil order. Nor did it anticipate the second- and third-order consequences of such an attack.

So far as we know, there is no coherent game plan for the military's response to such massive calamities. Neither the Pentagon's immediate response or emergency authority nor the National Response Framework, reviewed in preceding chapters, anticipates such a dramatic and perhaps sustained domestic military mission. Nor do the various CONPLANs appear to provide adequate guidance.

Given the near certainty of future catastrophes, large and small, and the consequent need for military assistance, we must plan now in as much detail as possible, consistent with the need to be able to adapt to unforeseeable circumstances. Comprehensive plans, based on sound legal advice, should clearly describe triggering conditions for military involvement, operational guidelines, and instructions for coordination across the military force and with civilian agencies. The plans also must include a process for returning fully to civilian government when the crisis is over. Since 9/11 both civilian and military authorities have made significant progress in this kind of planning. But much work remains to be done.

RECONFIGURING THE DOMESTIC FORCE

The traditional conception of the soldier as war-fighter no longer captures the realities of military service. Overseas deployments require military
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personnel not only to prepare for the use of force, but also to engage in the nonkinetic aspects of counterinsurgency, peacekeeping, nation-building, and conflict stabilization. A soldier’s duties may be as much constabulary as martial.

Future domestic operations may see soldiers performing an even wider range of tasks, including

- tactical combat against terrorists or insurgents,
- protection of critical infrastructure facilities,
- logistical support in disaster response,
- enforcing quarantines and providing triage care in a pandemic or bioterrorist attack,
- supporting civilian agencies in any of the above, and
- quelling civil disturbances or enforcing the laws when civilian institutions are unable to do so.

Army planning doctrine recognizes the “very different operational environments” in domestic missions, owing mostly to the relationships between troops and civilians.10

The Defense Department notes that its homeland defense, homeland security, and civil support missions “could be conducted in a simultaneous, near-simultaneous, or sequential fashion, across the threat spectrum, within or near the homeland.”11 Adding to the complexity, different, overlapping military rules may apply to a single mission, based on the label attached to the mission. Uniformed officers may thus not know how to react.

The potential for confusion and delay is further increased by the fact that military rules may be different from those that govern civilian agencies responding to the same crisis. Moreover, in the words of a recent army publication, “Because local, state, and federal civil authorities and state and federal military forces serve under their respective chains of command, true unity of command in incident response is not possible.”12 So troops deployed domestically may find themselves working at cross-purposes with civilian officials in an emergency operation.

Both civilian and military protocols for responses to catastrophic incidents must do a far better job of prescribing the scope and limits of soldiers’ domestic authority, based both on practical needs for their involvement and on the functions they perform.

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Along with improved legal guidance, troops must be better organized and equipped to respond to black swans as well as to less urgent emergencies. Existing state and federal rapid-reaction forces might be augmented by additional guard troops specially trained to perform discrete or multiple missions—counterterrorism, emergency response, public health protection, critical infrastructure support, and perhaps others. Guard personnel with relevant experience in their private lives, such as cyber security or firefighting, should be assigned to similar military duties.

Reserve forces could join National Guard units in responding to crises. Like members of the guard, reservists are widely dispersed in communities around the country. The two forces are also trained, equipped, and organized the same way, and all of their personnel are local citizens who may train together periodically. The Reserves are a federal force, subject to federal command and control. But Congress could authorize Reserve units to serve under state control during an emergency.

Even greater efficiencies might be achieved by the politically contentious but potentially helpful merger of the Army National Guard and the U.S. Army Reserve into one force, integrating Reserve personnel into the guard of the reservists’ residence states. Combining the forces would increase the number of troops available for domestic missions by 70 percent. Reserve brigades that specialize in medical and dental care, civil affairs, support hospitals, and medical supplies could be especially helpful. The Army Reserve is currently subordinate to the army chief of staff, while the chief of the National Guard Bureau is part of the Joint Chiefs of Staff. A merger would bring considerable cost savings and could produce a larger and more versatile domestic force for governors and, on occasion, for the president.

Because of maritime threats and other risks to coastal areas, both natural and manmade, Congress might also create a new Navy National Guard. Several states, including New York, already have state naval militias. The new naval guard would focus on state maritime security when not in federal service, leaving the Coast Guard to focus on federal needs.

The Coast Guard might be strengthened further as a domestic security resource. As part of the Department of Homeland Security, it operates as both a military force and a law enforcement agency. At least until the Coast Guard is called into service as a part of the navy, its mix of duties makes it an ideal provider of support to civil authorities, because it can use force and also enforce the laws. Like the National Guard, the Coast Guard has national strike force
teams with CBRNE detection capabilities, personnel protection and decontamination equipment, and mobile command posts. And like the other military services, the Coast Guard has its own Ready Reserve, which may be ordered to active duty by the DHS secretary in a domestic emergency.13

COORDINATION, COMMAND, AND CONTROL

Coordinating civilian and military responses to the next great crisis will present special challenges. Soldiers may serve alongside personnel from as many as thirty different federal agencies, as well as state, local, and tribal officials, in responding to the same incident. The potential for confusion from overlapping or inconsistent protocols, and from different chains of command, is clear.

Even within the military, the command and control of troops may be hard to predict. National Guard troops operate under the direction of state governors unless they are federalized by the president. Federal status officers ordinarily may not command state National Guard personnel, nor may state-status guard officers command federal troops. Nevertheless, army and air force personnel may be subject to state guard command with the permission of the president and consent of the governor.14 In the alternative, a National Guard officer may serve in both federal and state statuses while in active command of a National Guard unit if the president and the governor approve,15 and a 2011 law declares that appointment of a dual status commander should be the “usual and customary” arrangement for command and control.16

Consider one nightmare scenario rehearsed repeatedly by federal officials. It involves a terrorist release of pneumonic plague in a major U.S. city.17 Troops almost certainly would be called out to help enforce a quarantine of the entire city as soon as the contagion was discovered. Only the military, after all, has the personnel, organization, communications, and discipline required for such a massive and dangerous job. The quarantine might be ordered by either state or federal officials, with or without a federal disaster declaration under the Stafford Act. So long as National Guard troops were deployed in active state or Title 32 status, they could take any actions reasonably necessary to secure the cordon. Federalized guard units or active-duty military could also be deployed under one of the statutory exceptions to the Posse Comitatus Act. Or a local commander might simply order her troops to circle the city upon the strength of the military’s claimed constit-
tutional or immediate response authority.18 Meanwhile, federal, state, and local civilian officials on the scene would be pursuing their own agendas as instructed by their own chains of command.

In such a catastrophe, troops at all levels should be poised to respond, lines of command should be clear, and every soldier, like every civilian official, should know exactly what is expected of him. Many lives could hang in the balance. Yet existing regulations and plans (at least the ones available to the public) fail to provide for a prompt, predictable response even to such a plausible scenario. And while we applaud recent progress in clarifying the responsibilities of each part of the government in a variety of crises, the potential for confusion, mistake, and waste remains high so long as command structures remain separated.

CONTROLLING THE CONTROLLERS

From the beginning of the Republic we have struggled to maintain a military that could keep us safe at home without jeopardizing fundamental freedoms, and without surrendering civilian control of the troops. In this new age of terrorism, however, some say the military’s domestic role is due for reassessment.

One near constant throughout this history has been the military’s determination to respect civilian authority and respond to civilian orders. Only rarely have military officers acted on their own domestically. While some observers caution that “today’s armed services are professional and increasingly disconnected, even in some ways estranged, from civilian society,”19 the U.S. military’s continuing commitment to civilian leadership is steadfast and remarkable.

Yet the military’s civilian leaders have not always remained so committed to the principle that troops should only be called out when civilian authorities are unable or unwilling to ensure the safety of Americans at home. Even before the Civil War, presidents yielded to the temptation to deploy military personnel for blatantly political purposes, something the Framers never imagined.

Meanwhile, with the decline in importance of the citizen-soldier and the professionalization and growth of the standing army, military perspectives have gained greater influence in setting domestic policy. The concern is not that there will be a coup d’état. It is rather what former career military officer Andrew Bacevich calls “militarized civilians, who conceive of the world as
such a dangerous place that military power has to predominate, and constitutional constraints on the military need to be loosened. In other words, the Commander in Chief Clause has been interpreted ever more broadly to allow presidents to act unilaterally in using troops to meet domestic security objectives, or even to achieve goals having nothing to do with domestic security.

In the wake of the 9/11 terrorist attacks, for example, President George W. Bush relied on his commander-in-chief power to arrest and detain suspected terrorists without charges, access to counsel, or other due process protections. His military order of November 13, 2001, was designed to prevent imprisoned suspects from seeking relief in U.S. courts. He also ordered the National Security Agency, part of the Defense Department, to intercept domestic telephone and email traffic without judicial warrants. These actions almost surely violated constitutional guarantees of habeas corpus, free expression under the First Amendment, privacy under the Fourth Amendment, and due process under the Fifth Amendment. The president also threatened the separation of powers by ignoring express statutory limits on surveillance and detention, and by denying the right of courts to examine the legality of his actions.

To be sure, the courts and Congress are far from blameless here. While President Bush suffered several stunning setbacks in the Supreme Court, lower courts have more often followed the long tradition of judicial deference to the executive in cases implicating national security, and Congress has enacted measures giving the military unprecedented powers of doubtful constitutionality. These actions appear to send a message that the military does not labor under the same legal obligations that other government actors do.

So far, the Defense Department's planning, directives, and exercises generally describe a military respectful of civilian authority, and of statutory and constitutional limits on its domestic operations. But without the clear commitment of civilian leaders to the same limits, we cannot be sure that military forces will not be used in the future to sacrifice fundamental liberties unnecessarily in the name of security.

LESSONS LEARNED

The laws that prescribe the military's domestic role are far from perfect. Even the Constitution, which strikes a prescient and fairly durable balance between the powers of the national and state governments, and between the branches of the federal government, while subordinating the military to civilian authority, codifies ambiguities that may invite domestic excesses.

In the more than two centuries since the Declaration of Independence, we have observed an iterative process—recognizing our necessary reliance on soldiers to keep us safe in great emergencies, while at the same time exercising care to avoid making the military "superior to the Civil Power." Shortly after ratification, the Calling Forth Acts implemented basic constitutional principles and provided a template for presidents and governors to decide when troops should get involved in civilian affairs. Civil War era legislation expanding that potential involvement survives today in the modern Insurrection Act. Such measures have served reasonably well to provide a political framework for civilian leaders to decide whether and how to use troops in responding to varying crises.

Other statutes, most notably the Posse Comitatus Act, have imposed limits on domestic military actions, creating a default firewall between soldiers and civil society. These laws have sought to preserve the martial orientation of soldiers, so they can do what they are mainly trained and equipped to do. Like the measures creating domestic military authority, these need to be reexamined and possibly adjusted to enable a practical, response flexible response to future black swans and other crises.

U.S. military forces review every major action by developing a list of "lessons learned." The idea is to avoid repeating the same mistakes over and over again. In considering the military's domestic role, experience has taught us that while troops may be able to keep us safe at home when no one else can, they are not as well equipped as others to fight crime or collect intelligence or perform a host of more mundane government functions. We also have learned that a mission-oriented military force may feel that it needs to cut constitutional corners to get its job done, and that troops may be employed by civilian leaders to do what they otherwise could not do. But the most important lesson of all is that we are a nation of laws, and that the laws—albeit far from perfect—profoundly influence the way we provide security for the homeland and also safeguard the American values that our men and women in uniform have pledged to protect. History leaves no doubt that the rule of law is worth fighting for.
STRATEGY FOR
HOMELAND DEFENSE
AND DEFENSE SUPPORT
OF CIVIL AUTHORITIES

February 2013
FOREWORD

I am releasing this new Strategy for Homeland Defense and Defense Support of Civil Authorities to elaborate priorities for these core Department of Defense (DoD) missions. This Strategy reflects the direction of the Department’s civilian and military leadership and the advice of our Federal preparedness partners. It postures DoD to address the range of current and emerging threats to the homeland and natural and manmade hazards inside the United States for the period 2012-2020, and it is in keeping with current fiscal realities.

This Strategy relies first and foremost on those partnerships that are vital to DoD’s ability to successfully fulfill its homeland defense and civil support missions. These partnerships occur on multiple levels and include other Federal departments and agencies; State, local, Tribal, and Territorial authorities; private sector owners of defense-related industries and critical infrastructure; and our international partners.

This Strategy also highlights the Department’s priority efforts to expand unity of effort with State and local first responders; achieve an integrated planning approach with Federal and State authorities; ensure the continuous performance of DoD’s mission essential functions in an all-hazards environment; protect and improve the resilience of the Force; and bridge gaps in preparedness for catastrophic events.

The American people are served by the world’s finest military. This Strategy ensures that as threats to the homeland evolve over the next decade the men and women of DoD will be prepared to defend our Nation and support our people in their time of need.

Leon E. Panetta
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EXECUTIVE SUMMARY

We are now moving beyond traditional distinctions between homeland and national security. National security draws on the strength and resilience of our citizens, communities, and economy. This includes a determination to prevent terrorist attacks against the American people by fully coordinating the actions that we take abroad with the actions and precautions that we take at home. It must also include a commitment to building a more secure and resilient nation, while maintaining open flows of goods and people. We will continue to develop the capacity to address the threats and hazards that confront us, while redeveloping our infrastructure to secure our people and work cooperatively with other nations.

National Security Strategy
May 2010

Defending U.S. territory and the people of the United States is the highest priority of the Department of Defense (DoD), and providing appropriate defense support of civil authorities (DSCA) is one of the Department’s primary missions. This Strategy for Homeland Defense and Defense Support of Civil Authorities orients the Department towards an increasingly complex strategic environment. It emphasizes innovative approaches, greater integration, deepening of external partnerships, and increased effectiveness and efficiencies in DoD’s homeland activities. It applies the vital capabilities of the Total Force – in the Active and Reserve Components – to make the nation more secure and resilient. Finally, the Strategy guides future decisions on homeland defense and civil support issues consistent with the Defense Strategic Guidance and the Quadrennial Defense Review (QDR).

This Strategy identifies two priority missions for the Department’s activities in the homeland from 2012 to 2020. DoD works with the Department of Homeland Security (DHS) and other actors to achieve these missions:

- Defend U.S. territory from direct attack by state and non-state actors; and
- Provide assistance to domestic civil authorities in the event of natural or manmade disasters, potentially in response to a very significant or catastrophic event.

These priority missions are reinforced, supported, or otherwise enabled through the pursuit of the following objectives:

- Counter air and maritime threats at a safe distance;
- Prevent terrorist attacks on the homeland through support to law enforcement;
- Maintain preparedness for domestic Chemical, Biological, Radiological, Nuclear (CBRN) incidents; and
- Develop plans and procedures to ensure Defense Support of Civil Authorities during complex catastrophes.

This Strategy also defines a number of other priority lines of effort, or strategic approaches, that are intended to enhance the effectiveness of the Department’s homeland defense and civil support efforts. Although these items require a distinct departmental effort, they do so without adding significant resource requirements. These are:

- Assure DoD’s ability to conduct critical missions;
- Promote Federal-State unity of effort;
- Conduct integrated planning with Federal and State authorities; and
- Expand North American cooperation to strengthen civil support.

Defending the homeland neither begins nor ends at U.S. borders, and departmental planning is guided by the concept of an active, layered defense – a global defense that aims to deter and defeat aggression abroad and simultaneously protect the homeland. It is a defense-in-depth that relies on collection, analysis, and sharing of information and intelligence; strategic and regional deterrence; military presence in forward regions; and the ability to rapidly generate and project warfighting capabilities to defend the United States, its Allies, and its interests.

The homeland is a functioning theater of operations, where DoD regularly performs a wide range of defense and civil support activities through U.S. Northern Command (in concert with the North American Aerospace Defense Command, or NORAD), U.S. Pacific Command, and other DoD components. When faced with a crisis in the homeland – for example, a complex catastrophe as a result of an attack against the Nation or a natural disaster – DoD must be prepared to respond rapidly to this crisis while sustaining other defense and civil support operations. Within the homeland, arriving late to need is not an option.

The Department acts globally to defend the United States and its interests in all domains – land, air, maritime, space, and cyberspace – and similarly must be prepared to defend the homeland and support civil authorities in all domains. This Strategy is nested within a series of mutually supporting defense strategies and national guidance that provide policy and direction for the space and cyberspace domains, including the National Security Space Strategy, the Ballistic Missile Defense Review, and the Defense Strategy for Operating in Cyberspace. Other related and supporting strategies include the DoD Mission Assurance Strategy, Presidential Policy Directive 8 – National Preparedness, and Homeland Security Presidential Directive 25 – Arctic Region Policy. Finally, an active, layered defense of the homeland cannot be accomplished unilaterally nor conducted exclusively with military capabilities. The Western Hemisphere Defense Policy, the Strategy to Combat Transnational Organized Crime, the National Strategy for Counterterrorism, the National Strategy for Global Supply Chain Security and other regional and functional strategies articulate a range of defense, diplomatic, law enforcement, and capacity-building activities that the United States pursues with its neighbors to build an integrated, mutually-supportive concept of security.

The Department must weigh the objectives of this Strategy against the other priority areas described in the 2012 Defense Strategic Guidance and 2010 QDR. The defense of the homeland remains an important part of our decision calculus as we size and shape the future Joint Force. U.S. forces must be capable of deterring and defeating aggression by an opportunistic adversary in one region even when our forces are committed to a large-scale operation elsewhere. DoD
must also consider the homeland defense mission while ensuring it can still confront more than one aggressor, anywhere in the world. Additionally, when the Department must make resource or force structure tradeoffs between homeland defense and civil support missions, it is DoD policy to first prioritize the fulfillment of the Department's responsibilities for homeland defense. As a second priority, this Strategy seeks to ensure that DoD is able to support civil authorities during catastrophic events, including a complex catastrophe, within the homeland.
Military action is a method used to attain a political goal. While military affairs and political affairs are not identical, it is impossible to isolate one from the other.

—Mao Tse-Tung
On Guerrilla Warfare, 1937

I do not approve of this system of encouraging political discussion in the Army among soldiers as such... Discussions in which no controversy is desired are a farce. There cannot be controversy without prejudice to discipline. The only sound principle is "No politics in the Army."

—Sir Winston Churchill
Note for the Secretary of State for War, 17 October 1941

Effective civil-military relationships that are fully consistent with our Constitution and the powerful role the United States will continue to play in the international arena are essential for the future security and welfare of all Americans.

—General Barry R. McCaffrey
Foreword, American Civil-Military Relations, 2009
PREFACE

This bibliography supports the Civil-Military Relations special theme of the U.S. Army War College's curriculum. It focuses on the principle of civilian control over the military in the United States, but also includes a wide range of references for topics directly related, such as the military profession, strategy, policy, homeland defense, civil support, and the use of force. We have also provided a section about the civil-military relations of other countries. Not a comprehensive listing, this selected bibliography is intended to be a starting point for research.

With certain exceptions, the materials in this bibliography are dated from 1999 to the present. For older materials, please see Civil-Military Relations, compiled by Virginia C. Shope, January 1999. All items are available through the USAWC Library. For your convenience, we have added U.S. Army War College Library call numbers, Internet addresses, or database links at the end of each entry. Web sites were accessed May 2011.

This bibliography and others compiled by our research librarians are available online through the Library's home page at http://www.carlisle.army.mil/library/bibliographies.htm.

For additional information, please contact the Research, Instruction, and Access Services Branch, U.S. Army War College Library, by sending an e-mail message to USAWC.LibraryR@us.army.mil, or by phoning DSN 242-3660 or Commercial (717) 245-3660.

Greta H. Andrusyszyn, compiler
CIVIL-MILITARY RELATIONS

A Selected Bibliography

May 2011

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**Articles**


**USE OF FORCE**

**Books, Documents, and Internet Resources**


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Three years ago, RAND embarked on a project to take a fresh look at America's role in the world. What are America's international ambitions, what choices does the country face, and what are the feasible options for achieving the nation's goals? How might the next President exercise leadership in this turbulent world, and to what end? The result is our Strategic Rethink project, in which we have gathered some of our best minds to produce guides for policymakers and citizens, educators and the media, on the most critical choices likely to face the United States during the next administration.

The first volume, *Choices for America in a Turbulent World*, was anchored by Ambassador James Dobbins, RAND's distinguished Chair in Diplomacy and Security. It analyzed the major choices available to the United States in diplomacy and defense, in the global economy, and on such emerging new challenges as climate change and cybersecurity. The second report, by defense researcher David Ochmanek and RAND senior vice president Andrew Hoehn, outlined the key defense challenges and their financial implications in *America's Security Deficit: Addressing the Imbalance Between Strategy and Resources in a Turbulent World*. In the third, Hans Binnendijk examined the state of U.S. alliances in *Friends, Foes and Future Directions: U.S. Partnerships in a Turbulent World*.

This fourth volume is different. It is a Perspective, in which RAND attempts to capture the wisdom, in addition to the analytical insights, of one of our most distinguished foreign policy practitioners.
Ambassador Charles Ries retired from the U.S. Foreign Service in 2008, after a distinguished career of more than three decades. His career has taken him from the consular office in Santo Domingo, Dominican Republic, to London, Brussels, Ankara, and Athens, where he served as U.S. Ambassador from 2004 to 2007. It has also landed him in Baghdad, Kabul, and the White House Situation Room.

I asked Ambassador Ries to write this Perspective because of his extensive experience not only in diplomatic circles, but also with the management aspects of government and the Executive Branch decisionmaking process. In all, Ries has participated in senior interagency decisionmaking meetings in four successive administrations.

In this volume, Ries’ analysis of the U.S. decisionmaking process is broadened and deepened by more than 20 off-the-record interviews with senior and midlevel officials in a number of different agencies and positions—candid discussions that produced invaluable information about the challenges faced by U.S. officials inside the trenches.

The recommendations, however, derive from his own lessons learned. His prescription for shrinking the size of the National Security Council staff is widely shared by his interlocutors, but it was also informed by his experience in the Executive Office of the President, where he helped negotiate the 1994 North America Free Trade Agreement. This required coordinating and supporting more than 30 U.S. negotiating groups from an office with a staff of just seven. “People think they can get more done with a large staff, but actually, the opposite is true,” Ries said. “We had a ‘smaller turning radius’ . . . The smaller you are, the more you have to use others.”

His views on the need for more-effective civil-military cooperation crystallized in Iraq and Afghanistan, where he saw firsthand how such coordination could be highly effective—and what happened when it failed. “Civilians have to set the political objectives,” he said. “The military plans for ‘end-states’ but for diplomats nothing ever really ‘ends.’”

His observations about the struggle to preserve organizational messaging—the authorized, authenticated issuance of official instructions to all who need them, despite the current explosion of email—stem from his service on the committee that developed the State Department’s current system, the State Messaging and Archive Retrieval Toolset (SMART). “Email was killing us,” Ries recalled. “No one was reading the [official]
telegrams. By the time they arrived, people would have already heard about it on email and they would say, 'I already saw that.' But final cables, which have been vetted by all the stakeholders in a critical decision, often differ from their first drafts. Such problems persist today, Ries reports. "It's like [the game of] 'Telephone': multiple, uncoordinated, inconsistent instructions and records." The use of social media has complicated matters even more, Ries says, noting that "People are reading Tweets as official U.S. policy."

Ries now serves as a RAND vice president overseeing all of our overseas offices and international client relationships. I am pleased to share his Perspective, in hopes that it will spark more thought and debate about how the U.S. government can better organize itself to meet the challenges of a turbulent world.

Michael Rich
President and CEO, RAND Corporation
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This is the fourth publication in RAND’s Strategic Rethink series. The project results from the RAND Corporation’s Investment in People and Ideas program. Support for this program is provided, in part, by philanthropic contributions from donors. Special appreciation goes to the Hauser Foundation for its generous gifts and to Rita Hauser for her continuing support of the project.

The analysis also benefited from extensive, off-the-record conversations with more than 20 senior and midlevel policy officials from the current and previous administrations with hands-on experience at the Executive Office of the President and in national security agencies. RAND colleagues who have held senior positions in the U.S. government and in journalism provided vital perspective and criticism as the study progressed. Special thanks in that regard to James Dobbins, Richard Solomon, Seth Jones, Andrew Liepmann, Andrew Parasiliti, Linda Robinson, and Jack Riley, and to Sonni Efron for editing.

This paper was initiated with the special encouragement of Ambassador Richard Solomon, who also hosted an important luncheon discussion in March 2014 involving a select group of senior policy officials with White House, Cabinet, and sub-Cabinet-level experience. RAND is very grateful for their insights and willingness to contribute to the project. Karen Donfried, Lynn Davis, and Sina Beaghley provided thoughtful comments and suggestions as formal quality assurance reviewers. All errors of fact or analysis are the author’s.
Introduction

Chapter One
cials and academic experts. The recommendations are my own, stemming from my experiences over more than 30 years as a Foreign Service Officer, beginning in the Carter administration. Among my conclusions: The NSC staff size should be reduced to better focus on high-priority areas. Civil-military operations should be planned by a new joint office at the State Department with a military general officer as deputy. Red-team and lessons-learned efforts would help ensure that the system is adaptive and responsive. Better integration of intelligence insights and secondments of senior officials across agencies can improve the quality and coherence of decisionmaking. And the use of special envoys, or “czars,” should be limited.

The time to debate and decide on systemic changes is as a new administration prepares to take office. Therefore, this contribution to RAND’s Strategic Rethink series may be of particular interest to the next presidential transition team, as it hones policy priorities and updates its decisionmaking and management systems to respond to new demands and realities.

Evolution of Strategies and Systems

Over the more than six decades since the National Security Act of 1947 established the Department of Defense (DoD), the Central Intelligence Agency (CIA), and the post of Assistant to the President for National Security Affairs (also known as the National Security Adviser), U.S. systems for formulating strategy and making decisions have evolved both organically and by presidential direction.

Successive study groups and experts have noted inefficiencies and the dysfunction of U.S. interagency systems, proposing reforms and adaptations, yet little has changed. Operations still often trump strategy; the decisionmaking system is overcentralized,

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2 This study draws upon the exhaustive work of the report of the congressionally mandated Project on National Security Reform (PNSR), including its 793-page volume of case studies of U.S. government policy management cases. See PNSR, Forging a New Shield, the Project on National Security Reform, Washington, D.C.: Center for the Study of the Presidency, 2008; or, more recently, David J. Rothkopf, National Insecurity: American Leadership in an Age of Fear, New York: Public Affairs, 2014.
overburdened, and parochial; and resources are at times seemingly distributed without reference to priorities or a national strategic conception. Across administrations and decades, neither root-and-branch reform proposals nor marginal changes have taken hold or made a significant difference. Yet the nature of national security challenges is changing quickly, as is their simultaneity. The time and attention of top decisionmakers dedicated to each issue is increasingly scarce, the threats diverse, and the focus of public, media, and policy attention shifts ever more quickly, threatening policy coherence and public support.

Threats stemming from other great powers (in China's case, a growing power), rogue states, nonstate actors with transnational reach, and the new risks to prosperity in a globalized economy suggest the United States now needs a determined effort to increase the vision, efficiency, and effectiveness with which it uses the instruments of national power. Just as the United States successfully—though painfully—reformed the efficiency of its economy in the 1980s, it must now reform itself to become more strategic; that is, more coherent in matching resources including time and attention of top leaders, to key security and foreign policy objectives. Such an updating of the government's decisionmaking machinery should increase the odds that the United States can make prudent foreign policy choices in a timely manner, and avoid major strategic mistakes. Seizing such opportunities will require that the extensive resources and capabilities of the nation in the fields of foreign affairs, defense, intelligence, and economics (as well as the other sources of soft, hard, and coercive power) are coordinated and applied in support of a coherent strategic approach to international engagement. Otherwise, the United States will miss opportunities to make the most effective use of its great power and influence in international affairs.

This report is intended to distill and analyze the perspectives of national security practitioners, current and former, as well as other senior U.S. government officials who have firsthand experience in managing the challenges described here. More than 20 senior and midlevel officials were interviewed between August 2014 and November 2015, a period of near-constant crisis in international affairs. Four others who served on the National Security Council (NSC) were kind enough to read and comment on this report. These discussions took place under promise of anonymity. There was broad
Dysfunctionalities in U.S. decisionmaking structures are . . . the consequences of a steady Washington trend toward increasing the size and specificity of senior-level positions, use of email rather than organizational messaging, and frequency of meetings.

Consensus on the current problem: an increasing number of bureaucratic barriers to getting things done. My conclusion, and that of most of those I interviewed, is that the dysfunctions in U.S. decisionmaking structures are not ideological; nor are they unique to the present administration or the two that preceded it. They are the consequences of a steady Washington trend toward increasing the size and specificity of senior-level positions, use of personal messaging (email) rather than organizational messaging, and frequency of meetings.

Inside government, policymakers complained of an inability to prepare adequately and to triage between developments that require senior-level decisions and those that do not. They cited an overwhelming number of senior White House–led meetings with meager outcomes, overly reactive policies, choices made on short-term political considerations, and failures to consider second-order effects. Unintended consequences litter the geopolitical landscape.

Outside of government, commentators skewer administrations for policies adopted with insufficient analysis and preparation (and scant chances of success), or for a deliberative process that fails to develop viable policy options. Analysts bemoan difficulties in managing whole-of-government efforts, repeated failures to learn from history, and the habit of measuring inputs rather than outcomes. And despite awareness of the harm of overly reactive stances, policymakers said they feel that the social media and new media landscape demand instantaneous reaction to events, despite the murkiness of initial facts.

Some days the White House Situation Room (WHSR), the apex of the policy process pyramid, is booked solid with Deputies and Principals meetings. Video teleconferences are held by the WHSR with military commanders and ambassadors in the field. In the White House and in State Department and Defense Department briefing rooms, spokespersons feel obliged to make ephemeral comments on breaking news at lightspeed, even before all the facts (and certainly before the implications) are known.

And yet, despite (or perhaps because of) the reality of constant motion, policymaking often seems driven by the news cycle and is reactive to the latest crisis or media focus, to the exclusion of long-term strategic planning. Tactical and rhetorical responses are chosen with uncertain reference to, or in support of, a national strategic orientation.
to the world. Decisions are delayed by competing claims on principals’ schedules in an overly centralized system.

There is a natural tendency to attribute each successive administration’s decision-making style and processes to the personality and predilections of the President, the National Security Adviser, and senior cabinet members. Yet the American national security decisionmaking system has endured and evolved across many administrations, and its deterioration in particular has extended across the last several administrations, despite presidents of very different styles and with different priorities. Organization, therefore, matters.

President Dwight Eisenhower once observed that “organization cannot make a genius out of an incompetent . . . [but] disorganization can scarcely fail to result in inefficiency and can easily lead to disaster.” Good organization is necessary but not sufficient for effective national security decisionmaking. Its presence enables presidents and their advisers to make informed decisions in the context of a considered strategy, though they may still make the wrong decisions; but the absence of good decisionmaking processes raises the risks of failure.

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CHAPTER TWO

Why Process Matters

A global superpower such as the United States needs a process under the President’s leadership for formulating and testing strategies for the real world; incorporating information and perspectives in real time from within and outside of government; and fashioning and communicating messages relating to our strategies to allies, friends and adversaries, and the American people. This process must be tightly linked to resourcing decisions: What resources are needed to credibly undertake a proposed strategy? What are the opportunity costs of using resources—financial, moral, personnel, military, credibility, etc.—in one way rather than another?

The most important function of a decisionmaking system is to ensure the development of coherent and sustainable strategies for advancing U.S. national interests, and recommendation of those strategies to the President. Feasible and sustainable strategies are based on American interests and values, rooted in a sophisticated understanding of the international context, with realistic goals and elaborated plans for achieving them, and a clear sense of the resources that will be required. Military planning doctrine requires that all plans begin with a specification of the desired "end state." While international "relationships" never actually "end," having a clear goal is vital for good strategy. In the immortal words of Yogi Berra, "If you don't know where you are going, you might wind up someplace else."1

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1 Yogi Berra, BrainyQuote.com, undated.
Related to this first function is the importance of prioritization. Even a nation as powerful as the United States, with its strong government institutions and unmatched defense capabilities, cannot tackle every challenge or take advantage of every opportunity in all corners of the world. So, in addition to formulating feasible and sustainable strategies, the decisionmaking process should generate results that inform the President on relative priorities between policy objectives, in light of U.S. interests and values. It must also make judgments as to which issues require presidential involvement and which do not.

The development of feasible, sustainable, and prioritized strategies is only the first part of national security decisionmaking. Also important are:

- oversight of strategy implementation by agencies
- crisis management
- development of public presentation materials and approaches (press statements, questions and answers, speeches, fact sheets, social media strategies, etc.)
- engagement with stakeholders (domestic agencies, Congress, business, nongovernmental organizations [NGOs], political interest groups, etc.)
- resource planning for national security affairs
- utilization of the best available information and analysis from the intelligence community (and direction and guidance on priority-setting for the use of intelligence assets)
- information-sharing among agencies on non-crisis developments, to ensure situational awareness and to foster teamwork and coordination.

Each of these seven subsidiary functions is important, and collectively they may consume most of the time of the principals of the NSC staff and policy-level officials representing national security agencies (and supporting staff) under the President’s authority. But a critical aspect of effective national security decisionmaking systems—albeit one that is extremely hard to accomplish—is that they do not let the urgent overwhelm the important and do not let oversight or crisis management overwhelm strategy formulation and implementation.
In addition, senior NSC officials play a diplomatic role from time to time as direct representatives of the President, most famously in the case of Henry Kissinger's China diplomacy, but also on an everyday basis. The National Security Adviser or senior deputies can represent the President’s views to counterparts in chancelleries and prime ministries, and from time to time to heads of state directly. Utilizing such channels helps make U.S. diplomacy as effective as possible. A more efficient and effective decisionmaking system can help ensure that such diplomatic functions of the NSC reinforce coherent strategies, and free up senior leader time to develop such direct personal relationships.
CHAPTER THREE

How Did the National Security System Evolve?

The United States entered World War II with completely separate Army and Navy departments and no structures for their common oversight. Chief of Staff of the Army George Marshall compared the U.S. system—or rather, lack of system—unfavorably to the British secretariat supporting Prime Minister and Defense Minister Winston Churchill, observing "[O]n our side there is no such animal and we suffer accordingly. The British therefore present a solid front of all officials and committees. We cannot muster such strength." As the war progressed, President Franklin Roosevelt appointed Admiral William Leahy as his personal representative to the Chiefs of Staff Committee alongside Marshall and Navy Chief Earnest King. Leahy was also appointed Chairman of the Combined Chiefs of Staff, which also included the British service heads, and through which all major strategic decisions were passed. Leahy had no dedicated staff, however, nor was his position formalized in legislation. Roosevelt reserved all of the important decisions to himself, and tended to consult senior officials one by one rather than collectively.

After the war, the Truman administration and Congress undertook several initiatives to streamline and clarify the U.S. national security strategy and oversight process for what was seen as a challenging future. The Congress consolidated several oversight

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committees into the Senate and House Armed Services Committees. After more than a year of politicking and debate, the National Security Act of 1947 was adopted. It established the DoD, the CIA, and the NSC, which included statutory members (the President, Secretaries of State and Defense, the three service secretaries, and the Secretary of a new National Security Resources Board). The legislation made scant mention of staff support; it set out the functions of the NSC:

To advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.²

Over the subsequent years, the NSC grew to play a more influential role in devising and overseeing U.S. national security policies and operations, and developed a staff support structure. President Eisenhower, who was most familiar with military doctrine separating planning and operations, mirrored the military model by establishing a separate White House–led interagency body specifically for planning.³

President Richard Nixon was especially preoccupied by the issue of dysfunctional government decisionmaking on foreign affairs. He tapped as his National Security Adviser a man who had been part of a study group at Harvard University that was developing ideas for improving U.S. foreign policy management: Henry Kissinger.⁴

During the Nixon-Ford years, Kissinger dominated national security policy formulation and implementation, first from his National Security Adviser position, and

⁴ Historian Niall Ferguson documents this as a strong factor in Nixon’s decision to hire Kissinger in his book, Kissinger: 1923–1968: The Idealist (Penguin Press, 2015, pp. 855–866). Ferguson concludes “Kissinger’s appointment needs to be understood as more than just a meeting of minds...It was part of a radical overhaul of the machinery of foreign policy making, an overhaul for which Kissinger himself had coauthored the blueprint.”
then from the State Department in Nixon's second term and during the Ford administration. The Carter administration under National Security Adviser Zbigniew Brezinski brought back structure and the practice of interagency policy consultation, though it had to cope with some serious reversals, including the Soviet invasion of Afghanistan and the failure of the "Desert One" Iran hostage rescue mission.

During the two terms of Ronald Reagan's administration, there were six National Security Advisers and serious foreign policy management failures (e.g., the Marine barracks bombing in Lebanon, Iran-Contra, Siberian gas pipeline). Yet the administration also managed to coordinate policies for contesting the Soviet Union across the range of policy domains and to strengthen the U.S. economy (e.g., tackling inefficiencies at home and reforming the international exchange rate system through the Plaza Accords), while articulating a compelling soft-power vision for the role of the United States in the international system (e.g., "shining city on the Hill"). The administration saw serious State-Defense struggles over policy approaches, but did not face major military operations.

The current policy process has generally evolved from the design set out in 1989 by General Brent Scowcroft, National Security Adviser to President George H.W. Bush. The system created a Principals' Committee (PC), comprising the NSC minus the President; a Deputies' Committee (DC), comprising the deputy secretaries of State, Defense, and other departments and agencies; and a series of interagency policy committees (IPCs) to staff and support the Deputies on specific issues sets. The committees were intended to be a hierarchy such that policy options were developed and refined as they passed upward from the IPCs to the DC, PC, and the full NSC. Presidential decisions were then communicated back down the chain for implementation by the various departments and agencies.5

With an NSC staff count of about 100 (and without a Homeland Security Council, or a Director of National Intelligence [DNI]), that administration formulated and applied a coherent strategy for constructing a Europe “whole, free, and at peace” following the collapse of the Berlin Wall and then the Soviet Union. Designing a farsighted strategy for achieving German reunification, the redirection and enlargement of NATO, and the help offered to the new Russian Federation were not self-evident approaches, nor conventional wisdom, nor easy to accomplish. While the George H.W. Bush administration did not deter Saddam Hussein’s rash invasion of Kuwait, once it took place, the United States built a diverse multinational coalition to reverse it. This was a model of aligning ends, ways, and means successfully. The administration also avoided the temptation to seek a regime change that would have fractured the coalition.

Overall, the foreign accomplishments of this Bush administration were the result of good decisions by President Bush himself, but the policy process under General Scowcroft was unusually strategic and less operational than that of successor administrations. Scowcroft also carefully separated his policy advice to the President from his role in running a coordination process where all views are heard. That is why some consider the George H. W. Bush administration to be the “gold standard” in effective, efficient policy processes (Figure 3.1).

The Clinton administration created the National Economic Council to integrate domestic and international economic policymaking (Figure 3.2). After the terrorist attacks of September 11, 2001, the George W. Bush administration established a separate Homeland Security Council (Figure 3.3), but in 2009 it was reintegrated with the NSC staff by the Obama administration.

In the last two administrations, American national security policy development and management has been characterized by significant staff growth, and is considered

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Figure 3.1
National Security Council Structure (End of George H.W. Bush Administration), 1992

SOURCE: Figure courtesy of PNSR
Figure 3.2
National Security Council Structure (End of Clinton Administration), 2000

SOURCE: Figure courtesy of NSC
Figure 3.3
National Security Council Structure (End of George W. Bush Administration), 2008

SOURCE: Figure courtesy of PNSR
increasingly dysfunctional, even by some of its own practitioners. IPCs have proliferated without a discernible improvement in the formulation of options. DC and PC meetings are held with increasing frequency, without adhering to a regular schedule, and often on short notice, putting unsustainable demands on policymakers’ time, frequently with little chance to prepare. David Rothkopf notes that by the second term of the Obama administration, the NSC staff was ten times the size it had been during the Nixon-Kissinger years.

Yet the sharp increase in NSC staff size was tested as Washington sought to prevail in new foreign policy challenges, such as Iraq (from 2003 onward), Georgia (2008), Libya (2011), the Syrian civil war (2011 onward), Ukraine (2014), or the emergence of the Islamic State of Iraq and Syria (ISIS) (2014).

Such examples should not be seen primarily as intelligence failures, strategic surprises, or random acts. In many cases (especially in hindsight), the underlying fundamentals and risks were evident in advance of events and pointed out even by the intelligence community. And memoirs demonstrate that senior policymakers—engaged in crisis response on other fronts and coping with detailed management of ongoing operations and the era’s new emphasis on public diplomacy—may not have had the bandwidth to appreciate all the risks of these situations.

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6 "These issues [of micromanagement] did not begin under Obama. There has been a steady trend towards more centralized White House control over the national security apparatus ever since Harry Truman . . . . As recently as the Scowcroft-led NSC staff in the early 1990’s, professional staff numbered about 50. Today the NSS numbers more than 350. The controlling nature of the Obama White House and NSS staff took micromanagement and operational meddling to a new level." Robert M. Gates, Duty: Memoirs of a Secretary at War, New York: Alfred A. Knopf, 2014, p. 587. During the George W. Bush administration, the NSC staff was renamed the “National Security Staff” (NSS). Secretary Gates used both acronyms to describe the White House national staff function in different eras.

7 Rothkopf, 2014, p. 9. He later acknowledges that “some of that [the large NSC staff size] is the carcass of the Bush-era Homeland Security Council as it is slowly being digested” (p. 358).

8 Former Secretary of Defense Gates recalled an NSC (which he referred to as NSS) PC meeting in February 2011 on whether to support a continuing presence of U.S. trainers in Iraq: “At the principals’ meeting later that day, I said ‘What’ when we quickly dived into the details. Basic questions had to be answered first, including whether we all agreed we wanted a U.S. military presence in Iraq after December 31. . . . As so often, I said, the NSS was already in the weeds micromanaging before basic questions had been addressed” (Gates, 2014, p. 553).
So why have four administrations’ NSC staffs, all composed of brilliant overachievers, failed to produce better foreign policy decisions under two very different presidencies? The problem seems not to be resources per se, but effective organization for managing national security policies. Issues need to be managed by officials who understand them. Information and analysis need to be available when and where required. Intelligence insights must be reflected in the policy process. Strategy formulation needs to consider interagency perspectives. Leaders need to pay attention to the strategic options and avoid allowing the immediate to overwhelm the important. For effective and timely policy development and implementation, “wait and see” shouldn’t take precedence over proactive policies. The views of congressional leaders need to be incorporated into strategy formulation and key decisions. Perspectives of those outside the government (businesses, NGOs, academics) also should be incorporated to ensure that an administration doesn’t become a captive of groupthink.

**How Do Other Nations Make Decisions?**

Superpower status—and U.S. resource disparity—in some ways disguise the importance of how decisionmaking challenges are addressed. It may therefore be useful to examine how two much smaller governments tackle some of their key national security management issues (albeit on a far different scale). Though their bureaucracies are far smaller, they, too, must make critical decisions on short time frames amid information overload.

For most of Britain’s history, its national security and foreign policies have been made informally, coordinated by the Prime Minister and the Cabinet, with special roles for the Foreign Secretary and the Secretary of Defence. Both cabinet departments have internal policy development and oversight processes traditionally run by Permanent Under Secretaries (senior civil servants). Intelligence coordination was run by the Joint Intelligence Committee.
In 2010, Britain established a formal National Security Council, based in the Cabinet Office. Like its American analog, the British Nation Security Council has a National Security Adviser and standing members (the Deputy Prime Minister; secretaries for Foreign Affairs, Defence, International Development, a Home Secretary responsible for immigration and internal affairs, and the Chancellor of the Exchequer; as well as the Cabinet Office Minister of State). Subcommittees were established for Threats, Hazards and Contingencies (chaired by the Home Secretary), Emerging Powers (chaired by the Foreign Secretary) and Nuclear Affairs (chaired by the Prime Minister). The National Security Adviser also chairs the Joint Intelligence Committee.

With this reorganization, Britain modernized and gave structure to an inherited, informal system of national security decisionmaking and implementation. The new system also was notable for attempting to integrate the comprehensive resource review with the national security strategy. However, Parliamentary reviews in 2010 and 2012 were highly critical of the results. Over time, the British system reverted to its traditional system for dealing with foreign policy and security issues coordinated in the Cabinet office, illustrating that for the British, small and informal works better than large and formalized.

Singapore, while small and without the global responsibilities and interests of the United States or Britain, illustrates a disciplined approach to another critical aspect of national security decisionmaking support: risk assessment. A city-state only 3.5 times larger than Washington, D.C., Singapore has two imperatives: maintaining favorable external relations—especially with the two giants of the Asia-Pacific, China and India—and countering Islamist terrorism. In 2003, following consultations with the U.S. Defense Advanced Research Projects Agency, the government created a Risk Assessment and Horizon Scanning (RAHS) program to assist its national security apparatus. Foreign Policy's Shane Harris reported that Singapore uses a mixture of proprietary and commercial technology and is based on a "cognitive model" designed to mimic the human thought process. . . It's a tool that

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helps human beings sift huge stores of data for clues on just about everything. It is
designed to analyze information from practically any source—the input is almost
incidental—and to create models that can be used to forecast potential events. Those
scenarios can then be shared across the Singaporean government and be picked up
by whatever ministry or department might find them useful. Using a repository of
information called an ideas database, RAHS and its teams of analysts create “narratives” about how various threats or strategic opportunities might play out. The point
is not so much to predict the future as to envision a number of potential futures that
can tell the government what to watch and when to dig further.10

In an October 2012 report for the Woodrow Wilson International Center for
Scholars on modernizing America’s “legacy systems of management to meet today’s
unique brand of accelerating and complex challenges,” Leon Fuerth cited RAHS as one
of eight foreign “units to promote foresight and whole-of-government policy integration” that “offer models for approaches that could—with suitable modification—work
in the United States.”11 In a similar vein, Sheila Ronis, former chair of PNSR’s Vision
Working Group, argues that the United States could improve its national-security decisionmaking processes by conducting the sort of work done by Singapore’s Center for
Strategic Futures.12

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10 Shane Harris, “The Social Laboratory,” Foreign Policy, July 29, 2014.
International Center for Scholars, October 2012.
12 Sheila R. Ronis, Executive Office of the President of the United States: The Need for New Capabilities, Lessons From Singapore and the Project on National Security Reform, remarks at the World Future Society, Washington, D.C.,
Chapter, January 17, 2013.
For some time, analysts, practitioners, study groups, and professionals have urged improvements for the U.S. national security policymaking system.\textsuperscript{1} Perhaps the most comprehensive review was undertaken by the PNSR, which was mandated by the National Defense Authorization Act of 2008 (PL 110-181). The study was undertaken by the Center for the Study of the Presidency and led by James L. Locher III, one of the architects of the Goldwater-Nichols Act that modernized and institutionalized “jointness” for the U.S. military services. The study was guided by a board of 22 distinguished experts, including former congressmen, ambassadors, flag officers, and senior policymakers. The PNSR’s report, \textit{Forging a New Shield}, was more than 800 pages in length and accompanied by more than 1,000 pages of detailed, scholarly case studies.\textsuperscript{2}

The PNSR’s key insights were that the “U.S. national security system was grossly imbalanced, supporting strong departmental capabilities at the expense of integrating mechanisms.” It observed that resources were allocated to departments, not missions, and departments tended to focus on their “parochial” core missions. The study found that the resulting need for presidential integration “overly centralizes issue management

\begin{footnotes}
\footnotetext{2}{PNSR, 2008.}
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and overburdens the White House, and that the basic deficiency was that "parochial departmental and agency interests, reinforced by Congress, paralyze interagency cooperation even as the variety, speed and complexity of emerging security issues prevent the White House from effectively controlling the system." The study noted that Presidents have resorted to two methods of reducing policy management when the burdens of new issues or challenges become overwhelming: designating a lead agency, or appointing a lead individual—a "czar." It observed that neither approach has worked well in practice. The PNSR aptly concluded that centralization "tends to burn out National Security Council staff, which impedes timely, disciplined, and integrated decision formulation and option assessment over time . . . When there are fires to put out every day, there is little opportunity to see and evaluate the larger picture."

Another prominent advocate for NSC reform is Bruce W. Jentleson, professor of public policy and political science at Duke University and foreign policy adviser to numerous presidential campaigns and administrations. In 2009, he advocated the creation of a Strategic Planning Inter-Agency Group (SPIAG), with a membership that would parallel the NSC structure. The SPIAG was envisioned as supporting a new Deputy National Security Adviser for Strategic Planning, which would have been the most senior level official with specific planning responsibilities since the Eisenhower era. (Eisenhower famously empowered a "Solarium Group" of senior officials from various agencies to take a longer look at strategic choices the United States faced at the time.)

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7 While there is currently a Special Assistant to the President (and Directorate) for Strategic Planning, the responsibilities of the position are narrow: mainly to oversee the periodic production of the congressionally mandated "National Security Strategy."
8 Miller, 2013.
A third concept for decisionmaking reform is contained in RAND’s series of studies of specific U.S. experience in managing nation-building in postconflict settings, which highlighted the difficulty of managing complex, expensive, interagency teams to the success (or otherwise) of strategic U.S. national security undertakings. Consistent with the PNSR, RAND’s After the War recommended that the United States manage such interventions and reconstruction efforts by employing a dedicated senior level interagency working group to oversee implementation, and by employing personnel buttressed by cross-agency experiences. RAND also recommended developing a fully integrated single political-military plan, with civilians giving advice on military options and military providing advice on civilian tasks while maintaining clear delineation of responsibilities (“when all are responsible, no one is”).

None of these reform proposals were adopted. Nor have government management practices kept pace with the general trend toward decentralization of private-sector management as a means of adapting to rapid change.

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9 For example, see James Dobbins, Michele A. Poole, Austin Long, and Benjamin Runkle, After the War: Nation Building from FDR to George W. Bush, Santa Monica, Calif.: RAND Corporation, MG-716-CC, 2008.

10 Dobbins et al., 2008, pp. 135–141.
CHAPTER FIVE
Changing Environment

As other studies in the Strategic Rethink series have made clear, the environment for America’s strategic concept development, planning, and implementation (and related national security decisionmaking) has changed radically since the days of Harry Truman, George Marshall, and Dean Acheson. While Truman encountered strategic surprises, he did not have to contend with 196 other states plus nonstate actors capable of striking the U.S. homeland; economic, media, and social globalization; the emergence of environmental and energy issues as top-tier concerns; or the Internet and the 24/7 news cycle. Further, American politics once was more bipartisan, particularly with regard to foreign policy.

There are now several key factors impinging on U.S. national security strategy formulation:

• Large states are presenting new types of security challenges—especially a China that is more repressive at home and assertive abroad, and a Russia whose aggression in Ukraine and intervention in Syria may undermine stability on two continents.

While Truman encountered strategic surprises, he did not have to contend with 196 other states plus nonstate actors capable of striking the U.S. homeland.

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• Nonstate actors play a bigger role and have a longer reach. ISIS, al Qaida and its affiliates (Jabhat al-Nusra, Shabaab, al Qa’ida in the Islamic Maghreb, and al Qa’ida in the Arabian Peninsula); Boko Haram in Nigeria; drug cartels across the Americas; pirates off the coast of Africa; and cyber criminals in the former Soviet space and China play autonomous roles in fostering mayhem and raising costs to nation states everywhere.

• Environmental stress is an increasing concern. With population growth, urbanization, and climate change, the risks and costs of natural disasters (flooding, extreme storms, earthquakes, and droughts) now have more immediate international significance, imposing costs on the global system, generating refugee flows, and destabilizing regions.

• The interconnected global economic system means that a failure of a large investment bank (such as Lehman Brothers), poor policies, fraud, or even crop failure in one corner of the world can quickly affect the rest of the world, putting growth and stability at risk.

• The proliferation and dispersion of weapons technology (nuclear, biological, and chemical weapons, computer malware, man-portable air-defense systems [MANPADs] and even just high-powered automatic weapons) and delivery systems (missiles, drones, improvised explosive devices, suicide bombers) means that conflicts can quickly escalate in violence levels and jump across borders.

• An era of fiscal pressure and public aversion to international engagement is reducing the resources (development assistance, military aid, diplomatic funding) that the United States has traditionally used to bind its allies and pressure its adversaries. Similar trends are evident among key European allies, aggravated in their case by economic stagnation, energy vulnerabilities, and a crisis of confidence in European institutions.

• Patterns of energy supply and investment, always important in geopolitical terms, have changed more quickly and more thoroughly than ever before. Technological developments in the United States, for decades the largest importer of hydrocarbons but now re-emerging as an exporter of gas and oil on the success of new drilling techniques, have radically changed global markets.
  – Climate change poses a new challenge—both urgent and long-term—to economic security and resilience.
A special implementation challenge for this era is the effective coordination of civil-military planning and the use of military for political objectives. Much has been written about the problem, especially in the context of the recent Iraq and Afghanistan conflicts. And while it is difficult to synchronize civil and military operations in the field, in part because of the discrepancy in resources that can be brought to bear on the ground (the military has much more), achieving agreement at the strategic level on the use of military force for political ends is equally difficult. The United States is managing such a challenge in the current conflict against ISIS. It faces the need to utilize our air power, materiel, and special force trainers and advisers in such a way to achieve the desired end state against ISIS ("degrade and destroy") while being mindful of the political interests and ambitions of the rival superpower, Russia, and the Syrian, Iraqi, and regional players. A good example of such joined-up strategy was the conditional and partial application of U.S. airpower in September 2014 that resulted in the departure of then-Prime Minister Nouri al Maliki of Iraq. Effective civil-military coordination at the strategic and tactical level requires deep habits of cooperation in planning, resourcing, and operations that challenge each end of the civil-military continuum. There is considerable progress: For example, the United States Agency for International Development (USAID) established an Office of Civil Military Cooperation, and the State Department established the Bureau of Conflict and Stabilization Operations.

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3 Robinson et al., 2014, p. 52.


The NSC itself has evolved in response to these changes and other pressures. The NSC staff traditionally was divided into geographic directorates with fewer devoted to functional issues. Now there are a plethora of functional NSC staff directorates as well as geographic ones, with predictable turf-fighting among them. As noted earlier, the George W. Bush-era Homeland Security Council staff was incorporated into the NSC staff directly. Even with these organizational changes, interviewees with whom RAND spoke said that the NSC staff frequently faces difficulties in meeting the challenges of this new environment while performing the essential functions of the national security decisionmaking process.

As a consequence of the country’s global agenda and the concentration of power in the Executive Office of the President, it is the contention of this study and others that the NSC staff and staff support at top levels in the national security agencies have gotten too big and too “operational”—too preoccupied with issues of implementation that would be better delegated to the Cabinet agencies. Senior White House officials are bogged down in “small” and operational issues at the expense of focus on strategic planning and policy formulation, at times duplicating the work of agencies. Officials recount cases in which NSC staff has sought to direct diplomatic strategies in support of U.S. initiatives, or tinker with talking points.

Any President will naturally want to make the most-sensitive diplomatic and military decisions—and keep them to his or her innermost circle. Nevertheless, the incoming President should ponder the managerial as well as strategic advantages of delegating more to the Cabinet secretaries. As in many other institutions (corporations, NGOs, other governments), the information technology revolution and management principles argue for a leaner, disciplined, decentralized, and strategic approach to formulating U.S. national security policies.

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CHAPTER SIX

Recommendations for the National Security Decision Structure

Despite the checkered results of previous attempts to reform and restructure America’s national security decisionmaking system, and the importance of personalities in policymaking in general, a focused reform of a limited number of aspects of the system could pay real dividends.

There is broad agreement—dating back to the 1960s\(^1\)—that the time to debate and decide on changes is as a new administration prepares to take office. Newly named White House officials are especially jealous of their new prerogatives, and adversaries and friends are testing the new administration’s intentions.

As the next administration (preferably the next presidential transition team) weighs its desired new NSC structure, it may wish to weigh the RAND recommendations that follow. These are ordered in terms of priority. In combination, they are designed to ameliorate the wide range of overlapping management problems already discussed.

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\(^1\) Ferguson, 2015, p. 849.
NSC Staff Size

While the exact number of professional NSC staff is unclear (and obscured by the sizable number of officials “detailed” to the White House by departments and agencies), insiders cite the Obama administration’s NSC staff as numbering “over 500.” Having White House senior officials able to dedicate time and attention to every corner of the world and every functional challenge that the United States might face may seem attractive, but, in practice, such a large staff has a number of downsides. Most NSC senior directors chair an Inter-Agency Policy Committee or Committees, which in turn claim the time and attention of policy officials at national security agencies, even though many of the issues discussed never emerge for presidential involvement. With such staff numbers, the NSC staff has less need to rely upon—or delegate decisions to—line cabinet agencies, demoralizing Senate-confirmed officials at those agencies.

In this spirit, the NSC recently began an overdue pruning—“rightsizing”—of its staff and procedures. The White House blog post on the reforms noted that “taken together, they are designed to result in fewer, more-focused meetings, less paper to produce and consume, and more communication that yields better policymaking for the

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2 Number quoted by former administration official at RAND seminar, March 18, 2014, and separately at RAND Workshop on Lessons from 13 Years of War, June 19, 2014.

3 In a public “forum on the role of the national security adviser” at the Woodrow Wilson International Center for Scholars on April 12, 2001, Zbigniew Brzezinski responded to a proposal by former NSA Sandy Berger that NSC STAFF Senior Directors coordinate working-level officials in policy implementation by coordinating interagency groups of working-level officials: “I don’t think it should be at the working level, because at the working level there are a great many decisions that are really not of Presidential type. And if you try to make decisions at the desk-officer level you will end up with a staff on the NSC which, in my view, is too large . . . [t]he happy medium is [an NSS] of 50, 60 or so given the role that the U.S. plays today.” In reply, Berger gives the example of the Bosnia intervention where day-to-day decisions, while not at the presidential level, were “critically important” to the success of the policy and, while generally made at the Deputy Assistant Secretary level, the Deputies Committee was an “extremely important part of the decision coordination.” Colloquy quoted in Karl F. Inderfurth and Loch K. Johnson, eds., Fateful Decisions: Inside the National Security Council, New York: Oxford University Press, 2004.

benefit of the American people." Senior staffers explain privately that the rightsizing effort is being undertaken by reducing most directorates by one or two persons, rather than informed by a more strategic view of staff functions.

Senior staff expansion at the White House level has been duplicated at State, Defense, and the DNI. State now has two deputy secretaries and six under secretaries, rather than just one under secretary (and no deputy), as was the case in Acheson’s day. It now has six regional bureaus (rather than four under Acheson and Marshall, dealing with many fewer sovereign states) but 32 officials overall with the rank of assistant secretary and an additional 22 coordinators, special envoys, and representatives, all of whom in theory report directly to the Secretary of State. All of this places the country desks and functional action offices ever further from the policymaking process and leads to policy development uninformed by on-the-ground reality.

In 2012, the Office of the Secretary of Defense (OSD) had 2,700 civilian and military staff positions. In 2013, then-Secretary of Defense Chuck Hagel asked former Air Force Secretary Michael Donley to look for places to cut OSD, services, Joint Staff, and combatant command headquarters staff positions. Donley’s report recommended a 20-percent cut, to 2,200 staff positions.7

When it opened in the spring of 2005, the Office of the DNI comprised 11 staffers, crammed into a small office suite a block from the White House. A year later, the budding agency moved to two floors of another building. In April 2008, it moved to its permanent home at the Liberty Crossing Intelligence Campus in McLean, Virginia, and had a staff numbering well over 2,000.8

Better ways must be found to efficiently use senior leadership time and attention and to empower lower levels to manage second-order problems. While senior officials

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5 Suzy George, "Fine-Tuning NSC Staff Processes and Procedures," White House blog post, June 22, 2015.


often believe they can accomplish more with a large staff, in my experience, the opposite is true. The negotiations for the North American Free Trade Agreement—a highly complex diplomatic challenge—were run from the Office of the U.S. Trade Representative (USTR) in the Executive Office of the President. We coordinated and supported more than 30 U.S. negotiating groups from an office with a staff of just seven. This required us to rely on others, focusing our efforts on giving the teams clear and coordinated instructions. This created a diplomatic agility that benefited the accomplishments of our objectives. The more complex the task, the more the need for a small staff to support a large hub-and-spoke model, of the sort used by many corporations to maintain control of decisionmaking while decentralizing implementation.

New issues and challenges do not necessarily require new stove-piped bureaucracies—and in fact, are best managed in conjunction with existing relationships.

**Recommendation: Reduce Senior Staff Size**

As described, the NSC staff size has ballooned⁹ and its organizational complexity has increased at a time when corporate America is moving toward flatter, leaner organizational structures to foster more-efficient decisionmaking. The U.S. government will necessarily remain hierarchical but the experience of businesses—and other countries—indicates that it could benefit from fewer staff. A thinner layer of middle management would help curb the impulse for the NSC to become too operational.

While nearly every senior official interviewed for this study identified staff bloat as a problem, it is, of course, not easy to determine objectively the proper NSC size. Even the criteria for such a benchmark have not been put forward. One way to estimate the optimum NSC staff size might be functionally. The staff model should start with the President’s National Security Adviser, whose time is protected by two or three Deputy National Security Advisers so that he or she can focus on the highest presidential priorities. Next, there would need to be senior managers for the Executive Secretary and strategic planning functions, and for press and public affairs functions. A senior director should be in charge of each of State’s regional bureaus/military combatant commanders

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⁹ The NSC did recently begin an overdue pruning—“rightsizing”—of its staff and procedures (DeYoung, 2015).
(COCOMs) (per subsequent recommendation to align bureaus and COCOMs), plus senior directors for major functional categories (Homeland Security/counterterrorism, intelligence, cyber threats, economics, environment, energy, and perhaps a half-dozen others). With four or five supporting staff per senior director (not counting the 24-hour Situation Room staff) one can envision the resulting streamlined NSC staff sized at perhaps 120 professionals—although this would still be roughly five times the size of President Jimmy Carter’s NSC. In this way, the next administration can reduce and cap NSC staff and the number of State, Defense, and DNI subcabinet principals (and their respective staffs) in order to devolve responsibility to appropriate levels and ensure that the most-senior officials focus on the strategic picture.

An NSC staff sized at roughly 120 professionals could ensure enough staff support for White House principals and to manage crises, but not be so large that staff members are inclined to impinge on operations that can be appropriately delegated to agencies. While the resulting sharp cut in the NSC staff and such an arbitrary cap would be dramatic, there would be no clearer signal to agencies and foreign governments that the new administration intends for the NSC staff to step back to a coordinative role and leave operations to the designated departments. In parallel, the President should direct State, Defense, and the DNI to evaluate their staffs and similarly consolidate duplicative staff level functions in their organizations. This would result in more responsibilities being delegated to line offices and to embassies and commanders abroad.

**Civil-Military Cooperation and Resource Sharing**

At a moment when the United States is increasing military action against ISIS, attempting to stabilize Afghanistan, trying to end the Syrian civil war, and confronting aggression by Russia and China, it must coordinate use of its military and civilian tools to maximum effect. To be sure, cooperation between military commands and civilian agencies abroad has improved through a decade of war, but unresolved issues remain. I

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have seen one embassy where civil-military relations were excellent due to the close relationship between the ambassador and the U.S. military commander, and another where the two did not speak. The effects on U.S. efficiency were apparent to all.

Military officials often comment that they consider civilian response capabilities inadequate for the scale and scope of stabilization and nation-building tasks following recent conflicts, leading those tasks to fall on the military. Civilians also bemoan the sharp resource discrepancies between military and civilian programs, urge diplomatic and longer-term approaches to security challenges, and institutionally focus on state-to-state relations, although nonstate actors also are increasingly relevant. The State Department’s Bureau for Conflict and Stabilization Operations has been allocated neither the resources nor the responsibility to manage complex operations in the field. While DoD has most of the resources to implement most aspects of strategy, ownership of those “means” should not be allowed to militarize the process or skew the choice of “ways” to mainly military approaches. Civilians must set the political objectives.

A balanced civil-military relationship is critical to managing the different time lines under which military officials and diplomats operate through conflict and post-conflict situations. The military plans to accomplish specific goals, achieve defined “end-states”—and then leave. For American diplomats, nothing ever truly “ends.” The embassy stays on to manage the long-term relationship with the host nation.

Technology such as secure video-conferencing now allows ambassadors and commanders in the field to take part directly in Washington strategy discussions. In practice, ambassadors do not have the authority, training, or the staff support to play a strong role in on-the-ground coordination once strategy decisions are made, yet aside from the NSC-led process, an Ambassador’s Country Team is often the only other standing interagency process. Both military and civilian policy-level officials have in the past

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neglected to take account of the likely political effects of changes in military commitments. These considerations apply equally in Washington and in the field.

**Recommendation: Empower State on Policy, Leave Implementation to the Agencies**

A solution to the mismatch of resources and strategy for complex operations might be to empower State, as foreign diplomatic lead, to lead in the formulation of policies and direction of resources, but leave the implementation to the agencies best placed to undertake it.

Under this construct, planning of complex, blended, “whole of government” operations would be the responsibility of a new and robust strategic planning office under one of the two existing Deputy Secretaries of State, with a very accomplished and senior-level civilian director and a two-star military officer as deputy. This would allow State to tap military expertise at the behest of the White House and develop true civil-military strategies, while leaving implementation questions to case-by-case decisionmaking depending on the specific approaches selected. It would clarify that the role of Bureau on Conflict and Stabilization Operations is to focus on recruiting and managing civilians in such operations, and at the same time allow reductions in resources for strategic planning for such operations in the offices of the Joint Chiefs and OSD.

The boundaries of State’s regional bureaus and DoD’s COCOMs’ areas of responsibilities also should be aligned, with State policy advisers (POLADs) to the COCOMs reporting directly to regional assistant secretaries, and each COCOM assigning a senior (06 level) liaison officer to its corresponding regional bureau.

As our military power is used for defined ends (including assistance for building partner capacity), doctrine and practice in Washington and on the ground should ensure that military force is used in ways that support U.S. political objectives and interests (even beyond the defined “end state”). “Reward our friends, punish our enemies, deter our potential adversaries” should be the mantra.

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12 Robinson et al., 2014, pp. 52–59.

Decline of Disciplined, Organizational Messaging Systems

In many ways, the communications revolution and especially the advent of the Internet have helped in the management of national security decisionmaking. Easy, immediate access to press reporting in hundreds of local languages (and now social media postings) gives intelligence analysts and decisionmakers news of important events and an immediate feel for foreign perspectives and political pressures. Secure video teleconferencing technology lets ambassadors, overseas commanders, and traveling policymakers participate remotely in Washington policy debates, which likely injects realism and immediacy into conversations.

But the communications revolution has hindered the coherence of decisionmaking in one important way: It has led to the decline of the use of formal organizational messaging systems, and its effective replacement by informal email messaging. Email is, of course, vital for context and for supplementary information, but organizational messages—which flow between institutions, such as the State Department’s “telegrams,” and which constitute searchable, retrievable records—have long been the way that instructions are issued and developments reported to all foreign affairs agencies at once.

In our hyperconnected age, however, the clearance and approval processes associated with formal organizational communications have made them seem cumbersome.

Moreover, what had been a tendency of the State Department and other agencies to make organizational messages available interagency on the SIPRnet \(^\text{14}\) was disrupted by the damaging leak of more 200,000 State cables in the Wikileaks disclosures that had been downloaded from this network. As a result, practitioners admit to an explosion of official instructions and reporting now first taking place by classified or unclassified email channels. \(^\text{15}\) One problem with the email channel is that the messages are

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\(^{14}\) The “Secure Internet Protocol Router Network” between U.S. government agencies allows exchange of messages up to the “Secret” level.

\(^{15}\) In two terms of the Clinton administration, there were 1 million emails in the White House system. In George W. Bush’s two terms, 5.3 million. After six years of the Obama administration, thus far there have been 10 million emails logged in the NSC system. (See Rothkopf, 2014, p. 366). Similarly, the State Department’s Office of the Historian estimates that the department produces 2 billion emails a year. (See Matthew Connelly and Richard Immerman, “What Clinton’s Emails Really Show,” *New York Times*, March 4, 2015, p. A25).
routed to and from individuals, rather than organizations. In the State Department’s new “SMART” (State Messaging and Archive Retrieval Toolset) messaging architecture, emails can be preserved as “record” messages, but few actually are.\textsuperscript{16}

Another problem is that NSC, State, Defense, and Treasury all have separate classified email systems. Though this may have security benefits and the systems interconnect, some key functions, such as directory search, are not available between systems. In the interagency context, this means that offices and organizations that perhaps are not directly involved, but do have a need to understand and act in accordance with U.S. government strategies and policies, often are left in the dark (or reliant on press coverage).

\textbf{Recommendation: Enforce Use of Organizational Messaging Systems}

The Executive Secretaries of the NSC, State, and Defense should be instructed to crack down on abuse of email channels for instruction and reporting, and institute wide U.S. government usage of the State Department’s “SMART” messaging architecture to send, retrieve, and archive organizational messages of all sorts.\textsuperscript{17} They must also ensure that every relevant agency “gets the memo” the first time, a task that is surprisingly difficult but that would greatly improve policy coordination.

\textbf{Including the Right Agencies}

National security policy increasingly involves interests and expertise that are beyond the confines of State, Defense, or even Intelligence Community domains. Economic and

\textsuperscript{16} The Office of the State Department Inspector General found that in 2011, employees identified only 61,156 record emails out of more than 1 billion emails sent (Office of Inspections, Office of the Inspector General, Department of State, Review of State Messaging and Archive Retrieval Toolset and Record Email, ISP-I-15-15, 2011, p. 1).

\textsuperscript{17} With a similar logic, the PNSR suggested: “To enable cross-departmental information sharing, we recommend the creation and development of a collaborative information architecture. Parallel with the construction of this information architecture, the PSC Executive Secretariat must develop overarching business rules for interdepartmental communications and data access in order to eliminate bureaucratic barriers presently hindering the flow of knowledge and information” (PNSR, 2008, p. xiv).
financial issues affect the stability of our economy and thereby our national security. Financial crises can affect the political stability of such key allies and partners as Greece. Trade issues are strategic as well, as is evident in the negotiation of new comprehensive trade and investment agreements with Asia and Europe. Environmental threats and natural disasters affect political stability in fragile states. The Environmental Protection Agency (EPA), Department of Agriculture, and Department of Energy (DOE) officials have much to contribute. Development issues should benefit from the analyses and policy insights of senior USAID officials. Policymaking in other fields is improved by bringing in other agencies, such as health (Department of Health and Human Services), environment (EPA), or aviation (Department of Transportation). DOE Secretary Ernest Moniz made a major contribution to the recent Iran nuclear deal.

Nevertheless, some administrations simply interested in getting things done in a bloated system succumb to the temptation to exclude officials and agencies that are known to be skeptical of bruited policy approaches. This is almost always a mistake, as Richard Haass writes in the context of his analysis of the Iraq war decisions: "Formal decision making can be time consuming, can increase the chance of leaks, can stifle innovation, and are no guarantee against groupthink and error. Nevertheless, rigorous and inclusive policy development mechanisms can improve the quality of policy, protect leaders from themselves and the shortcomings of those around them, and increase the odds that implementation faithfully reflects what is sought."18

**Recommendation: Issue Clear Presidential Instructions to Ensure Representation**

The next President should establish guidelines and specific instructions to the NSC to ensure broad representation of interests and points of view during the analysis phase prior to decisionmaking, and in the oversight of implementation. Financial crises are a good example. For example, senior Treasury officials should continue to participate in NSC staff-led discussions when countries of concern find themselves in financial crisis, and Treasury should open up its internal debates on such issues to foreign and defense officials. This need not mean large numbers of officials representing duplicative views,

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but if the topic is a trade dispute with a major country, there is a case for including the departments of Agriculture and the Treasury along with State and Commerce and the USTR. A smaller NSC staff can be tasked with reaching out to all of the affected stakeholders, making sure the right officials from the right agencies are invited to the conference table, flushing out disagreements, identifying shared priorities, formulating choices, and moving the issue upward for decision by senior officials. In cases when the President or deputies deem an issue not ripe for decision, the NSC staff should be encouraged not to hold more meetings in the meantime.

**Integrating Intelligence Insights**

It has always been a tricky task for national security decisionmaking systems to appropriately factor in intelligence analysis and insights. The United Kingdom has long had a single, senior-level Joint Intelligence Committee led by a senior career official. The U.S. government has a number of coordination structures and processes, the Office of the DNI (which itself has a large staff), the National Intelligence Council, and the tradition of requesting periodic National Intelligence Estimates and/or Special National Intelligence Estimates. Yet many after-the-fact analyses of the run-up to the Iraq war were critical of the intelligence communities of the United States and the United Kingdom for in some cases providing the findings that policymakers expected to see and ignoring contrary indications. And the tendency is not limited to the Iraq case or the Bush administration. Histories of the Kennedy administration generally conclude that President Kennedy relied for intelligence in the Bay of Pigs on CIA’s proponents of the operation, who had an incen-

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20 Vali Nasr describes the distortion of intelligence analysis to support policy assumptions in discussing how the United States saw what it wanted to in Pakistan President Musharraf’s conception of “Jinnah’s Islam.” Nasr said he remarked to an analyst that “the whole thing is a shameless autocrat’s cynical and transparent manipulation.” The analyst replied, “Well, our customers are very interested to know how we can support it. . . . You have no idea how much of this [our customers] lap up. We have to write a report” (Vali Nasr, *The Dispensable Nation: American Foreign Policy in Retreat*, New York: Anchor Books, 2013, p. 67).
tive to predict success. And even had the processes been better and less politicized, the findings might not have been different, merely more qualified with uncertainties. But the pendulum has swung. Now, intelligence insights are more systematically integrated into the policy process, though recent senior officials note the effect may be to reinforce risk aversion. And there seems to be an effort to protect analysts, not so much from policymaking process as from the wider scholarly and analytical communities. That seems unwise, and not justified by security considerations.

**Recommendation: Integrate Intelligence Analytical Insights into Decisionmaking, and Ensure Intelligence Analysts Have Appropriately Wide Scope**

Intelligence insights—whether based on classified matter, open-source materials, or interaction with experts outside of government—should be factored in at all stages of decisionmaking. We should seek clear understanding of adversaries and appreciate the political dynamics affecting our allies (which can be best understood from open source and the insights of outside specialists). Iconoclastic judgments and views should be encouraged and factored in.

**Groupthink and Embedded Assumptions**

A corollary to making effective use of intelligence is making room for outside-the-box thinking. Former participants in national security decisionmaking processes at all levels

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23 One former senior administration official observed that National Intelligence Managers (responsible for coordination of taskings and working for the DNI) have generally replaced the National Intelligence Officers at NSC staff-led IPCs, which perhaps facilitates downward information flows but deprives the IPCs of relevant analytical insights (Interview with former Obama Administration policy official, July 25, 2014).

often observe that the range of options considered are often narrow, constrained by previous decisions and public statements, assumptions not sufficiently examined, and branches and sequels of proposed policy decisions not systematically examined. Decisionmaking processes have a tendency toward minimalism, taking decisions sufficient unto the day. But there is a benefit to explicit "red teams" tasked with challenging assumptions, anticipating the reactions of adversaries, allies, and neutrals to proposed courses of action, and challenging the path dependence of previous decisions. In any case, adaptive, responsive organizations normally have established reflective lessons-learned efforts to capture insights from policy initiatives at all levels, both to understand those that work well and therefore should be replicated, and approaches that failed to work for reasons that could have been anticipated but were not.

Recommendation: Increase Use of Red Teams and Lessons-Learned Efforts
Reform of the national security decisionmaking system should include ways to ensure trusted "red teaming" for important policies before the decision, and careful lessons-learned reviews afterward.25 Ideally, the Intelligence Community would recruit and manage red teams to challenge assumptions on policy directions of high strategic importance.

Continuity, Integration, and Professional Staff Development

In 2008, the PNSR recommended "the formation of a National Security Professional Corps (NSPC) in order to create a cadre of national security professionals specifically trained for interagency assignments."26 The concept was that these senior national security managers would rotate among agencies with national security responsibilities as a way to foster cooperation and "joint-ness" among the agencies. Such managers would

25 Lessons-learned analyses are carried out sporadically by the military, but seldom, if at all, in civilian agencies (recently, USAID is a notable exception). Not only should State, Treasury, and OSD set up dedicated lessons-learned programs, but civilian perspectives should be brought into the military studies.

26 PNSR, 2008, page xiii.
undoubtedly help in the ways the project envisaged, but the proposal faced daunting opposition from agencies, the complexities of differing civil, foreign, and military personnel systems, and skepticism from political appointees that such managers would constitute a class of “mandarins” resistant to political guidance. Some of the benefits of cross-agency perspective, however, can be obtained by easing bureaucratic and legal obstacles to systematic secondments between and among national security agencies (especially if Congress would fund dedicated personnel slots for the practice), and by supporting training initiatives. Generations of State, Commerce, and USDA officials, for example, have been seconded to USTR for trade negotiation functions, and the practice of American trade policy is much stronger for it.

**Recommendation: Build National Security Professionals**

While some Foreign Service Officers have been seconded to OSD’s Policy and to military commands as POLADs, and senior Defense managers have been seconded to State, the practice can and should be strengthened and given a legislative basis. The smaller, more strategic NSC staff advocated here also would attract the best and brightest of senior managers.

A formal program for Senior Executive Service SES and GS14/15-level secondments between national security agencies should be established and funded by Congress. Moreover, steps should be taken to ensure Civil Service and Foreign Service personnel seconded to the White House or other agencies are eligible for step and grade increases during their secondments. The best and the brightest deserve the same opportunities as their counterparts who are working at their home agencies or departments.

The Foreign Service Institute, the National War College, and the CIA’s training directorate should collaborate on the establishment (or re-establishment) of a cooperative joint training program for fast-track versatile officials on the cusp of senior interagency responsibilities, akin to the State Department’s highly respected (but canceled) Senior Seminar.
Overuse of Czars

In light of the difficulties of organizing effective and sustained action on a complex area of policy, or to demonstrate that the United States takes an issue area seriously, successive administrations increasingly have resorted to the use of special envoys, special representatives, coordinators, or, more colloquially, “czars” to assume responsibility for an area of policy. Rothkopf identified more than 40 regional and functional bureaus, and other “coordinators” at State who in theory reported directly to the Secretary.\textsuperscript{27} The American Diplomacy at Risk study identified 59 diplomatic functions headed by individuals titled Special Adviser, Envoy, and Representative as of January 30, 2015.\textsuperscript{28} Across the administration, there are many more such single purpose “czars.” Some of these positions have been established by Congress to goad an administration to take action (or at least pay attention to) an issue; others were set up by the White House as prestigious jobs for prominent political supporters.

In some critical situations that merit a short-term focus or sustained whole-of-government approach but have no obvious lead, a special envoy-type position might make sense. For example, former chief of staff for Vice President Al Gore and coordinator for the 2009 stimulus plan implementation Ron Klein took on the troubled Ebola response effort for a short period of time, and Lt. General Douglas Lute was appointed to follow the Iraq war developments from the White House and across administrations (and the Afghanistan war somewhat later).\textsuperscript{29} But our friends and allies rarely have counterpart envoys. Used too widely, these positions can lead to rivalries with existing bureaucracies and impede cross-issue trade-offs with allies or adversaries.

\textsuperscript{27} Rothkopf (2014, p. 248) recalls observing in 2009 that the Obama administration alone was responsible for producing more czars than the Romanov dynasty.


Recommendation: Make Rare Use of Czars

All special envoy, coordinator, or representative positions should sunset with each presidential term (if not before) and the clear presumption should be that existing senior officials take responsibility for pressing national security issues.\(^\text{30}\)

\(^{30}\) A good example is the Iran nuclear issue, where negotiations in the P5+1 format (China, France, Russia, the United Kingdom, and the United States; plus Germany) were led by the State Department’s Under Secretary for Political Affairs (with direct engagement by the Secretary of State as needed) rather than a special envoy. This allows the Under Secretary to engage with her counterparts on a wide range of other policy areas that are important to our allies in this effort.
CHAPTER SEVEN

Conclusion: Strategizing, Decisionmaking, and Policy Implementation

As long as the United States is a world power with global interests and responsibilities, the development of a coherent national security and foreign policy strategy will be essential to effective international engagement. Otherwise, our dealings with the world will be reactive, short term, and tactical. Even presidential statements of strategic intent will be declaratory, without the credibility of operational significance. With simultaneous, serious challenges facing the nation across the globe, new arenas for competition and cooperation, and a widening scope of actors that can help or harm the United States, national security decisionmaking structures need to change.

The next President has an opportunity to put in place more strategic, adaptive, reflective, coordinated, and faster-moving structures. He or she can force the sclerotic U.S. government to achieve coherence and sustainability in national security policy by breaking organizational stovepipes, reducing bloat at the top of the structures and the agencies, improving internal and external messaging, and becoming better at looking ahead. Simply put, our institutions need to do less at the top, delegate more, and insist on accountability. That will help ensure a focus on what is important, rather than having those issues overwhelmed constantly by the immediate.

When considering American national security decisionmaking and management arrangements, elements of the system are based on statute, but each President can shape the system to his or her management style and perceived needs. That may be true for

Simply put, our institutions need to do less at the top, delegate more, and insist on accountability.
the President's immediate aides and work style. But every President needs a decision-
making system that harnesses the full capabilities and accumulated wisdom of the U.S.
government and the nation's many stakeholders. The trimmer, more-focused system
recommendations proposed here are intended to help the nation effectively formulate
and carry out the more agile and aware national security strategies the nation will need
in the 21st century. The adoption of such principles and arrangements could prove to be
critical to the next President's success in advancing U.S. interests in a turbulent world.
### Abbreviations

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>CIA</td>
<td>Central Intelligence Agency</td>
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<td>COCOMs</td>
<td>combatant commanders</td>
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<td>DC</td>
<td>Deputies’ Committee</td>
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<td>DNI</td>
<td>Director of National Intelligence</td>
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<td>DoD</td>
<td>Department of Defense</td>
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<td>IPC</td>
<td>interagency policy committee</td>
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<td>ISIS</td>
<td>Islamic State of Iraq and Syria</td>
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<td>NGO</td>
<td>nongovernmental organization</td>
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<td>NSC</td>
<td>National Security Council</td>
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<td>NSS</td>
<td>National Security Staff</td>
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<td>OSD</td>
<td>Office of the Secretary of Defense</td>
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<td>PC</td>
<td>Principals’ Committee</td>
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<td>PNSR</td>
<td>Project on National Security Reform</td>
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<td>POLAD</td>
<td>policy adviser</td>
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<td>RAHS</td>
<td>Risk Assessment and Horizon Scanning</td>
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<td>SMART</td>
<td>State Messaging and Archive Retrieval Toolset</td>
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<tr>
<td>USAID</td>
<td>United States Agency for International Development</td>
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<td>USTR</td>
<td>U.S. Trade Representative</td>
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George, Suzy, “Fine-Tuning NSC Staff Processes and Procedures,” White House blog post, June 22, 2015. As of March 11, 2016: https://www.whitehouse.gov/blog/2015/06/22/fine-tuning-nsc-staff-processes-and-procedures


PNSR—See Project on National Security Reform.


About the Author

Ambassador Charles Ries is the vice president, International, at the RAND Corporation, and a Senior Fellow, whose research has focused on the economics of development, the Middle East, and Europe. He retired from the U.S. diplomatic service in 2008 after a distinguished career that began during the Carter administration.

Among other assignments, he has served as an economics officer in three embassies, as Deputy Assistant U.S. Trade Representative (1990–1992), Minister-Counselor for Economic Affairs in London and Brussels, Principal Deputy Assistant Secretary of State for European Affairs (2000–2004), Ambassador to Greece (2004–2007), and Coordinator for Economic Transition in Iraq (2007–2008), where he received the Department of the Army’s Outstanding Civilian Service Award.

Ries has also received the State Department’s Cordell Hull Award for Senior Economic Officers, the Distinguished Honor Award, the Presidential Meritorious Service Award, the Rockwell Schnabel Award for U.S.–EU Relations, and several Superior Honor Awards. He is a member of the Board of Directors of the Academy of American Diplomacy.

During a leave of absence from RAND in 2010, Ries was executive vice president of the Clinton Bush Haiti Fund.
Every president needs a decisionmaking system that harnesses the full capabilities and accumulated wisdom of the U.S. government and the nation’s many stakeholders. Yet national security professionals—the officials who must advise the president on the most-difficult decisions—cite a range of structural problems that hinder effective policymaking. While a more focused and timely decisionmaking process will not necessarily improve outcomes for the United States, poor choices could be calamitous. This Perspective analyzes a range of management challenges in the national security system and presents eight recommendations for strengthening U.S. decisionmaking and oversight of policy implementation. Among the conclusions:
The National Security Council staff size should be reduced to better focus on high-priority areas. Civil-military operations should be planned by a new joint office at the State Department with a military general officer as deputy. Red-team and lessons-learned efforts would help ensure that the system is adaptive and responsive. Better integration of intelligence insights and secondments of senior officials across agencies can improve the quality and coherence of decisionmaking. And the use of special envoys, or “czars,” should be limited.
Demystifying the Citizen Soldier

Raphael S. Cohen
Preface

In his General Ronald R. Fogleman Award–winning essay, Air National Guard Colonel Mark Meyer claimed, “With a strong National Guard and its membership of citizen soldiers, national security policy will remain consistent with the will of the people—the ultimate requirement of our democracy.” For Meyer and others, the Guard’s importance to American society runs far deeper than the missions it conducts or the money it saves the U.S. Department of Defense. These advocates argue that the Guard historically has served as the linchpin for American national security, prevented the United States from fighting controversial foreign wars, and—most important of all—embodied the ideals of “citizen soldier.” While most of today’s debate about the active-reserve component mix rightly focuses on cost or utility, these historical and sociological claims also need to be critically evaluated.

This analysis, conducted in RAND Project AIR FORCE’s Strategy and Doctrine Program, evaluates these claims and examines the Guard’s

- centrality to American national security
- ability to prevent the United States from fighting controversial foreign wars
- embodiment of the ideals of the citizen soldier.

RAND Project AIR FORCE

RAND Project AIR FORCE (PAF), a division of the RAND Corporation, is the U.S. Air Force’s federally funded research and development center for studies and analyses. PAF provides the Air Force with independent analyses of policy alternatives affecting the development, employment, combat readiness, and support of current and future air, space, and cyber forces. Research is conducted in four programs: Force Modernization and Employment; Manpower, Personnel, and Training; Resource Management; and Strategy and Doctrine. The research reported here was prepared under contract FA7014-06-C-0001.

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Summary

The National Guard is often portrayed as the modern heir to the colonial militia and as retaining at least three of the latter’s three defining attributes—a key instrument of American national security, a check on federal power, and home of today’s “citizen soldiers.\(^1\) Evaluating this assertion prompts three questions. First, how has the National Guard transformed from a militia to the institution it is today? Second, what does the term “citizen soldier” mean? And third, how have the militia and the National Guard embodied these three attributes at various points during history? Arguably, the answers to these questions shape more than our understanding of the National Guard; they also play to broader debates about civil-military relations and the intersection of military and civilians in American society today.

This report explores how the term citizen soldier has been defined in academic literature—as compulsory, universal, legitimate service by civilians—and then looks at how the National Guard has evinced these attributes at various periods in its history. Since the United States’ founding, the militia—and later, the National Guard—slowly evolved into an increasingly formidable warfighting force and increasingly important tool for national security. This evolution, however, has come at the expense of two other attributes of the colonial militia—serving as a check on federal power and filling its ranks with citizen soldiers. The report concludes that there are inherent and increasing tensions among being a warfighting force, serving as a check on federal power, and embodying the ideals of a citizen soldier, and it is not clear that the Guard—or any other force for that matter—can fully reconcile them.

Ultimately, the Guard’s transformation from citizen soldiers to a professional force may very well be inevitable and is likely a positive development for American national security. It is, however, important to realize that this trend is occurring, to demystify the citizen soldier, and to see the force for what it is.

I would like to thank RAND Project AIR FORCE for funding this project, and Dr. Paula Thornhill for her invaluable guidance and critiques of previous drafts. Dr. Sean Zeigler and Dr. Gian Gentile provided critical help with the research phase. Mr. Dick Anderegg, Dr. Lisa Harrington, and Dr. Richard Kohn provided thoughtful critiques of an earlier draft and shaped both the final product and my thinking on these issues immeasurably. Brigadier General Timothy Cathcart also provided a thoughtful critique of an earlier draft. In addition, the attendees of a presentation of this paper hosted by the Secretary of the Air Force-Chief of Staff of the Air Force Executive Action Group provided important feedback. Jane Siegel, Kimbria McCarty, Amanda Hagerman-Thompson, and Kari Thyne helped with formatting and editing the document and navigating the RAND publication processes.
<table>
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<tr>
<td>9/11</td>
<td>terrorist attacks of September 11, 2001</td>
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<td>ANG</td>
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1. Introduction

In February 2012, the U.S. Air Force—under pressure from Congress to reduce spending—announced plans to cut 3,900 airmen from the active component force, 900 from the Air Force Reserve, and 5,100 from the Air National Guard (ANG), and to retire 500 aging aircraft—primarily from the ANG.¹ The proposal sparked an uproar from the National Guard Association of the United States, the National Governors Association, and the newly created Council of Governors. The National Governors Association even “took the unprecedented step of asking Congress to reject the Air Force’s budget out of hand.”² By April, Secretary of Defense Leon Panetta had restored 2,200 Guard positions but even this was insufficient to quell Guard supporters in Congress and in the National Governors Association.³

Today, a similarly heated debate is occurring within the U.S. Army over who should control that service’s AH-64 Apache helicopters—and, more broadly, who should absorb the coming budget cuts forced upon the service by sequestration.⁴ Stepping back from the specifics, these debates demonstrate the Guard’s powerful presence in American politics and society at large. Indeed, in its coverage of the ANG’s budget battle, the New York Times quipped, “In combat zones, National Guard units generally take their orders from active-duty commanders. Not so in Washington.”⁵

Explanations for the Guard’s widespread appeal fall broadly into three categories. First, there are political reasons: The Guard’s constitutional mandate, dual federal-state nature, and geographical dispersion make it uniquely positioned to respond directly to states’ needs—from natural disaster relief to supplementary law enforcement—and, consequently, to have a strong influence on congressional decisionmaking. Second, there are economic and utilitarian arguments: The Guard can provide a cost-effective adjunct to the active component,⁶ and it may

⁴ Sydney Freedberg, Jr., “National Guard Commanders Rise in Revolt Against Active Army; MG Rossi Questions Guard Combat Role,” Breaking Defense, March 11, 2014b.
⁵ Dao, 2012.
⁶ For example, the National Guard Association of the United States, the Guard’s semiofficial lobbying arm, proclaims, “The numbers speak for themselves. For 11 percent of the Army budget, the Army National Guard provides 32 percent of the Army’s total personnel and 40 percent of its operating force. For 6 percent of the Air Force budget, the Air National Guard provides 19 percent of the Air Force’s total personnel and 30–40 percent of the fighter, tanker and airlift capacity.” National Guard Association of the United States, Legislative Strategic Plan, 113th Congress, undated-b, p. 5. Similarly, the National Guard’s Posture Statement repeatedly emphasizes its cost-effectiveness. National Guard Bureau, 2015 National Guard Bureau Posture Statement, Washington, D.C., 2015, pp. 7, 9, 25, 39, 51, 61.
attract skills found in the civilian world that are not easily retained in the military.\footnote{For example, see Commission on the National Guard and Reserves, Transforming the National Guard and Reserves into a 21st-Century Operational Force, final report to Congress and the Secretary of Defense, January 31, 2008, p. 9; and John Nagl and Travis Sharp, An Indispensable Force: Investing in America’s National Guard and Reserves, Washington, D.C.: Center for a New American Security, September 2010, pp. 14-15. For Dempsey and Hagel arguing that the National Guard and the reserve component at large should complement the capabilities in the active component, see U.S. Department of Defense, Quadrennial Defense Review 2014, Washington, D.C., March 4, 2014, p. 60; and Chuck Hagel, U.S. Secretary of Defense, “FY15 Budget Preview,” press briefing, February 24, 2014.} Finally, there are historical and sociological explanations, which are often mentioned but rarely evaluated: The Guard—which claims the mantle of modern heir to the colonial militia—remains deeply rooted in American tradition and plays a critical role in civil-military relations.\footnote{For example, see National Guard, About the Army National Guard, undated; Gus Hargett, President, National Guard Association of the United States, testimony delivered before the Reserve Forces Policy Board’s Task Group, July 16, 2013, pp. 2–3; and Michael D. Doubler, The National Guard and Reserve: A Reference Handbook, Westport, Conn.: Praeger Security International, 2008, p. 1.} While much of the analytical effort directed toward the Guard rightly focuses on economic and utilitarian arguments, these latter claims also deserve attention.\footnote{For example, see Albert A. Robbert, Costs of Flying Units in Air Force Active and Reserve Components, Santa Monica, Calif.: RAND Corporation, TR-1275-AF, 2013; and Joshua Klimas, Richard E. Darilek, Caroline Baxter, James Dryden, et al., Assessing the Army’s Active-Reserve Component Force Mix, Santa Monica, Calif.: RAND Corporation, RR-417-1-A, 2014. For official studies, see Commission on National Guard and Reserves, 2008; and Reserve Forces Policy Board, “Eliminating Major Gaps in DoD Data on the Fully-Burdened and Life-Cycle Cost of Military Personnel: Cost Elements Should be Mandated by Policy,” Falls Church, Va., January 14, 2013.}

Over the next six chapters, I examine the historical evolution and sociological role of the National Guard. First, I analyze three key claims about the National Guard: that it is the principal instrument of American national security, that it prevents the United States from fighting controversial foreign wars, and that it embodies the attributes of the “citizen soldier.” I then examine each of these claims during the militia era (from the founding of the United States until 1830, when the enrolled militia system began to break down), the volunteer period (from 1831 until the Dick Act of 1903, when the federal government began to assert more authority over the Guard in exchange for increased funding), the strategic reserve (lasting roughly until the end of the Cold War), and the operational reserve (from the end of the Cold War until today, when the Guard began to be used regularly in overseas operations). I conclude with the implications of the study’s core findings for today’s policy debates: Two of these historical and sociological claims are true—with caveats. Only the idea that the National Guard and militia prevented the United States from fighting foreign wars does not appear to have a firm empirical base. More important, embedded in these three claims is an inherent tension that has only increased over time, and it is not clear that the Guard—or any force, for that matter—can fully reconcile them.
2. Defining and Evaluating the Mystique of the Citizen Soldier

The National Guard’s mystique starts with a seemingly straightforward historical claim: Even before its founding, the Guard served as the linchpin in U.S. national defense. Indeed, the Army National Guard claims that the Guard is the “the oldest component of the United States armed forces,” tracing its roots to the first militia regiment formed in Massachusetts in 1636.\(^1\) National Guard Association President Gus Hargett said, “If you look back in history, you’ll find a nation that relied on citizen soldiers to protect and defend our country for several hundred years.”\(^2\) Similarly, National Guard officer and historian Michael D. Doubler argues that the Guard’s role in “defending the nation is as old as America itself” and that it played “an indispensable role in defeating the nation’s enemies,” throughout its history and particularly in the 20th century.\(^3\) Even the Guard’s symbol—a militiaman resolutely grasping a musket—evokes images of the Minutemen who defended the nascent American state at Lexington and Concord and have been there for the country ever since.

Air Force Chief of Staff General Ronald Fogleman—ironically, a former active-component airman and not a Guardsman—attributes even more importance to the militia and the Guard’s role in the history of American defense. In a 1995 speech, he asserted, “a fundamental precept of our American military tradition is that the United States of America is a militia nation.”\(^4\) By a *militia nation*, he meant, “in peacetime, the U.S. maintained a small full-time military that was augmented during wartime with state militia and eventually, the National Guard. Once a conflict was over, the nation rapidly demobilized and returned to its reliance on militia or Guard forces.”\(^5\) More recently, Fogleman claimed that the militia model provides a construct for how to fight wars in the future and solve current defense budget shortfalls. In a 2012 article, he argued that “we should return to our historic roots as a militia nation.”\(^6\) More specifically, he said, “we should return to the constitutional construct for our military and the days when we maintained a smaller standing military and a robust militia.”\(^7\) Ultimately, Fogleman’s characterization suggests a testable hypothesis: If the United States is, indeed, a “militia nation,” the majority—or

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\(^1\) National Guard, undated.
\(^2\) Hargett, 2013, p. 3.
\(^3\) Doubler, 2008, p. 1.
\(^7\) Fogleman, 2012.
at least the plurality—of the combat power used to fight U.S. wars should come from the militia—or, later, the National Guard.

According to its proponents, the Guard defended the United States in another sense as well—by preventing it from fighting wars in the first place. As former Maine Army National Guard Adjutant General James Campbell said, “A less often discussed, but nonetheless critical, function of this organizational method was recognized by the founders of the nation—a small standing regular force and reliance for the preponderance of our security on the militia acts as a significant brake on executive power, requiring Congress either to authorize a federalization of the militia or vote for an expansion of regular forces to mobilize the nation for engagement in a major conflict.”8 Indeed, some active component officers also accepted this logic. Most notably, after the Vietnam War, Army Chief of Staff Creighton Abrams designed the service to rely more heavily on the reserve component (both Army Reserve and Army National Guard) to prevent a repeat of the highly unpopular war and “to maintain a clear linkage between the employment of the army and the engagement of public support for military operations.”9 This, in turn, leads to a second testable claim: If the militia and National Guard—and, in latter times, the reserve component at large—performed this function, there should be a historical record of this structure preventing the United States from fighting wars.

The Guard’s mystique runs deeper than a storied lineage or its role as a check on federal power; rather, it is bound up in the concept of the citizen soldier. This idea pervades the Guard’s public statements. In his recent testimony to the Senate Armed Services Committee, Chief of the National Guard Bureau General Frank Grass repeatedly referred to the “citizen-soldiers and airmen” of the Guard, rather than simply as soldiers, airmen, or Guardsmen.10 The label implies that the Guard forms the crucial bridge between the military and the rest of American society. In fact, Grass asserted that the National Guard’s “377-year legacy as an operational force is deeply engrained within the foundation of American strength and values.”11

Some suggest that the Guard serves as the essential link between the American public and military. In his General Ronald R. Fogleman Award–winning essay, Air National Guard Colonel Mark Meyer claimed, “With a strong National Guard and its membership of citizen-soldiers, national security policy will remain consistent with the will of the people—the ultimate requirement of our democracy,” and “without the existence or use of the National Guard, the nation treads dangerously toward inconsistency between national security policy and the will of

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10 Frank J. Grass, “Army Total Force Mix,” statement before the Senate Armed Services Committee, April 8, 2014.
the people.” Hargett argued similarly: “Living and working in over 3,000 communities across the country, the National Guard is the face of our U.S. military. To lose this direct military-civilian connection is to lose our nation’s long-standing tradition of unquestionable support for our armed forces.” Even some active component officers have echoed this claim. Strategist and author Colonel Harry Summers said in the 1970s that the United States should increase its reliance on the reserves so that “the citizen-soldiers of the National Guard and the Reserve would serve as a bridge between the American people.”

Evaluating this last claim—the National Guard’s role in American society and democracy—proves a more complicated task than evaluating the other two assertions. After all, the concept of “citizen soldiers and airmen” is rather nebulous and ill defined. All American servicemen—active or reserve—either are citizens already or on the path to earning citizenship. Other organizations, aside from the National Guard, also claim the mantle of citizen soldiers. For example, the Virginia Military Institute claims to prepare “cadets to become citizen-soldiers who will serve their country and communities,” since about half of their graduates choose military careers while many others pursue civilian public service careers. Similarly, the U.S. Marine Corps’ recruiting website explicitly states, “We develop quality citizens” under a section labeled “our purpose is our promise.” What, then, makes the National Guard unique?

Academic work often associates citizen soldiers more with conscription-based militaries than with the reserve component. Indeed, military sociologist Morris Janowitz used the term in a 1979 essay to characterize the draft-era military—not the National Guard. Similarly, Eliot Cohen did not answer whether the citizen soldier label should apply to reservists, but argued that “the term seems archaic, even quaint” in the 21st century. Historian Barry Strauss claimed that while “the idea of the citizen-soldier remains alive” across all the components (not just the National Guard), in practice, “the American citizen-soldier is a far less common figure than he was in the era of conscription.” Finally (but perhaps most interestingly), during the height of the Iraq and Afghanistan Wars, sociologist Charles Moskos proposed reinvigorating the citizen soldier concept—not by expanding the National Guard, but by creating a new category of short-

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13 Hargett, 2013, p. 17.
15 Virginia Military Institute, Citizen-Soldier, undated.
16 U.S. Marine Corps, Our Purpose, undated.
term active-duty enlistments. He concluded, "The citizen-soldier proposed here harkens to our nation's militia tradition of national defense."  

In other words, while Janowitz, Cohen, Strauss, and Moskos all seem open to the idea that Guardsmen, in fact, are citizen soldiers, they indicate that other forms of military service may be a better fit.

Even if these works do not directly tackle the Guard's role as citizen soldiers, they lend form to this amorphous concept. Janowitz defines the term based on three dimensions. Military service must be obligatory (compulsory service fulfilling part of one's duties as a citizen), universal (reflective of the nation as a whole, not just one segment of the population) and have legitimacy by democratic standards (or strong popular support).  

Most scholars accept Janowitz's definition. Cohen, for example, also uses a three-part definition: Like Janowitz, he ascribes the obligatory and universal characteristics to citizen soldiers, stating, "in the case of the true citizen-soldier, military service is either an obligation imposed by the state or the result of mobilization for some pressing cause," and the "true army of citizen-soldiers represents the state."  

Cohen, however, substitutes Janowitz's "democratic-legitimacy" characteristic for another dimension: Instead of standing armies staffed by full-time soldiers, "the true citizen-soldier's identity is fundamentally civilian."  

To a varying degree, the National Guard's own definition of what it means to be a citizen soldier reflects these four traits as well. For example, Doubler also emphasizes the obligatory attribute, saying "citizens have a civic duty and moral obligation to defend their local community and the nation from foreign invaders and domestic threats" (emphasis added). In addressing the universal and democratic legitimacy qualities, he suggests that citizen soldiers come from "the very mainstream of society" and "constitute an important link that binds together the government, the military and the people."  

Like Cohen, Doubler highlights the civilian aspect of citizen soldiers. "In times of crisis, citizen-soldiers set aside their personal pursuits and private lives, don the uniform for a temporary period, perform their duties, and return to civilian life."  

Perhaps, this last quality—a fundamentally civilian identity—is the most important of the four attributes. Indeed, in his classic History of the Militia and the National Guard, John Mahon defines citizen soldier as "a person who is primarily a civilian, acting, in war or peace, as a soldier."  

The Cohen-Mahon-Doubler definition, however, prompts the question of what it means to be primarily or fundamentally a civilian. On a basic level, Cohen and Doubler's

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definition implies that soldiering is a temporary occupation for citizen soldiers; these individuals do not intend to make a career of military service. Mahon’s definition suggests that soldiering is a part-time profession and that a majority of one’s day is spent outside the military. On a deeper, if more amorphous level, a citizen soldier’s identity and outlook on the world should more closely reflect those of the broader civilian population, rather those of the military.\textsuperscript{28}

In sum, the historical and sociological underpinnings of the National Guard’s mystique can be reduced to three testable propositions, each of which should have clear observable implications in the historical record (see Table 1). First, the Guard has been the principal instrument of American national security, by providing a plurality of combat forces used to fight America’s wars. Second, the Guard has—by its dual federal-state nature—prevented the United States from fighting controversial foreign wars. Third, the Guard captures the essence of the American citizen soldier by embodying Janowitz and Cohen’s four traits: obligatory, universal, “legitimate” service performed largely by self-identifying civilians rather than active-component soldiers. The question, of course, is the extent to which the evidence fits with these claims. With that, we turn to the National Guard’s historical evolution.

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<th>Claims</th>
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<td>Provided the principal instrument of American security</td>
<td>Provides a plurality of the combat power</td>
</tr>
<tr>
<td>Prevented the United States from fighting wars</td>
<td>Wars not fought</td>
</tr>
<tr>
<td>Obligatory</td>
<td>Compulsory service</td>
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<tr>
<td>Universal</td>
<td>Reflective of the general American population</td>
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<tr>
<td>Legitimate</td>
<td>Well regarded by the American population</td>
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<tr>
<td>Civilian</td>
<td>Temporary (noncareer) and part-time service</td>
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\textsuperscript{28} Doubler alludes to this argument: “Citizen-soldiers bring to the military the fundamental and diverse societal values of entrepreneurship, innovation, pragmatism, risk taking and problem solving, traits that are not always associated with career soldiers.” Doubler, 2008, p. 1.
3. The Militia Era (1775–1830)

At first glance, the American military history of the late 18th and early 19th centuries provides the strongest evidence for the first hypothesis: that the National Guard—or in its earlier incarnation, the militia—served as the principal instrument of American national security. As then—Chairman of the Joint Chief of Staff General Richard Myers said in his 2004 introduction to the Joint Forces Quarterly’s issue on the reserve component, “The New England militia fought at Lexington and Concord, the first engagements of the Revolutionary War, in April 1775. It won the Army’s first battle streamer at Fort Ticonderoga in May 1775. It wasn’t until a month later that the Continental Congress officially established the Continental Army.”¹

A militia-based force also had serious limitations. Indeed, as historian John Shy notes, General George Washington “never ceased complaining about his militia—about their undependability, their indiscipline, their cowardice under fire.”² Washington himself summed it up: “To place any dependence upon the militia is assuredly resting upon a broken staff.”³ As political scientist Ronald Krebs noted, some of the founding fathers turned to the militia because it was the best option available, not because it was the optimal solution. John Adams, for example, believed that “not more than a regiment ‘of the meanest, idlest, most intemperate, and worthless’ would have signed up for the war’s duration.”⁴ Eventually, the United States needed to form a more unified Continental Army (molded by a Prussian military officer, no less) before it could win the Revolutionary War.

Moreover, as the decades drew on, American politicians increasingly became convinced that the militia system could not serve as the principal instrument for American national security in the future. One reason was that the militia system proved unreliable during crises. During the 1786 Shay’s Rebellion, for example, 800 militiamen—sympathetic to the rebels—refused to put down the uprising.⁵ Later, during the War of 1812, mobilizing the militia proved “cumbersome and ineffective” and even when mobilized, militiamen occasionally refused orders—such as to

⁵ Mahon, 1983, p. 47.
cross into Canada, which extended beyond their mandate. Another reason politicians turned away from the militia system was that it proved difficult to manage and costly to outfit. Many militiamen could not afford to equip themselves and federal funds (some $200,000 in 1808) were insufficient to do so (with some estimates of the full costs ranging up to $50 million). Consequently, by 1830, the War Department’s appropriation for the militia equipped only 12,500 men out of an estimated pool of 1–2 million eligible men. As a result, the early republic looked for alternative military solutions.

The second historical claim—that the militia system prevented the United States from fighting wars—proves harder to test, if only because it requires trying to prove a negative referring to wars not fought. But insofar as there is evidence, the record shows little validity to this claim. While the militia system proved unwieldy, the United States fought wars nonetheless—most notably, the American Revolution and the War of 1812, but also a host of frontier skirmishes. When the militia system proved unworkable, the United States looked for alternative options—such as employing a small regular Army and requesting unrestricted volunteers for individual campaigns.

Finally, the third proposition—that the militia embodied true citizen soldiers—has, perhaps, the firmest evidentiary base. Service in the militia was compulsory—on paper, at least, though not always in practice. While the 1792 Militia Act required all white men ages 18 to 45 to enroll in their local militia, “obligatory service fell into obsolescence over the succeeding decades, notwithstanding the letter of the law.” Historian Richard Kohn remarks that even in colonial times, universal enrollment into militia was less a system and more a concept of “a people in arms to ward off an invader,” with a number of exceptions.

The militia was both universal (at least for its day) and composed of true civilians. In theory, the unorganized militia included 719,499 in 1811, approximately 10 percent of the population, although the fighting force was considerably smaller in actuality. It excluded key demographics—notably women and slaves—but included large swaths of the rest of society. And the force was certainly civilian. As historian Jim Dan Hill notes, even the generals and colonels on the rolls “were undoubtedly just as reluctant about assuming the field duty

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7 Mahon, 1983, p. 66.


10 Kohn, 1975, p. 7.

11 Jim Dan Hill, The Minute Man in Peace and War: A History of the National Guard, Harrisburg, Pa.: The Stackpole Company, 1964, p. 11. The population of the United States in 1810 was estimated at 7,239,000.
implications of such ranks and titles as most the men on their mass rosters were reluctant to buy their own arms, uniforms and ammunition.”

As for the legitimacy of the early American militia, many suggest that this was one of the primary strengths of the militia system, although it is hard to say for certain without public opinion data. Despite his misgiving about their military utility, George Washington declared in 1791 that “the militia is certainly an object of primary importance, whether viewed in reference to the national security to the satisfaction the community, or the preservation of order.”

Perhaps, the reason behind Washington’s statement is the militia’s place in society. Shy, for example, argues that one of the militia’s main virtues was giving Americans “a political education conducted by military means,” forcing an apathetic majority to take sides, thereby “nullifying every British attempt to impose royal authority short of using massive armed force.”

Ultimately, the actual militia of the founding era differs from that of popular imagination. Despite the image of heroic Minutemen, the militia was not as central to American national security as some contend, and while the militia system proved an inefficient means of mobilizing men and resources, it did not prevent the United States from going to war. Still, the early militia largely fulfilled the last of the three claims: they were—for better or worse—citizen soldiers.

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12 Hill, 1964, p. 11.
13 Esch, 1903, p. 290.
4. The Volunteers (1831–1902)

In 1831, Delaware abolished its militia system. Between 1844 and 1851, Maine, Ohio, Vermont, Connecticut, New York, Missouri, and New Hampshire followed suit. Other states—including New Jersey, Iowa, Michigan, and California—either exempted their young men from service or removed the threat of prison for failing to pay the militia fine. In its stead, a new militia system based on optional participation came increasingly into vogue—volunteer companies. Volunteer companies in the United States date back to well before the founding: Boston’s Ancient and Honorable Artillery Company was founded in 1638. As the enrolled or compulsory militia declined, these voluntary companies grew in importance and, over the next seven decades, became an increasingly organized, formal institution, eventually evolving into the National Guard of today.

With the rise of volunteer companies, some suggest that the first claim—that the militia provided the principal instrument of American military power—remained true. According to some accounts, the Mexican-American War was “largely fought and won by militia regiments from the Southern and Western States enlisting as volunteers.” During the Civil War, the Union and Confederate armies consisted mostly of state-raised regiments, similar to the National Guard’s structure. And the state-based “volunteer” forces ultimately contributed more than 223,000 soldiers and officers to the Spanish-American War, composing the vast majority of the Army’s overall end strength.

On closer examination, however, most of these volunteers were not members of the volunteer companies. On January 1, 1861, just prior to the Civil War, the volunteer strength of the Northern state militias numbered 41,190 personnel spread throughout 781 companies. Abraham Lincoln exhausted the North’s supply of militiamen when he called for 75,000 men early on in

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4 Esch, 1903, p. 291.
5 For grand total figures, see Adjutant General’s Office, Statistical Exhibit of Strength of Volunteer Forces Called Into Service During the War With Spain; with Losses From All Causes, Washington, D.C.: Government Printing Office, 1899; reprinted online by the U.S. Army Center of Military History Historical Resources Branch, Spanish-American War: Volunteer Forces, undated. By way of comparison, on November 29, 1898, the Army had in total 178,000 officers and men—only 63,000 of them regulars. Graham A. Cosmas, An Army for Empire: The United States Army in the Spanish-American War, College Station, Texas: Texas A&M University Press, 1998, p. 304.
6 Todd, 1941, p. 153.
the war. Consequently, the Union Army largely consisted of men with “no previous training in
the school of the soldier” who either volunteered or later were drafted “under special statutes”—
not as militia. The same phenomenon also occurred in other American wars. For example, the
Spanish-American War volunteers were “in reality a mass of untrained civilians commanded by
National Guard officers and stiffened by a thin cadre of old militiamen.” That is to say, while
the United States turned to citizen soldiers to fill out the Army’s ranks during the 19th century,
this often did not mean turning to the militia (or later, the National Guard).

Moreover, the senior leadership often came from the regular Army. For example, while the
Civil War was fought mostly by state-based regiments, regular Army officers led most of these
troops. Generals Ulysses S. Grant, William Tecumseh Sherman, Robert E. Lee, James
Longstreet, and Thomas “Stonewall” Jackson—and many others—all graduated from the U.S.
Military Academy at West Point and spent much (although not all) of their careers as full-time
soldiers. Similarly, during the Spanish American War, President William McKinley appointed
26 major generals and 102 brigadiers for the “volunteer” companies, most of whom (19 and
66 respectively) came from the regular army.

While the volunteer companies did not provide the principal tool for fighting wars, they
increasingly took on an active role at home and with it, a new name—the National Guard. New
York first used the label “National Guards” for its militia in 1824, in honor of Gilbert du Motier,
the Marquis de Lafayette, when he visited the city (Lafayette had commanded the French
National Guards in 1789). The term picked up popularity after the Civil War. In 1869, New
Jersey became one of the first states to switch its militia’s title to the “National Guard.”
Less than three decades later, in 1896, only three states retained the name “militia,” with the rest
opting for the term “National Guard.” The term “militia” hung on in certain areas: The War
Department still used the term “organized militia” to refer to the National Guard at least as late

7 Esch, 1903, p. 291; and Todd, 1941, p. 153. Mahon notes that “the militia rolls in the North showed 2,471,377
men,” but goes on to say that these dated to 1827, so, in reality, states often could only raise 1 or 2 percent of their
8 Todd, 1941, p. 153.
9 Elbridge Colby and James F. Glass, “The Legal Status of the National Guard,” The Virginia Law Review, Vol. 29,
10 Cosmas, 1998, p. 119. Mahon estimates that 40 percent of the volunteer force had no previous drill experience.
That said, since he estimates the National Guard’s size at the start of hostilities at 114,000 strong, but the total
number of volunteers at 223,000, there are reasons to question this estimate. Mahon, 1983, pp. 128, 125, 133.
12 Colby and Glass, 1943, p. 842.
13 Colby and Glass, 1943, p. 842.
14 Colby and Glass, 1943, p. 842.
as 1912, and the "Militia Bureau" officially changed its name to the "National Guard Bureau" in 1933.\textsuperscript{15}

The shift of labels away from militia to National Guard was more than just semantics. Formed around old volunteer companies and combining the remnants of the old militia, the National Guard became the instruments state governors used to respond to domestic unrest. The task was very much in keeping with the intended function of militias as outlined in the Constitution—to "execute the Laws of the Union, suppress Insurrections, and repel Invasions."\textsuperscript{16} The new incarnation, however, gave state governors a more capable tool to perform these tasks, and from end of the Civil War to 1906, the Guard was called out 481 times—mostly to handle race conflicts, political disputes, and industrial disputes; guard prisoners; enforce state laws; and perform a variety of other law-and-order functions.\textsuperscript{17}

The National Guard also became increasingly important for coastal defense during this period. Particularly in the latter half of the 19th century, with the rise of steel warships powered by steam engines, concern grew about the vulnerability of coastal areas to long-range offshore bombardment. Given the regular army’s small size, the, Secretary of War William Endicott saw the Guard as a solution. To this end, Congress increased federal support to the Guard to $400,000 in 1887—marking one of the first significant boosts in funding for the Guard since 1808 and reaffirming the Guard’s role in homeland defense.\textsuperscript{18}

The second claim—that the militia prevented the United States from fighting controversial foreign wars—proved increasingly untrue. To be sure, some advocates for the militia (and later the Guard) protested fighting foreign wars. For example, writing in The North American Review in 1900, Charles Clark lambasted the "perverted public sentiment" that called for using the Guard abroad.\textsuperscript{19} "It is wholly unreasonable to expect them [the National Guard] to sacrifice their business interests, and inflict hardships upon their creditors and families by abandoning business to go with their organizations to different points in America or foreign countries," he wrote.\textsuperscript{20} Indeed, through the end of the 19th century, there was no procedure for mobilizing the militia during wartime, nor a clear legal authority for the President to deploy the Guard abroad.\textsuperscript{21} As a result, late in the century, some in the regular Army wanted to create an entirely new force to better allow the United States to fight wars abroad. Civil War General and postwar military

\textsuperscript{15} Colby and Glass, 1943, pp. 840, 842.
\textsuperscript{16} U.S. Constitution, Article I, Section 8, Clause 15: Militia.
\textsuperscript{17} Mahon, 1983, p. 110–111.
\textsuperscript{18} Hill, 1964, pp. 130, 134–135.
\textsuperscript{20} Clark, 1900, p. 738.
reformer Emory Upton, for example, proposed creating the “National Volunteers” for precisely this reason, although his proposal never came to fruition.  

Nonetheless, the United States fought numerous wars throughout this period: the Mexican-American War, the Civil War, the Spanish-American War, and smaller wars against the American Indians on frontiers. And the United States conducted smaller-scale interventions abroad. Indeed, the U.S. Marine Corps alone landed troops 180 times in 37 countries from 1800 to 1934 and was actively engaged in fighting small wars of one sort or another for almost all that time.  

In all these cases, the United States simply used regular forces, supplemented by volunteers if needed.

Finally, as for being citizen soldiers, the proposition remained mostly true, although somewhat less so than during the militia period. Unlike the militia period, as their name implies, service in the voluntary companies was not an obligatory part of citizenship. Indeed, obligatory military service—in any form or component—proved increasingly unpopular. When the Union tried to institute obligatory service in the Union Army in 1863, the result was not an outpouring of civic virtue, but draft riots. Indeed, in the July 1863 draft, 30 percent “used commutation or substitution to evade service, and another 65 percent were declared exempt.”  

The later drafts produced only marginally higher yields—with 19 percent of those “held to service” personally serving.

The volunteer companies, and later the National Guard, maintained the other aspects of citizen soldiers, however. Despite the demise of compulsory service, they still attracted elements from a broad swath of society. Immigrant groups—German, Irish, and Scottish—often formed their own volunteer companies. The Guard also recruited from a range of economic classes as well, with a mixture of factory workers, business men, clerks, and farmers showing up on the state rolls. As for its democratic legitimacy, the Guard became more popular—or at least more successful at navigating the democratic process. The National Guard Association was formed in 1879, and after a rocky start, became increasingly adept at winning friends in Congress and the Executive Branch.

Finally, the Guard retained its civilian feel, although it was slowly developing its own institutional character, especially by the latter half of the 19th century. The Guard was still

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composed mostly of part-time soldiers. By 1880, regular Army officers inspected militia summer encampments “at the request of the state authorities,” but they remained relatively few in number.29 In 1894, for example, the War Department assigned 27 full-time and another 40 part-time regular army officers to serve as National Guard instructors.30 That said, with the growth of the National Guard Association and the National Guard Bureau, the Guard was developing its own bureaucratic identity—distinct from the regular army but an “integral component of the national military force.”31

By 1900, however, most recognized that the National Guard had evolved into something quite different from what the militia had been at the start of the century.32 On the one hand, “militia service in the sense in which Washington meant it, and in the sense in which it was understood in the early frontier villages, was not continued.”33 Many of these changes were positive: The Guard was slowly evolving into a more useful instrument for federal policy—although more so for controlling state-level domestic unrest than national warfighting. At the same time, with the abolition of the compulsory service requirement, the Guard began to lose some of its citizen soldier sheen.

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29 Todd, 1941, p. 159.
32 Clark, 1900, p. 730.
33 Colby and Glass, 1943, p. 841.
5. The Strategic Reserve (1903–1990)

In 1903, the Dick Act became the “cornerstone” of the modern National Guard. It expanded on efforts already underway in the late 19th century to turn the Guard into a strategic reserve that could fill the regular Army, as needed. At its core was a simple quid pro quo relationship: In exchange for increased federal oversight and control (if needed), the Guard received $2 million in federal funding in 1903, up fivefold from $400,000 the year before. Later legislation—the National Defense Acts of 1916 and 1920—made the Guard a component of the U.S. Army, gave the federal government more latitude to “prescribe the qualifications for their officers,” and allowed for the Guard’s federalization in exchange for more federal funding of drill and field pay. The legislation never took the Guard away from the states but by 1933, 12,381 of 13,364 National Guard officers also commissioned into the Federal Reserve. These reforms—combined with the ANG’s creation in 1947—largely gave the Guard its modern form and enabled it to make important contributions, particularly during the World Wars and the Korean War.

Thanks to these reforms, the first claim—the National Guard’s centrality to American national security—became increasingly true. During World War I, as border tensions heated up in 1916, the National Guard deployed 156,414 men for nine months along the Mexican border. The National Guard contributed two of the first four divisions—the 26th and 42nd—to arrive in France as part of the American Expeditionary Force, and ultimately, 18 out of 43 divisions serving on the Western front came from the National Guard. In the estimation of the American Expeditionary Force commander, General John Pershing, the Guard “performed very excellent service”—especially given that they were underfunded and unevenly trained prior to the war. Similarly, during World War II, the National Guard contributed 18 divisions and some 300,000 troops to the overall effort, fighting in such critical engagements as the D-Day invasion. Roughly 34 percent of the Army National Guard—some 138,600 in total—and 80 percent of the...

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1 Cantor, 1969, p. 370.
2 Todd, 1941, p. 163; Colby and Glass, 1943, pp. 843–844; and Cantor, 1969, p. 370.
3 Colby and Glass, 1943, pp. 844, 847.
4 Colby and Glass, 1943, pp. 846, 850.
5 Todd, 1941, p. 166.
7 Todd, 1941, p. 168.
newborn ANG—some 45,000 airmen in total—mobilized for Korea. Many Guardsmen went on to serve with distinction and the new ANG eventually produced four jet aces.

As impressive as these contributions were, however, the National Guard still never provided the plurality of American combat power (contrary to the first hypothesis). The World War I Army largely came from the “National Army”—a new component composed of draftees and totaling nearly 3 million on November 11, 1918. The World War II statistics paint an even starker contrast: The active-duty Army alone—never mind the other services—peaked at 6 million men in uniform in 1945, dwarfing the National Guard’s contribution. Similarly, the size of the active-duty Army during the Korean War in 1952 peaked at 1.6 million. Moreover, American mobilization policy at the time rotated soldiers out of Korea after a set period, so the number of Guardsmen in Korea declined dramatically toward the end of the war. In fact, by June 30, 1953, less than a month before the Armistice was signed, only 1.5 percent of all Army soldiers on active duty were volunteer Guardsmen and Reservists. And so, while the Guard fought in all three conflicts, draftees did most of the fighting.

Moreover, as in previous eras, National Guard units often were subordinated to regular Army officers. When selecting his advanced party to go to France in 1917, Pershing chose 157 officers, including 50 reserve officers but no Guardsmen. Similarly, during World War II, Army Ground Forces commander General Lesley McNair and China, Burma, and India commander General Joseph Stillwell did not hide their disdain for the Guard’s generals, who they felt owed their ranks to political ties rather than military competence. And during the Korean War, most Air Guardsmen ended up augmenting the active force rather than fighting with their reserve units.

After Korea, the Guard—and the Reserves at large—focused more on domestic crises. As depicted in Figure 1, some 65,000 Air and Army Guardsmen mobilized for the Berlin Crisis—including two “high priority” Army National Guard Divisions (the 32nd and the 49th)—while

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12 Thom Shanker and Helene Cooper, “Pentagon Plans to Shrink Army to Pre-World War II Level,” New York Times, February 23, 2014. A snapshot from July 1940 through June 1941 further depicts the breakdown between components. Of the 1,248,393 enlisted, called to duty, or inducted into the service during the period, 325,629 came from the regular Army, 293,491 were Guardsmen, and the vast majority—629,273—were selectees. Marvin A. Kreidberg and Merton G. Henry, History Of Military Mobilization in the United States Army 1775–1945, Washington, D.C.: Department of the Army, 1955, p. 590.

13 Shanker and Cooper, 2014.

14 Hill, 1964, p. 514.


only approximately 19,600 Guardsmen served in the Vietnam War.\(^{18}\) The Guard, however, played a more active role in homeland defense. As the Cold War heated up and the Soviet nuclear threat increased, the ANG manned fighter wings and the Army National Guard fielded air defense artillery battalions.\(^{19}\) The Guard also routinely confronted domestic instability. Of the ten times the National Guard has been federalized for domestic law enforcement since the Second World War, seven occurred between 1957 and 1970, mostly responding to unrest caused by the Vietnam War and racial tensions.\(^{20}\)

**Figure 1. National Guard Participation in Overseas Conflicts (Strategic Reserve Period)**

<table>
<thead>
<tr>
<th>Event</th>
<th>Number of Service Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>World War I (1917—1919)</td>
<td>500,000</td>
</tr>
<tr>
<td>World War II (1940—1945)</td>
<td>450,000</td>
</tr>
<tr>
<td>Korean War (1950—1956)*</td>
<td>400,000</td>
</tr>
<tr>
<td>Berlin Crisis (1961—1962)</td>
<td>350,000</td>
</tr>
<tr>
<td>Cuban Missile Crisis (1962)**</td>
<td>300,000</td>
</tr>
<tr>
<td>Vietnam War (1968—1969)</td>
<td>250,000</td>
</tr>
</tbody>
</table>

\(^*\) End date reflects when last units returned to state control
\(^**\) Data includes the Army, Navy, and Marine Corps Reserve, as well as the National Guard contribution


The Guard’s increasingly active role in national policy during the 20th century came at a cost to its second claim—that it prevents the United States from fighting controversial foreign wars. Beginning with the Dick Act, the Guard increasingly relied on the federal government for its budget. In 1891, the states paid for roughly 85 percent of their National Guard.\(^{21}\) By 1933, states paid approximately a third of the Guard’s costs; three decades later, in 1963, they contributed

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\(^{18}\) See, also, Brayton, 1972, p. 141.

\(^{19}\) Brayton, 1972, p. 142.


\(^{21}\) Mahon, 1983, p. 124. In 1891, the states paid for $2,339,086, compared with the federal government’s $387,000.
only 6 percent. And as federal government picked up more of the tab, it demanded that, in return, the Guard become more responsive to its needs.

In fact, throughout the 20th century, the federal government successfully fought a series of legal battles to expand its hold over the Guard. As late as 1912, Taft administration Attorney General George Woodward Wickersham concluded that the President could not deploy the Guard abroad "as a part of an army of occupation." Later attorneys general, however, fought to expand the federal government's ability to deploy the Guard wherever and whenever it was needed. Even in the mid-1980s, governors still challenged federal authority to deploy the National Guard overseas. These state challenges to federal authority mostly fell flat, however, reinforcing one of the key trends in the Guard's evolution during this period—increasing federal control over the institution.

Deploying Guardsmen overseas still carried significant political costs. Lyndon Johnson, for example, chose not to deploy the Guard in substantial numbers to Vietnam partially because of the fear of domestic political backlash. As former Nixon administration Secretary of Defense Melvin Laird notes, "As unpopular as the draft was, it was still an easier sell for Johnson than deploying whole National Guard and Reserve units out of the communities in middle America."

The argument about political hesitation to deploy Guardsmen requires at least two caveats, however. First, the reluctance to deploy the Guard was not a hard and fast rule. As mentioned before, the Guard participated in both World Wars and, perhaps more important, in Korea—even though it was a "police action" on paper. Conversely, Johnson's decision against using the Guard in Vietnam was only partially driven by domestic political costs. He also wanted to avoid provoking a larger Southeast Asia war and direct Chinese or Soviet intervention. Second, and more important, the political hesitation and legal hurdles to deploying the Guard did not actually prevent wars from being fought. The Johnson administration still fought the Vietnam War—it just did so mostly without the Guard. Even after Vietnam, when the Total Force Policy ensured

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24 In 1986, for example, Maine Governor Joseph E. Brennan protested the deployment of Maine Guardsmen to a training exercise in Honduras. Eventually, 13 other governors either followed suit or expressed reservations about such deployments. Kester, 1988, pp. 177–179.


that the military would need to mobilize reservists for the next major conflict, the United States still regularly went to war—as shall be detailed in the next chapter.29

The National Guard’s role as a check on federal power also diminished in another dimension. In a watershed event regarding federal versus state control of the Guard, Arkansas Governor Orville Faubus attempted in 1957 to use the Guard to block the federal court–ordered integration of Little Rock’s high schools. In response, President Dwight Eisenhower federalized the Arkansas National Guard and deployed elements of the 101st Airborne Division to uphold the court’s decision. A few years later, in 1963, when Governor George Wallace attempted to use the Alabama National Guard to prevent the integration of the University of Alabama, President John F. Kennedy also federalized the Guard to enforce the policy. These incidents were not only significant milestones for race relations in the United States, but for the National Guard as well, demonstrating the federal governments’ increasing control over the Guard.30

As for the third proposition, the Guard’s claim on the title of citizen soldier also arguably suffered during this period. Despite the draft, military service was never fully obligatory. As Barry Strauss notes, “Even with the draft in effect, only about 41 percent of American men of the Vietnam generation served in the military.”31 As a result, the compulsory element of the citizen soldier was lacking.

More problematically and contrary to the “universal” element of the citizen soldier ideal, the Guard became one way for the wealthy and the well-connected to avoid the Vietnam War. Most notably, perhaps, George W. Bush flew for a Texas ANG squadron nicknamed a “champagne unit” because it was composed largely of Texas’ political and economic elite.32 Bush was not alone: A New York Times investigation in 1988 leveled similar accusations against more than a dozen congressmen and senators—both Republicans and Democrats, from all corners of the country.33 Other elites found their way into the Guard as well: At one point, ten Dallas Cowboys’ players all belonged to the same Guard unit.34 While these were exceptions rather than the rule, these anecdotes question the extent to which the Guard actually reflected American society.

The flip side of this trend, of course, was that the Guard still reflected the “civilian” quality of the citizen soldier. Polls from the Vietnam period showed about three-quarters of Guardsmen enlisted because of the draft. Only about 3 percent of Guardsmen reenlisted after their first tour and only 0.5 percent of active-component veterans chose to continue on in the Guard. As Mahon

notes, “It was obvious that few young men in the early years of the decade [the 1970s] had the slightest interest in a military career.”

On a more positive note, despite these trends and the social turbulence of the second half of the 20th century, the Guard’s “legitimacy”—as Mahon also notes—“survived with relatively minor scars.” While Gallup polls show that Americans’ confidence in the military sank to an all-time low with Vietnam, these polls did not directly ask about the National Guard. Perhaps more relevant to the Guard’s legitimacy was its role at home. As David Adams notes, the Guard conducted more than 560 internal military interventions between the fiscal years (FYs) 1961 and 1983, often called by the state but sometimes at federal behest, involving more than a half-million troops. While these missions were not new, the scale “surpasses anything before in U.S. history.” Many of these interventions proved controversial; some—most notably, when National Guard troops fired on student protesters at Kent State—remain so today. Even when these domestic responses turned ugly, however, the public still often sided with the Guard. Despite the vocal outrage after the Kent State shooting and the years of investigation that followed, a Gallup poll found that 58 percent of Americans blamed the students and only 11 percent blamed the Guardsmen for the incident.

37 Gallup, Military and National Defense, undated.
6. The Move to an Operational Reserve (1991–Present)

The origins of the “Operational Reserve,” arguably, lie two decades earlier in the Total Force Policy of the 1970s. Faced with budget cuts and manpower problems in the aftermath of the Vietnam War, Secretaries of Defense Melvin Laird and James R. Schlesinger proposed pairing reserve units—including the National Guard—with active-component units.\(^1\) Army Chief of Staff General Creighton Abrams took the policy even further—permanently assigning National Guard brigades to active-component divisions and ensuring, at least in theory, that the Army would need to mobilize the Guard to fight any major conflict.\(^2\) In practice, integrating the forces did not come easily. Famously, during Operation Desert Storm, the Defense Department called up three National Guard brigades to “round out” active-component divisions in 1990; only one—the 48th Infantry Brigade—was ever certified as combat-ready and only after it was too late to deploy during the Gulf War.\(^3\) Of the 62,411 Army Guardsmen mobilized for that conflict, only 37,484 served in combat.\(^4\) The ANG mobilized 12,456 Guardsmen during the war and eventually flew a range of missions—including airlift, refueling, and attack and reconnaissance sorties.\(^5\) It was only after the Gulf War, as the active component shrunk and the number of small-scale interventions grew, that the National Guard—and the reserve component as a whole—became increasingly operational, deploying regularly throughout the 1990s and becoming dramatically more active during the Global War on Terrorism (see Figure 2). And as deployments picked up, the first claim—the centrality of the Guard to American national security—became increasingly true.

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5 Rosenfeld and Gross, 2007, p. 16.
After the Gulf War, the peacekeeping missions of the 1990s provided new opportunities for the Guard to gain operational experience. As the Gulf War demonstrated, the Army National Guard’s Achilles heel was readiness. Predictable peacekeeping rotations, however, offered the Army National Guard sufficient time to mobilize. After the Iraq War kicked off and the demand for troops skyrocketed, the National Guard assumed responsibility for the Kosovo peacekeeping mission from 2003 to 2013.

For its part, the ANG underwent a transformation after the Gulf War. Thanks to declining budgets and the Base Realignment and Closure Commission’s decision to consolidate military facilities throughout the United States, Secretary of Defense Les Aspin transferred the 1st Air Force, responsible for the air defense of the United States, to the ANG. Simultaneously, the ANG expanded its airlift and tanker fleets, and by 1996, it provided 43.9 percent of Air Force’s tactical airlift and 43.2 percent of the KC-135 air refueling capabilities.

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7 Steven Beardsley, “Active-Duty Troops to Deploy to Kosovo for First Time in a Decade,” Stars and Stripes, March 13, 2013.
8 Air National Guard, ANG Heritage: Missions, Wars and Operations, undated.
9 Gross 1996, p. 60.
As with the rest of the American military, the terrorist attacks of September 11, 2001, and the Iraq War had a profound effect on the Guard. In the immediate aftermath of 9/11, more than 7,000 Guardsmen deployed to 429 airports while Air Guardsmen stepped up patrolling the skies. Between that time and February 2003, 170,000 Guardsmen and reservists had been activated for homeland security duties. Especially, after the Iraq War started, the Guard also took on an increasingly active role abroad—deploying to both the Iraq and Afghanistan Wars. As one of the Army National Guard’s promotional slides notes, “at one point in 2005, Army National Guard brigades made up more than 50% of U.S. Army combat brigades in Iraq, the Army Guard’s largest combat role since WWII.” Indeed, of the 152,000 troops in Iraq in October 2005, about one-third—49,000—came from the Army National Guard, with the Army Reserve providing another 22,000 and the Marine Corps Reserve providing another 4,000, respectively.

Combat experience and additional resources improved the quality of the force. For example, the 2015 National Guard Bureau Posture Statement says that “numerous commanders have stated they cannot tell the difference in performance between active duty and National Guard Soldiers and Airmen on the battlefield,” and “the National Guard has proven itself as indistinguishable from active forces in battle at around one-third the cost to sustain during peacetime.” Hargett, the President of the National Guard Association, proclaimed, “After a decade of war, the Guard meets, and many times exceeds, the readiness and training standards for deployment as its active counterparts.” And in a recent article in the Army War College’s Parameters, then-Maine Adjutant Brigadier General James Campbell asked, “How many National Guard units must fight and succeed, suffer casualties, earn decorations and citations, and serve with dedication and honor before we stop this destructive debate and make no distinction between organizations, regardless of component?”

Two important caveats are in order about the Guard’s role in Afghanistan and Iraq, however. First, despite the increased Guard participation, the vast majority of soldiers deploying to Iraq and Afghanistan still came from the active component (Figure 3). Second, even when deployed, the Guard and the active component often performed different roles. Of the 47 Army National Guard Brigades deployed to Iraq and Afghanistan between 2001 and 2013, only 17 were assigned counterinsurgency missions (the rest were tasked with either training local security forces or other security missions). Moreover, the majority of these brigades (9 out of 17) took on the counterinsurgency mission between 2004 and 2006, and none had this mission between the

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13 National Guard Bureau, 2015, pp. 20, 61.
14 Hargett, 2013, p. 4.
seminal years of the Iraq Surge between 2007 and 2008. In fairness, as former National Guard Bureau director Lieutenant General Steven Blum noted, “units do not get to select their mission assignments.”

Figure 3. Service Members Deployed to Iraq and Afghanistan, 2001–2008

Historically speaking, the ANG also has performed different missions than the active component. The ANG provides 70 percent of the Air Force’s communications and air traffic control capability and its fleet comprises 40 percent of the Air Force’s refueling capacity and 38 percent of its airlift capacity, but only 31 percent of its fighter capacity and 17 percent of its intelligence, surveillance, and reconnaissance capability. As a result of their different capabilities, the active-component Air Force provided different types of support in the Iraq and Afghanistan Wars. For example, between FY 2006 and FY 2010, the U.S. Air Force provided almost all MQ-1 Predator support—more than 570,000 hours—although ANG has been expanding in this area. Even when the two components did have the same airframes, the Guard


18 The active-component Air Force logged some 615,594 hours, 93.8 percent of which was operational. The ANG, by contrast, logged 1,531 hours, all in training. Albert A. Robbert, James H. Bigelow, John E. Boon, Jr., Lisa M. Harrington, Michael McGee, S. Craig Moore, Daniel M. Norton, and William W. Taylor, Suitability of Missions for the Air Force Reserve Components, Santa Monica, Calif.: RAND Corporation, RR-429-AF, 2014, p. 24. More recently, the ANG has expanded its capabilities in this area; in FY 2015 it owned about 18 percent of the MQ-1 Predator and MQ-9 Reaper fleet. National Guard Association of the United States, “FY15 Fact Sheet: Ground Based and Airborne Sense and Avoid Capability for ANG Remotely Piloted Aircraft,” undated-a.
often took on different roles—providing the vast majority of air defense missions flown in the United States, for example.\textsuperscript{19}

The move to an operational reserve also further undercut the Guard’s claim that they prevent the United States from fighting controversial foreign wars. Indeed, the Guards’ leaders today cast it as a force that wants to deploy. A former director of the Army National Guard, Lieutenant General William Ingram, commented, “Our soldiers expect to be gainfully employed. Every one of them has either enlisted or reenlisted since 9/11, motivated by a desire to serve their country. One weekend a month and two weeks in the summer are not what they signed up for.”\textsuperscript{20} And as the 2015 Posture Statement notes, of the 44,000 requests for manpower in FY 2013, the ANG filled almost 90 percent with volunteers.\textsuperscript{21} If the Guard is indeed raring to go, then it may not act as a brake on executive power as its proponents contend.\textsuperscript{22}

More profoundly, perhaps, as the Guard became more operational, the veracity of the third claim—as the modern embodiment of the citizen soldier—declined proportionally. Ever since the move to an all-volunteer force, the obligatory aspect has disappeared. More interestingly, in contrast to Janowitz’s argument of democratic legitimacy and contrary to the Guard’s claims, even as Americans have grown increasingly personally disconnected from the military, they have remained strongly supportive of it as an institution. A recent 2013 Pew poll found that 78 percent of Americans thought the military contributed “a lot” to society’s well-being, down from 84 percent in 2009 but still higher than any other profession.\textsuperscript{23} Gallup found a similar trend: The percentage of Americans expressing “a great deal” or “quite a lot of confidence” in the military consistently ticked upward from 58 percent in 1975 to 74 percent in 2014, in a series of annual or semiannual polls.\textsuperscript{24} Unfortunately, neither Pew nor Gallup captured the differences between the Guard and the active component per se, but evidence seems to contradict the idea that familiarity breeds legitimacy. If anything, the more removed most Americans are from the military, the more they support and respect it.


\textsuperscript{20} William E. Ingram, Jr., “The Army National Guard: Where We’ve Been and Where We Want to Go,” Army, August 2012, p. 28.

\textsuperscript{21} U.S. National Guard Bureau, 2015, p. 23.

\textsuperscript{22} Even as early the mid-1990s, there was some evidence of the convergence of attitudes (in this case, toward peacekeeping missions) between reserve- and active-component soldiers. David R. Segal and Ronald B. Tiggle, “Attitudes of Citizen-Soldiers Toward Military Missions in the Post-Cold War World,” Armed Forces and Society, Vol. 23, No. 3, 1997, pp. 373–390.


\textsuperscript{24} Gallup, 2014. Importantly, older studies found that confidence in the military may be concentrated in select demographics—male (as opposed to female), conservative (rather than liberal), white (as opposed to minorities), and Depression, Generation X, and Millennial generations (but not the Baby Boom). See David C. King and Zachary Karabell, The Generation of Trust: Public Confidence in the U.S. Military since Vietnam, Washington, D.C.: AEI Press, 2003, pp. 11–12, 17.
The Guard today still remains more universal than the active component. According to the 2012 *Demographics: Profile of the Military Community*, more than 70 percent of the active component reside in just ten states and more than 42 percent reside in four states—California, Texas, Virginia, and North Carolina. Thanks to post–Cold War base consolidation, the active force tends to be concentrated into a select few superbases within these states—such as Fort Hood, Naval Base San Diego, or Joint Base San Antonio. By contrast, during the same year (2012), only 42 percent of the selected reserves lives in the top ten states and one would have to include 22 states to find 70 percent of the force. Moreover, since reservists often want to drill close to home, the reserve component tends to be spread out even within these states. More important, since Guard units report to state adjutant generals, Guardsmen identify with their home states and state governors are more likely to fight to keep bases in their state open.

That said, the days when the Guard—like the military at large—truly reflected the United States are long gone. As of September 2013, there were only 465,000 Guardsmen in the United States, well less than 0.2 percent of the American population. Given the expected end-strength reductions and the predicted growth of the overall American population, this percentage will likely decline in the future. Already, a 2011 Pew Foundation study found that fewer Americans—particularly among younger generations—had an immediate relative who served in the military. Pew also found that those with ties to military service tend to be concentrated within select demographics, rather than reflective of the overall population.

Finally, the transition to operational reserve, arguably, came at greatest cost to the “civilian” dimension of the citizen soldier. The Global War on Terrorism and increased military budget allowed for reservists to functionally sever their ties to the civilian sector and jump from one mobilization to another. Even before 9/11, however, the number of “full-time part-timers”—those reservists whose full-time job is to support the reserve component—has been on the rise. As depicted in Table 2, the share of “full-time support” (FTS) relative to the overall force increased by roughly 5 percent or more since the end of the Cold War. Increasingly, these FTS personnel are not active-component members who are temporarily detailed to support the reserve component; they are full-time Active Guard Reserve personnel or “military technicians” (typically selected reserve service members who then also work for the reserve component in their civilian capacities). While there are plenty of good reasons for the growth of FTS,

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26 Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy, undated, p. 85.
27 Kapp and Torreon, 2014, p. 5.
29 Pew Foundation, 2011. Specifically, they found that white, rural-dwelling Republicans were more likely to have a relative in military service.
especially as the warfare grows more complex and demands more sophisticated skills, this also means that there are fewer true civilians than ever before.

Table 2. Full-Time Support for the National Guard

<table>
<thead>
<tr>
<th></th>
<th>Full-Time Support for Air National Guard</th>
<th>Full-Time Support for Army National Guard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active Guard Reserve</td>
<td>8,468</td>
<td>14,557</td>
</tr>
<tr>
<td>Military technicians</td>
<td>23,963</td>
<td>22,568</td>
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<tr>
<td>Active component</td>
<td>640</td>
<td>208</td>
</tr>
<tr>
<td>Civilian</td>
<td>1,944</td>
<td>208</td>
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<tr>
<td>Total full-time support</td>
<td>34,988</td>
<td>37,541</td>
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<tr>
<td>Selected reserve personnel</td>
<td>116,300</td>
<td>105,708</td>
</tr>
<tr>
<td>Percentage of FTS/select reserve</td>
<td>30%</td>
<td>36%</td>
</tr>
</tbody>
</table>


More significantly, multiple surveys suggest that National Guardsmen’s identities and preferences might more closely resemble those of active-component soldiers, rather than of civilians. Already in the 1990s, David Segal and Ronald Tiggle found that “while the attitude of these citizen soldiers (National Guardsmen who participated in the peacekeeping missions) differed from those of active duty soldiers who have served in the Sinai MFO [Multinational Force Observers], what is most notable is how minimal these differences are.”

Similarly, in another study, psychologist and Army National Guard Colonel James Griffith argues that the Guard today often identifies as “soldier warriors” and “conservative ideologues.”

And anthropologist Bonnie Vest found that after deployments, Guard members’ identities shifted. “Soldier, as a sense of who one is, is no longer a secondarily assumed or temporarily dominant role, but a central piece in the overall sense of one’s identity.”

While the gap between reserve and active components may be narrowing, the gap between the military and broader society seems to be widening. In one of the most comprehensive studies to date, the Triangle Institute for Strategic Studies conducted a survey of military leaders between 1998 and 1999, compared it to the general society and found two key observations. First, like the other aforementioned studies, “active reservists”—the study did not separate out National Guard from Reserves—often mirrored their active-component counterparts in terms of

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31 Segal and Tiggle, 1997, p. 388.


religious preference, home of origin, political preference, and ideological bent. At the same time, both groups differed sharply from the overall civilian population. For example, both active and reserve component service members identified with the Republican Party by a margin of six to one. Importantly, this study was conducted before the Global War on Terrorism. And while there has yet to be a similarly comprehensive analysis post–Iraq and Afghanistan, if anything, the polarizing effects of these wars and the repeated mobilization of National Guardsmen to fight these wars has likely only further blurred lines between active component and Guard profiles and sharpened the divide between them and the overall population.

Ultimately, the move to the Operational Reserve came with a tradeoff. On the one hand, while the Guard still is not the principal instrument of American combat power, it contributes more to American national security today than perhaps at any other point in its history. The Guard’s increased proficiency, however, came at the expense of its other two claims: The modern Guard serves as less of a check on the United States’ ability to fight foreign wars and is composed of fewer citizen soldiers than ever before.

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7. Demystifying the Citizen Soldier

At first blush, two of the three claims about the National Guard partially fit the historical record (see Table 3). Only the claim that the Guard prevents the United States from fighting controversial foreign wars does not stand up to scrutiny. While mobilizing the Guard historically proved cumbersome (and, at times, politically unpopular), this has not prevented the United States from fighting wars. The other two claims are true, but with caveats. First, the “militia model” may be more folklore than reality: For most of American history, the active component or (more often), short-term draftees or volunteers—not the organized militia—provided the bulk of American combat power. Still, the militia and Guard served admirably in a variety of capacities throughout American history, responding to trouble at home and, more lately, to crises abroad. Second, and perhaps profoundly, while it has reflected many of the citizen-soldier traits throughout its centuries of existence the National Guard—except for a brief period at the earliest militia period—never embodied all four traits of the citizen-soldier ideal.

<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Historical</td>
<td>True</td>
<td>False</td>
<td>More true</td>
<td>More true</td>
</tr>
<tr>
<td>Prevented the United States from fighting</td>
<td>False</td>
<td>False</td>
<td>False</td>
<td>False</td>
</tr>
<tr>
<td>wars</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sociological (Citizen soldier)</td>
<td>Obligatory true (on paper)</td>
<td>Less true</td>
<td>Less true</td>
<td>False</td>
</tr>
<tr>
<td></td>
<td>Universal true</td>
<td>True</td>
<td>Less true</td>
<td>Less true</td>
</tr>
<tr>
<td></td>
<td>Legitimate true</td>
<td>True</td>
<td>True</td>
<td>True</td>
</tr>
<tr>
<td></td>
<td>Civilian true</td>
<td>True</td>
<td>Less true</td>
<td></td>
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</tbody>
</table>

On a deeper level, however, the National Guard’s evolution tells a nuanced and more important story (see Table 4). Long before the term “operational reserve,” the National Guard embarked on a series of reforms to become a more proficient, responsive force. While it never became the United States’ principal warfighting force, the Guard today increasingly shoulders more of the burden. But this evolution has not been cost-free. The Guard’s ability to check federal power in the manner the framers of the Constitution had originally envisioned the militia—which was never absolute to begin with—has increasingly fallen by the wayside, as military and legal reforms strengthened federal control over the Guard. More important, as the Guard has grown more militarily capable, it has become less like the militia of the founding era—manned by fewer true civilians and representing a narrower segment of American society.
In sum, today’s Guard looks more like professionals and less like the classic concept of citizen soldiers.

<table>
<thead>
<tr>
<th>Historical</th>
<th>The Verdict</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal instrument of U.S. security</td>
<td>Increasingly true</td>
</tr>
<tr>
<td>Prevented the United States from fighting wars</td>
<td>Not true</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sociological (Citizen soldier)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Obligatory</td>
<td>Increasingly less true</td>
</tr>
<tr>
<td>Universal</td>
<td>Increasingly less true</td>
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<tr>
<td>Legitimate</td>
<td>True</td>
</tr>
<tr>
<td>Civilian</td>
<td>Increasingly less true</td>
</tr>
</tbody>
</table>

These competing trends hint at a fundamental and perhaps irreconcilable tension among these three claims. To provide a useful military tool for American national security, a military force needs to be both readily deployable and militarily proficient. Being readily deployable requires minimizing the same obstacles that would constrain U.S. ability to fight wars. Less obviously, perhaps, maintaining military proficiency requires a more professional force, with fewer true citizen soldiers, as warfare grows more intricate and demands more-specialized skills that must be honed continuously. In sum, an oxymoron may be embedded in some of the rhetoric about the Guard: In this day and age, a force cannot simultaneously be the principal instrument of American national security, a check on federal power, and composed of citizen soldiers.

What should this mean for today’s policy fights between the active component and the National Guard? At the end of the day, shifting to a Guard-heavy force may be a prudent policy choice for economic and utilitarian reasons. These decisions, however, should be considered dispassionately—without the romanticized version of history and citizen soldiers that often clouds discussions of the active-reserve balance. The National Guard is certainly not alone in having a certain seductive appeal. Airpower today has its own mystique, as do Special Operations Forces. At other points in American military history, the horse cavalry, the paratroopers, and the armor corps had similar mystique—based partly on truth and partly on lore. Arguably, these auras help give military service its character. And yet, these heroic narratives can prove debilitating if they prevent objective examination of capabilities and clear analysis of limitations. As budget battles are decided, we need to demystify the citizen soldier and see them for who they are, not what we imagine them to be.

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The National Guard is often portrayed as the modern heir to the colonial militia and as retaining at least three of the latter’s defining attributes—a key instrument of American national security, a check on federal power, and home of today’s “citizen soldiers.” This report explores how the term citizen soldier has been defined in academic literature—as compulsory, universal, legitimate service by civilians—and then looks at how the National Guard has evinced these attributes at various periods in its history. Since the United States’ founding, the militia—and later, the National Guard—slowly evolved into an increasingly formidable warfighting force and increasingly important tool for national security. This evolution, however, has come at the expense of two other attributes of the colonial militia—serving as a check on federal power and filling its ranks with citizen soldiers. The report concludes that there are inherent and increasing tensions among being a warfighting force, serving as a check on federal power, and embodying the ideals of a citizen soldier, and it is not clear that the Guard—or any other force for that matter—can fully reconcile them. Ultimately, the Guard’s transformation from citizen soldiers to a professional force may very well be inevitable and is likely a positive development for American national security. It is, however, important to realize that this trend is occurring, to demystify the citizen soldier, and to see the force for what it is.