Recent media reports have Pentagon officials considering “putting elite special operations troops under CIA [Central Intelligence Agency] control in Afghanistan after 2014, just as they were during last year’s raid on [Osama bin Laden’s] compound.” This shell game would allow Afghan and U.S. officials to deny the presence of American troops in Afghanistan because once “assigned to CIA control, even temporarily, they become spies.” Nearly simultaneously, Department of Defense (DOD) leaders were warned to “be vigilant in ensuring military personnel are not inappropriately utilized” in performing “new, expanding, or existing missions,” ensuring the force is aligned against strategic choices “supported by rigorous analysis.”

Placing Servicemembers—uniformed members of the Army, Navy, Marine Corps, and Air Force—under CIA control demands such rigorous analysis. The raid on bin Laden’s compound provides a framework.

In his May 1, 2011, televised address, President Barack Obama reported “to the American people and to the world that the United States ha[d] conducted an operation that killed Osama bin Laden.” President Obama initially detailed little beyond noting that he had directed “the[n] Director of the CIA [Leon Panetta], to make the killing or capture of bin Laden the top priority of our war against al Qaeda” and that the operation, carried out by a “small team of Americans” was done “at [his] direction [as President].” In the following days, senior executive branch officials garrulously provided explicit details, from the now-iconic White House Situation Room photograph to intricate diagrams of the Abbottabad compound and the assault force’s composition. Most noteworthy was Panetta’s unequivocal assertion the raid was a covert action:

Since this was what’s called a “Title 50” operation, which is a covert operation, and it comes directly from the president of the United States who made the decision to conduct this operation in a covert way, that direction goes to me. And then, I am, you know, the person who then commands the mission. But having said that, I have to tell you that the real commander was Admiral [William] McRaven because he was on site, and he was actually in charge of the military operation that went in and got bin Laden.

Despite his self-effacing trumpeting of Vice Admiral McRaven’s role, Panetta’s comment highlights that critical confusion exists among even the most senior U.S. leaders about the chain of command and the appropriate classification of such operations.

Openly describing the raid as both a “covert operation” and “military operation,” Panetta asserted he was the “commander,” describing a chain of “command” that went from the President to Panetta to McRaven. Panetta’s public comments are problematic, as is describing a chain of command that excludes the Secretary of Defense and purports to route command authority through the CIA director. Title 50 is clear:

The term “covert action” means 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, but does not include . . . (2) traditional . . . military activities or routine support to such activities.8

The administration did the opposite, making patently clear the raid’s nature and, in exhaustive detail, the precise role of the United States. Instead of categorizing it as a covert action under the director’s “command,” the President could have conducted the raid as a covert action under the Secretary of Defense instead of the CIA director, or under his own constitutional authority as Commander in Chief and the Secretary’s statutory authorities, classifying it as a traditional military activity and excusing it from the statute’s coverage. As a traditional military activity, there would have been no legal limits on subsequent public discussion. Alternatively, conducting the raid as a covert action within a military chain of command removes the issues the director raised in asserting command authority over Servicemembers. The decision-making process remains shrouded, but conducting a raid into a sovereign country targeting a nonstate actor using military personnel and equipment under the “command” of the CIA director and classifying it as a covert action raises significant legal and policy questions. Such decisions threaten the legitimacy and moral authority of future U.S. actions and demand a rigorous examination of those associated risks.

The Abbottabad raid illustrates the post-9/11 security environment convergence of DOD military and CIA intelligence operations.7 While dead terrorists attest to this arrangement’s efficacy, many directly challenge the legal and policy framework behind current DOD-CIA cooperation. The discourse focuses largely on distinctions between Title 10 and Title 50 and the legal basis for conducting apparently overlapping military and intelligence operations beyond the battlefields of Iraq and Afghanistan. Notwithstanding the potentially misleadingly simple labels of Title 10 and Title 50, these complex issues lack clear answers. Many argue the legacy structure ill equips the President to effectively combat the threat. But tweaking that structure carries risk. Thus, correctly classifying and structuring our actions within that framework are critical. The law of war is designed to protect our nation’s military forces when they are engaged in traditional military activities under a military chain of command; spies conducting intelligence activities under executive authority have no such protections. This distinction rests on a constitutional, statutory, treaty, and doctrinal framework underpinning the military concept of command authority. U.S. power relies on moral and legal legitimacy. Exclusive state control over the legitimate use of armed force remains viable domestically and internationally only where exercised within an accepted framework. Thus, employing DOD forces in a nontraditional manner entails significant risk. The policy implications of classification and structure are neither semantic nor inconsequential, and must be understood by senior decision-makers; likewise, individual Servicemembers must understand the practical effects. A rigorous risk analysis should therefore inform any deviation, however permissible under domestic law.

This article focuses on the risks associated with both using military personnel to conduct kinetic covert action and using them without a military chain of command. Those risks inform the recommendation to change practice, but not the law. Specifically, the author rejects melding distinct operational military (Title 10) and intelligence (Title 50) authorities into the often mentioned Title 60. Properly classifying actions—either under the statute as a covert action or exempted from the statute as a traditional military activity—ensures the correct command structure is in place.8 Ultimately, the analysis argues for revisiting the previously rejected 9/11 Commission recommendation to place paramilitary covert action under DOD control.9

This article first outlines current and likely future threats and then explains the critical terms of art related to covert action and, against that lingua franca, examines why kinetic military operations should be either classified as traditional military activities or kept under a military chain of command. Analyzing the relevant constitutional, statutory, treaty, and doctrinal elements of command, this article illustrates that a raid conducted like the Abbottabad raid, while legally permissible, is best conducted as a traditional military activity.

**U.S. power relies on moral and legal legitimacy**

In the decade since 9/11, DOD and CIA elements have become “operationally synthesized.”10 A senior intelligence official recently noted that “the two proud groups of American secret warriors had been ‘deconflicted and basically integrated’—finally—10 years after 9/11.”11 The direct outgrowth is the increased reliance on special operations forces (SOF) to achieve national objectives against a “nimble and determined” enemy who “cannot be underestimated.”12 While the United States fought wars on geographically defined battlefields in Iraq and Afghanistan and beyond, the underlying legal structure remained constant. In the wars’ background, leaders, advisors, academics, and others argued about the structure of the appropriate legal and policy framework. Post-Iraq and post-Afghanistan, the United States must still address other threats, including those that al Qaeda and their associated forces present.

The threats have migrated beyond a battlefield defined by sovereign nations’ borders. When asked recently in “how many countries we are currently engaged in a shooting war,” Secretary of Defense Panetta laughed, responding, “That’s a good question. I have to stop and think about that . . . we’re going after al Qaeda wherever they’re at . . . clearly, we’re confronting al Qaeda in Pakistan, Yemen, Somalia, [and] North Africa.”13 The unresolved legal and policy challenges will likely increase in complexity on this geographically unconstrained battlefield. Remaining rooted in enduring principles is critical. DOD conduct of kinetic operations beyond traditionally recognized battlefields raises significant legal and policy concerns, especially where the U.S. Government conducts them without knowledge or consent of the host nation, as apparently happened with the Abbottabad operation.14 Properly categorizing and structuring these operations, while vexing for policymakers and their lawyers, carries much greater stakes for the Service members executing them.

**The Need for a Lingua Franca**

Colloquial usage refers to DOD authorities as Title 10, and the CIA’s as Title 50. That is technically inaccurate and misleading since DOD routinely operates under both Titles 10 and 50.15 Instead of Title 10, this article uses the term *military operations*; instead of Title 50, it uses CIA operations or the more
specific covert action. All three terms require clarification.

CIA operations are all CIA activities except covert action. Covert action is the narrow, statutory subset of Presidentially approved, CIA-led activities.\(^\text{16}\) Unfortunately, colloquially, covert action “is frequently used to describe any activity the government wants concealed from the public.”\(^\text{17}\) That common usage ignores the fact that a traditional military activity, notwithstanding how “secretly” it is executed, is by statute not a covert action. DOD defines a covert operation as one “planned and executed as to conceal the identity of or permit plausible denial by the sponsor,” where “emphasis is placed on concealment of the identity of the sponsor rather than on concealment of the operation.”\(^\text{18}\) While not in conflict with the statutory definition, the DOD definition is incomplete; it fails to recognize the President’s role and ignores the exception of traditional military activities.\(^\text{19}\) Practitioners should use the statutory definition.

The concept of clandestine operations further blurs colloquial and doctrinal imprecision.\(^\text{20}\) DOD activities “may be both covert and clandestine . . . focus[ing] equally on operational considerations and intelligence-related activities.”\(^\text{21}\) Appropriately, DOD officials assert that, absent a Presidential covert action finding, they “conduct only ‘clandestine activities.’”\(^\text{22}\) They characterize clandestine activities as those “conducted in secret but which constitute ‘passive’ intelligence information gathering.”\(^\text{23}\) Interchanging the terms and mixing them with intelligence functions is inaccurate and dangerous; practitioners must draw clear distinctions. The sponsorship of a covert action is hidden, not the act itself. The specific acts of the U.S. Government in influencing a foreign election (for example, posters, marches, election results, and so forth) would be visible, but not the covert sponsorship of those acts. For clandestine acts, the act itself (for example, intercepting a phone call) must remain hidden. The CIA and DOD can conduct clandestine operations without Presidential approval, whereas covert action triggers statutory requirements for a Presidential finding and congressional notification. Some have argued DOD’s “activities should be limited to clandestine” activities, as this would ensure military personnel are protected by the law of war,\(^\text{24}\) a critical point examined in detail later.

Military operations are DOD activities conducted under Title 10, including activities intended or likely to involve kinetic action. Pursuant to an order issued by the Secretary of Defense, they are conducted by military personnel under DOD command and in accordance with the law of war. They specifically exclude DOD’s intelligence activities (for example, the Joint Military Intelligence Program); like the CIA’s, those intelligence activities are conducted pursuant to Title 50.

Statutorily assigned responsibility helps distinguish between CIA operations and military operations. Although the President can designate which department, agency, or entity of the U.S. Government will participate in the covert action, the statute implicitly tasks the CIA as the default lead agency: “Any employee . . . of the [U.S.] Government other than the [CIA] directed to participate in any way in a covert action shall be subject either to the policies and regulations of the [CIA], or to
written policies or regulations adopted . . . to
govern such participation.25

Executive order 12333 (EO 12333) makes
that default tasking explicit:

The Director of the [CIA] shall . . . conduct
covert action activities approved by the
President. No agency except the [CIA] (or the
Armed Forces of the United States in time of
war declared by the Congress or during any
period covered by a report from the President
to the Congress consistent with the War Powers
Resolution . . .) may conduct any covert action
activity unless the President determines that
another agency is more likely to achieve a par-
ticular objective.26

The statute, coupled with EO 12333,
equivocally places all covert action
squarely under the CIA’s control; the narrow
exception for DOD is currently inapplicable.
While the Executive order expressly tasks
the director with conducting covert action,
it does not task the Secretary of Defense.27
Default CIA primacy and the absence of
statutory specificity in defining traditional
military activities create risk when DOD con-
ducts kinetic covert action.

The Unique Nature of Traditional
Military Activities

One practitioner described traditional
military activities exclusion from covert
action’s definition as “the exception that swal-
lows the rule.”28 But while DOD-CIA opera-
tional convergence blurs the issue, the excep-
tion need not swallow the rule. Functionally,
anything done by a uniformed member of a
nation’s armed forces is a “military” activity;
the nuanced requirement is to understand
which are traditional military activities. That
definition can be consequential, functional,
or historical—or a combination of some or
all three approaches. The statute’s legislative
history provides the best clarification, noting
the conferees intended that:

“Traditional military activities” include activi-
ties by military personnel under the direction
and control of a United States military com-
mander (whether or not the U.S. sponsorship
of such activities is apparent or later to be
acknowledged) . . . where the fact of the U.S.
role in the overall operation is apparent or to be
acknowledged publicly. In this regard, the con-
ferees intend to draw a line between activities
that are and are not under the direction and
control of the military commander. Activities
that are not under the direction and control of
a military commander should not be consid-
ered as “traditional military activities.”29

That nonstatutory definition frames the
follow-on analysis. That functional and his-
torical definition turns on who is in charge.
Activities under the “direction and
control of a military commander” meet the
requirement to be excepted from the statute;
those with a different command and control
arrangement are not traditional military
activities. “Command” is unique to the
military and the definition appears to draw a
bright line rule; but the CIA director blurred
the line by asserting “command” over a
DOD element.30 The confusion questions the
necessary nature and scope of leadership by
a “military commander.” What level or rank
of command is required? Must the chain of
command from that military commander
run directly back to the Commander in Chief
solely through military channels? Must it run
through the Secretary of Defense? Can it run
through the director if there is a military com-
mander below him? Given Goldwater-Nich-
ols,31 what about the geographic combatant
commander? In short, what does the wiring
diagram look like? These questions highlight
three baseline possibilities as depicted in the
figure below.

Part 1A of the figure reflects DOD’s Title
10 chain of command, illustrating the broad-
est historical, functional, and consequential
definition of traditional military activity. The
clear chain is rooted in the uniquely military
concept of command and the President’s
constitutionally defined role as Commander
in Chief. It clarifies congressional oversight
responsibility, results in unquestioned jurisdic-
tion, and forms the basis of the strongest legal
argument for combatant immunity. Part 1B
represents the President as chief executive,
exercising oversight and control of the CIA
under Title 50. This hierarchy lacks the legal
command authority exercised over military
personnel in 1A. Finally, part 1C represents the
paradox created by the covert action statute’s
attempts to overlap the parallel structures of
1A and 1B; it is often described as Title 60.

The current Congressional Authorization
for the Use of Military Force allows the
President to “use all necessary and appropriate
force” to prevent “future acts of international
terrorism against the United States.”32 This
statutory grant of power creates the paradox:
here, where the Senate vote was 98 to 0 and
the House vote was 420 to 1, the President’s
executive authority (as Commander in Chief
and chief executive) is greatest,33 the exercise
of those powers blurs the clear lines of parts
1A and 1B of the illustration. Merging the two,
although permissible under the covert action
statute, creates risk.

Consequently, questions about
the nature and structure of the chain of
command demand rigorous scrutiny and
cannot be left to ad hoc arrangements.
Defining military command determines
whether or not the activity is a traditional
military activity and therefore not under the
ambit of the statute. The criticality of this categorization is twofold: it is the core of the state’s monopoly on the legitimate use of force and cloaks Servicemembers in the legal armor of combatant immunity.

**Chain of Command, or Control?**

Since George Washington’s Presidency, the Secretary of War (later Defense) has served without interruption as a Cabinet member. The President’s role, enshrined in the Constitution, is clear: “The President shall be Commander-in-Chief of the Army and Navy of the United States.” With the Secretary of Defense, this embodies the Founders’ vision of civilian control of the military. The Secretary of Defense’s appointment requires the “Advice and Consent of the Senate.” While the President can relieve him and replace him with an inferior officer (that is, the Deputy Secretary of Defense), Senate-confirmed executive branch officials are not fungible. He cannot interchange officials individually confirmed to fulfill separate and unique duties—something James Madison warned about in Federalist 51.

Longstanding U.S. practice is an unbroken chain of command from the President, through his Secretary of Defense, to a subordinate uniformed commander. Even Goldwater-Nichols’s streamlining the military warfighting chain of command to run from the President through the Secretary and directly to the unified combatant commanders did not alter that fundamental practice. Combatant commanders simply replace Service chiefs. The civilian leader between the Commander in Chief and his senior uniformed commander remains unchanged—a specific individual confirmed by the Senate to execute statutory duties. The inviolate concept of civilian control of the military and the Senate’s Advice and Consent requirement make assertion of any executive authority to “trade out” duties between Cabinet officials implausible. The President can place military personnel under CIA control, but control is not command.

Command is the inherently military “privilege” that is “exercised by virtue of office and the special assignment of members of the United States Armed Forces holding military grade.” In fact, under the Army regulation, “A civilian, other than the President as Commander-in-Chief . . . may not exercise command.” Goldwater-Nichols allows the President to exercise command through his Secretary of Defense. Command rests on constitutional and statutory authority (including the Uniform Code of Military Justice) and the customs and practices of the Service. Removing military personnel from that hierarchy—illustrated in part 1C of the figure—changes their fundamental nature. This is Panetta’s assertion: he was in “command” of the raid on Osama bin Laden’s compound.

Titles 10 and 50 define the specific duties of the Secretary of Defense and Title 50 the CIA director’s. The duties are neither identical nor interchangeable. In Title 50, Congress explicitly states that DOD shall function “under the direction, authority, and control of the Secretary of Defense” in order to “provide for their unified direction under civilian control.” Placing the Services under the Secretary of Defense is necessary to “provide for the establishment of [a] clear and direct line of command.” Congress is equally clear in Title 10, granting the Secretary complete authority over DOD: “there shall be a Secretary of Defense, who is the head of the [Department], appointed . . . by the President, by and with the advice and consent of the Senate.” The statute allows the Secretary to “perform any of his functions or duties, or [to] exercise any of his powers through” other persons, but only persons from within DOD.

Goldwater-Nichols codifies geographic combatant commanders’ nearly inviolable command authority: “all forces operating within the geographic area assigned to a unified combatant command shall be assigned to, and under” his command. Two exceptions supplant that authority. Servicemembers assigned to U.S. Embassies (for example, the Defense Attaché) are under the Ambassador’s control and the Defense Intelligence Agency’s command. For those Servicemembers, diplomatic protections have replaced law of war protections, but the Secretary of Defense remains in the chain of command. The second exception, carved from Goldwater-Nichols’s “unless otherwise directed by the President” language, covers DOD participation in covert action.

Two caveats exist to the Secretary of Defense’s "authority, direction, and control": the Secretary’s authority is "subject to the direction of the President" and the 1947 National Security Act. The latter covers DOD personnel within the National Foreign Intelligence Program (NFIP). The former appears to be an exception that swallows the rule. But even in empowering the President to limit his Secretary’s authority, Congress did not specifically authorize any change to the fundamental command of military forces. Likewise, in defining the director’s limited authorities over military personnel, Congress maintained the military command structure over military operations.

Congress neither allows the director command nor control of DOD operational assets, nor did it grant the President a caveat like that with the Secretary of Defense’s authority. Although the director’s duties include the transfer of “personnel within the NFIP,” which includes DOD personnel, such transfers are limited to personnel within DOD’s Joint Military Intelligence Program (JMIP). SOF are not part of the JMIP. When DOD does transfer any JMIP personnel to the CIA, the director must “promptly” report that transfer to both the intelligence oversight and Armed Services Committees of both houses. Transfers between other executive branch elements trigger no such requirements. Congress only intended CIA control over DOD intelligence assets and was clearly concerned about even that. Goldwater-Nichols reinforces this analysis.

Goldwater-Nichols codifies geographic combatant commanders’ nearly inviolable command authority: “all forces operating within the geographic area assigned to a unified combatant command shall be assigned to, and under” his command. Two exceptions supplant that authority. Servicemembers assigned to U.S. Embassies (for example, the Defense Attaché) are under the Ambassador’s control and the Defense Intelligence Agency’s command. For those Servicemembers, diplomatic protections have replaced law of war protections, but the Secretary of Defense remains in the chain of command. The second exception, carved from Goldwater-Nichols’s “unless otherwise directed by the President” language, covers DOD participation in covert action. Goldwater-Nichols’s silence on the Secretary of Defense remaining in the chain of command indicates Congress did not intend to change the default hierarchy. DOD recognized that point by defining combatant command as being “under a single commander” and running “through the Secretary of Defense.” All these say nothing about covert action.

The statute and EO 12333 put the director “in charge” of the conduct of covert actions. CIA “ownership” means any non-CIA employee supporting a covert action “belongs” to the CIA. However, the CIA lacks DOD’s legal command structure and no CIA official possesses the command authority inherent in an officer’s commission. The CIA can only be in charge, not in command. The director cannot give a lawful order that would be legally binding on Servicemembers. The Constitution unequivocally grants Congress the authority to “make Rules for
the Government and Regulation of the land and naval Forces.” Those rules, the Uniform Code of Military Justice, never contemplated CIA personnel exercising command authority over Servicemembers. The CIA's ownership of covert action is limited. Exclusive CIA control fails elsewhere; the statute authorizes the President to task “departments, agencies, or entities” to conduct covert action. The implication is that DOD can conduct a covert action exclusively. EO 12333 specifically envisions that. Placing DOD elements under CIA control to conduct a kinetic operation is arguably unnecessary.

This chain of command is constitutionally enshrined, codified, and ratified through longstanding practice; even if Congress had explicitly authorized the President to reroute it, doing so creates risk. First, it removes the law of war's protections upon which Servicemembers conducting kinetic operations rely. In such an event, Servicemembers must be made aware they are no longer protected. Second, as a state practice, realigning military personnel under a nonmilitary framework to conduct kinetic activities creates precedent risk for U.S. allies. Such a decision must be fully informed at all levels.

Chain of Command: International Law Context

National armies engaged against each other have, throughout modern history, been cloaked in the law of war’s combatant immunity. Absent that immunity, a captured individual is subject to criminal prosecution for his wartime conduct. His deliberately targeting and killing others become nonmilitary and therefore criminal. In World War II’s aftermath, widespread acceptance of what constituted an “army” rendered a definition unnecessary: “Individuals composing the national forces” automatically enjoyed combatant immunity. However, for those outside their nation’s military hierarchy, specificity was necessary. The Third Geneva Convention grants prisoner of war status—which confers combatant immunity—to those who are subordinate to a responsible commander, wear a fixed, distinctive insignia recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the laws and customs of war.

The command requirement stems from the “dual principle of responsible command and its corollary command responsibility.” The Hague Convention required that a commander be "responsible for his subordinates." The Geneva Convention recognized "no part of [an] army . . . is not subordinated to a military commander," applying this “from the Commander-in-Chief down to the common soldier.” The later protocols “could not conceive” of a hierarchy “without the persons who make up the command structure being familiar with the law applicable in armed conflict.” This is DOD’s unchallenged area of expertise. Like Congress’s definition of traditional military activity, the commentary’s definition, when coupled with the requirements for those not considered part of the Nation’s army, is the parallel to Servicemembers conducting kinetic covert action under CIA control. Combatant immunity necessitates prisoner of war status; for those not acting as part of the army, that status requires a military chain of command. Replacing the Secretary of Defense with the CIA director eviscerates this.

U.S. history records a fundamental belief in the rules for combatant immunity. First, to codify these requirements, the 1863 Lieber Code defined prisoner of war as including “all soldiers.” The code noted noncompliance with the rules meant no combatant immunity: spies were “punishable with death by hanging by the neck.” “Armed prowlers . . . who steal within the lines of the hostile army for the purpose of . . . killing . . . are not entitled to the privileges of the prisoner of war.” The code’s noteworthy purpose was not to regulate conduct between nations, but for application in a non-international armed conflict and maintaining the moral high ground necessary to facilitate reconciliation with and reintegration of the confederate states.

The law of war’s efficacy rests on the principle of reciprocity. One party provides the protections to its prisoners believing and hoping its enemies will respond in kind. Commendable German and U.S. treatment of each other’s prisoners during World War II exemplifies this principle; Japanese treatment of U.S prisoners at Bataan proves its imperfections. Regardless, maintaining the moral context of their actions and the expectations of the world community is imperative. The law of war, as a discipline of conduct, is the foundation of international law, a commitment to and belief in the law's values.
high ground is critical. Had Abbottabad gone poorly, the United States would have asserted that U.S. personnel in Pakistani custody were entitled to the high standards of prisoner of war treatment. That would have required those Soldiers and Sailors to be in compliance with the law of war. The nonmilitary chain of command may have been problematic in making that assertion.

Conclusion

“From its inception . . . America has venerated the rule of law.”72 Traditional military activities occur against a rich fabric of domestic and international law. Covert action, while uniquely codified, presents multiple dilemmas. Although permissible under U.S. domestic law, covert action is generally illegal in the target country.73 Again, maintaining the moral high ground is critical.

Although inimical to covert action’s fundamental premise, overt executive branch commentary following the Abbottabad raid highlighted the legal risk associated with policy decisions. Placing Servicemembers under CIA command threatens to undermine the protections they rely on when conducting kinetic military operations, especially where the activity is more accurately classified as a traditional military activity.

The risk can—and should—be mitigated by first properly classifying the activity. Classifying a traditional military activity as anything else undermines the very categorization and its inherent law of war protections. DOD can undoubtedly conduct secretive (that is, clandestine and/or unacknowledged) actions as traditional military activities and enjoy the full body of the law of war’s protections. The current framework neither envisions nor facilitates placing Servicemembers under CIA control and preserving the command relationships necessary to cloak them in combatant immunity. The Abbottabad raid utilized this risk-laden approach.

This is not to assert that conducting the raid as a covert action was illegal. There were three likely outcomes: success, failure, or something in between (that is, aborting the mission). Either success or failure required covert action’s plausible deniability. The United States immediately publicly acknowledged killing of “public enemy number one”; regardless, the crashed helicopter disclosed the U.S. role. A noncatastrophic driven decision to abort (for example, Pakistani detection of violation of their sovereign airspace) provides the sole outcome where the United States would likely have hidden behind the statute’s shield, disavowing all. The covert action classification provided an insurance policy, yet the cost of allowing that policy to “lapse” through post-success disclosures undermines the plausibility of such “insurance” in the future.

Compare the Abbottabad covert action with the recent rescue of a U.S. citizen in Somalia, conducted secrectively, but not covertly, by “a small number of joint combat-equipped U.S. forces.”74 This comparison illustrates that such activities can be conducted as traditional military activities, maintaining secrecy and preserving individual Service-member protections. The need for continued distinction between covert action and traditional military activities and, where covert, the need for DOD-conducted operations to maintain a military chain of command, drive these recommendations. The United States should revisit the rejection of the 9/11 Commission’s recommendation that DOD assume responsibility for paramilitary covert operations.75

Where DOD participation is necessary and primary, the operation should be conducted as an unacknowledged traditional military activity. If the risk analysis drives a decision to conduct the operation as a covert action, the President should maintain the military chain of command. This ensures Servicemembers going in harm’s way have every protection the Nation they serve can provide them—or a clearer understanding of the additional risks they are assuming on behalf of their Nation. JFQ

NOTES


2 Ibid. Emphasis added.


4 Remarks by President Barack Obama, delivered from the East Room of the White House, May 1, 2001, available at <www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead>.


8 50 U.S.C. §413b(e)(2).
