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**BARNES-WALL FOUNDATION OF SOUTH CAROLINA AWARD 2013
ANNOUNCEMENT**

The Military Legitimacy Review (MLR) is pleased to announce that the Barnes Wall Foundation of South Carolina, after careful consideration and deliberation, has selected for its 2013 scholarship award Ave Maria School of Law (AMSL) Class of 2013 Juris Doctor Candidate Michael Sahadi's work entitled:

KEEPING JSOC A SECRET

The Barnes Foundation, through the efforts of the MLR and also from recommendations of university and law faculty professors, sought nominations for this award amongst many deserving student-candidates. Attorney Sahadi was a scholar examining National Security Law at AMSL when he completed this superb and presciently timely work regarding the exposure of special warfare and its adverse effects on national security and defense to the United States.

The award includes publication in MLR as well as a monetary prize (\$500.00) given in this inaugural year of competition to Mr. Sahadi for having written the best paper on a topic related to military legitimacy.

The award is not intended to recognize a paper for academic credit in an independent study, but an award for the best paper in a class or group of 3 or more. The topic and paper should relate to legal and moral issues in military operations and/or strategy (e.g. democracy, human rights and the rule of law, and religion/cultural issues), with the winning paper being posted with the author's permission on the Military Legitimacy Review (MLR) website at <http://militarylegitimacyreview.com/>

With this award a new cycle for 2014 begins, with submissions solicited for the next year's competition encouraged and accepted through April 7th, 2014. For additional details please contact the Editor in Chief of the MLR, Professor of Law Kevin Govern, via info@militarylegitimacyreview.com and / or khgovern@avemarialaw.edu for additional details.

**KEEPING JSOC A SECRET:
THE EXPOSURE OF SPECIAL WARFARE AND ITS ADVERSE EFFECTS ON
NATIONAL SECURITY AND DEFENSE TO THE UNITED STATES**



By: Michael J. Sahadi, Jr.
3L, Ave Maria School of Law
Military Law
April 25, 2013

In dedication to the unsung heroes who fight, or
have fought, thanklessly to preserve the freedoms
we all treasure.
Thank you.

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Introduction

Any exposure is too much exposure. At least this holds true for the special forces of the United States. JSOC, or Joint Special Operation Command, operated in total secrecy with minimal to naught exposure by the media. That changed dramatically on May 1, 2011, in the wake of Operation Neptune Spear. In a matter of minutes after President Barak H. Obama announced to the world that Osama bin Laden was neutralized, media outlets began reporting the Navy SEALs killed bin Laden. Within in a very short time the world was made known of mission details, from the modified Black Hawk helicopters, to the compound where bin Laden lived, all the way to the unit who neutralized him. Never before has so many details dealing with an operation been disclosed globally. The effects of such a divulging of information are completely adverse to JSOC and its ability to conduct successful missions.

This research paper will be discussing JSOC and its intended purposes. This paper shall argue that the recent exposure JSOC has received is detrimental to its success in missions and operations it conducts. Though at times it may appear a political argument is being made, it is important to note those arguments deal directly with the danger of politicizing the military, not advancing a political agenda.

This paper shall discuss the-now-famous Operation Neptune Spear, not for the purposes of retelling the story, but to illustrate why disclosure of any mission to the caliber that Neptune Spear was disclosed is dangerous and counterproductive to the mission of JSOC. This paper aims to discuss these, while at the same time not promote disclosure of sensitive material. JSOC has also been incredibly instrumental in the War on Terror, and this paper shall argue that in order for this command to maintain successful operations, it must remain secret.

What is JSOC?

JSOC is a military acronym for the Joint Special Forces Operations Command. This command falls under the United States Special Operations Command, under the acronym USSOCOM. JSOC is one of the most, if not the most, important command within our military. Without the supporting and active role that JSOC plays, our military would not enjoy the success it has throughout history. Quite frankly, without JSOC, history as we know it today would be largely different, and likely for the worse. What is it that JSOC does that makes it so important? JSOC is “charged to study special operations requirements and techniques, ensure interoperability and equipment standardization, plan and conduct special operations exercises and training, and develop joint special operations tactics.”¹

JSOC is comprised of the elite of the elite in our military. Its overall focus is on counter terrorism, and each branch of the military has their most lethal units under JSOC’s command. Although JSOC is involved with many operations on a regular basis, very little is known about those

¹ United States Special Operations Command, *Joint Special Operations Command*, USSOCOM (Mar. 2, 2013, 1:52 PM), <http://www.socom.mil/pages/jointspecialoperationscommand.aspx>.

missions - as it should be. Because of the nature and purpose of JSOC, secrecy is vital. JSOC works very closely with the intelligence community to plan and execute operations. The units involved with these operations are separate from the general military, and in a sense, work parallel to their general counterparts. Being an operative in one of these elite units is not something one can simply join. The selection process is incredibly rigorous, even for best military personnel. Members of these units are traditionally handpicked, in addition to the extensive training and screening. The units comprising JSOC include “the Army’s Delta Force, the Navy’s SEAL Team 6, the Air Force’s 24th Special Tactics Squadron, and the Army’s 160th Special Operations Aviation Regiment and 75th Ranger Regiment.”² Working under the same command does not necessarily mean working in together on all operations. Both “Iraq and Afghanistan had been informally divided, with the SEALs running Afghanistan and the U.S. Army’s Delta Force conducting the bulk of the operations in Iraq, though there was overlap of each organization.”³

Of all the units that comprise JSOC, none is more studied than the most elite and lethal unit, the United States Naval Special Warfare Development Group (DEVGRU). There is almost a romantic aspect about this group which draws so much attention, albeit that when it was conceived, no one was supposed to know of its existence.

DEVGRU

Navy DEVGRU is the most elite and most lethal unit in the world. That is a bold statement, and one might even argue an arrogant one. However, that statement is absolutely true.

Naval Special Warfare Development Group, otherwise known as 'DEVGRU' or 'SEAL Team 6', is a Counter Terrorism unit administered by US Naval Special Warfare Command. An elite within an elite, the unit is made up of SEALs selected from existing SEAL Teams. DEVGRU is considered a 'Tier One' special mission unit on a par with the Army's Delta Force. SEAL Team Six is under operational command of JSOC.⁴

DEVGRU came to exist in the wake of the Iranian hostage crisis after the failed Operation Eagle Claw. In early November, 1979, “Iranian militants seized the U.S. Embassy in Tehran, and took all it’s diplomatic personnel hostage.”⁵ At the time, the United States did not have specialized units to deal with situations like this. Soon thereafter, “Major General James Vaught was charged by the Joint Chiefs of Staff to form a task force - it was called TAT, or Terrorist Action Team - that would plan a military hostage-rescue option.”⁶ Colonel Charlie Beckwith was tapped to design a team.

² Dana Priest, *‘Top Secret America’: A Look at the Military’s Joint Special Operations Command*, THE WASHINGTON POST (Apr. 10, 2013 1:56 PM), http://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ_story_1.html. [Hereinafter Priest].

³ Kimberly Dozier, *Fabled SEAL Team 6 Ends Hunt for bin Laden*, MILITARY TIMES (Apr. 16, 2013, 12:50 PM), <http://www.militarytimes.com/apps/pbcs.dll/article?AID=2011105020305>. [Hereinafter Dozier]

⁴ American Special Ops.Com, SEAL Team 6, (April 2, 2013), <http://sealteamsix.americanspecialops.com>.

⁵ RICHARD MARCINKO, ROGUE WARRIOR 225 (1992).

⁶ *Id.* at 225.

Colonel Beckwith had been part of several special forces operations in the past. Colonel Beckwith “had realized early on there was a need for an elite, mobile, highly trained unit to fight terrorism, conduct surgical behind-the-lines operations, gather intelligence, and provide nonconventional options to low-intensity-conflict scenarios. The unit he’d conceived and built to do the job was called SFOD-D - Special Forces Operational Detachment-Delta - or more commonly, Delta Force.”⁷

Due to a series of mechanical problems with the helicopters and severe dust storm, along with other factors, the mission ultimately failed. Failure, though never good, provides a critical learning tool. There were a “number of significant lessons were learned from Operation Eagle Claw, which led to the establishment of the United States Special Operations Command (USSOCOM) and its USAF component, the Air Force Special Operations Command (AFSOC). The operation also highlighted the necessity of Joint planning and training.”⁸ Within SOCOM, JSOC came to exist.

SEAL Team Six was the brainchild of Navy SEAL Commander Richard Marcinko. Marcinko was involved with the Terrorist Action Team, though he did not design SFOD-D, he did help plan their mission. In the wake of Operation Eagle Claw, it was evident specialized forces, properly equipped and trained, would be necessary to deal with counterterrorism. Marcinko writes in his autobiography, *Rogue Warrior*, “[w]hat I had wrought was a new SEAL unit devoted exclusively to counterterror. It would become a coequal part of the JTF [Joint Task Force], alongside Delta and the Air Force’s SOF, with world-wide maritime responsibilities.”⁹ This new unit would be called SEAL Team Six, later to be known as DEVGRU. Marcinko named it “Six because there were already six platoons that had received CT [Counter Terrorism] training. And Six because the number would make the Soviets believe that there were five other SEAL teams somewhere, when there were in fact only two.”¹⁰

At its inception, SEAL Team Six was designed to blend in anywhere in the world, much like the way people might imagine CIA operatives to act. Marcinko writes, “SEAL Team Six would be lean and mean - seventy-five enlisted men and fifteen officers. They would look like civilians. Modified grooming standards - long hair, earrings, beards, and mustaches - would be maintained, so they’d pass as blue-collar workers anywhere in the world. Language skills would be encouraged.”¹¹ Anywhere in the world was not a sales gimmick, Team Six would truly become a global unit. However, “[u]nlike SEAL One or Two, whose activities were limited geographically,

⁷ *Id.* at 226.

⁸ Air Force Historical Studies Office, *Operation Eagle Claw*, (April 2, 2013), <http://www.afhso.af.mil/topics/factsheets/factsheet.asp?id=19809>.

⁹ Marcinko, *supra* note 5, at 240-241.

¹⁰ *Id.* at 241. At the time, there were SEAL Teams One and Two, one on each coast. Team One was the West Coast Team located in San Diego, California; Team Two was the East Coast Team located in Little Creek, Virginia.

¹¹ *Id.* at 241. SFOD-D also shares in “modified grooming standards” much to the same level as SEAL Team Six.

SEAL Team Six would be available on four-hour notice to deploy from its Virginia base to anywhere in the world.”¹²

According to Marcinko, SEAL Team Six was “an alleged top-secret unit. We wore civilian clothes; I’d ordered my men to remove the base stickers from their vehicles, keeping them instead on magnetic strips they’d attach just as they drove through the gates. We’d come and go at odd hours. Nothing about SEAL Six was military - and that’s the way I wanted it.”¹³ SEAL Team Six’s behavior modeled their appearances, leading the common man to not give it a passing glance should he run into the unit.

The entire idea of SEAL Team Six was completely cloaked in secrecy. The unit was so secret, that although it was housed a few yards from SEAL Team Two, Two did not know who this group was. There are several reasons for this, first and foremost, in remaining secret, they had the element of surprise on their enemies. Enemy combatants can not take preventative steps to stop a unit they do not know exists. The purpose of “non-existence” is so much more than just the surprise element. When a unit is the best of the best, the most lethal, it is completely adverse to show enemy combatants what makes that unit so lethal. So long as SEAL Team Six remained secret, they could train in secret, hone their skills, and essentially be a phantom unit. Our enemies did not know of SEAL Team Six’s existence, but they likely knew that the United States did not have a counterterrorism unit in place. What little they would have known about our counterterrorism would have entirely been based on Operation Eagle Claw, and would not have been very credible.

Another reason for the secrecy, arguably equally as important as the first, was to protect the unit operators. SEAL Team Six operators are people too, they have family, homes, and friends. Much like CIA agents, exposing their identity not only makes them vulnerable to counter attacks, but also jeopardizes the missions they participate in. To say that secrecy is important to SEAL Team Six’s success is an understatement, it is essential to it.

Any Exposure is Too Much Exposure

There are misperceptions that exist, “[t]his is what people think of when they imagine the Joint Special Operations Command, or JSOC — the secretive, über-elite military unit that killed Osama bin Laden.”¹⁴ There is a very good reason that this is all that people’s view is of JSOC, and for that matter DEVGRU: too much exposure. There has been no other operation in JSOC’s history that has received the hype and glamour that Operation Neptune Spear received. Granted, DEVGRU neutralized a very high-value target, Osama bin Laden, but apart from the value of the target, the operation was of little difference compared to the thousands of operations conducted annually by JSOC.

¹² *Id.* at 241. SEAL Team’s One and Two would operate in specific geographic areas, Six was designed to operate globally, this is just one of many differences between Six and its counterpart SEAL Teams.

¹³ *Id.* at 260.

¹⁴ Spencer Ackerman, *How The Pentagon’s Top Killers Became (Unaccountable Spies)*, WIRED (Mar. 31, 2013), <http://www.wired.com/dangerroom/2012/02/JSoc-ambinder/>. [Hereinafter Ackerman].

Most American's are aware that agencies like CIA and NSA exist, but few if any, can possibly imagine what those agencies do. Comparatively, most American's had no idea whatsoever that JSOC existed, that is until Operation Neptune Spear. Most people knew that the Navy SEALs were an elite fighting force, and possibly knew they were broken up into teams. However, it would take active research to determine what each team specializes in, and to understand the night and day differences between SEAL Team Six and the rest of the SEAL teams. Most of that knowledge came in the forms of books, and unless the reader was interested in the US Navy or special warfare, the average person would not have known these details.

JSOC was designed to be shrouded in secrecy. The "mystique is hard to penetrate: JSOC is so secretive that it instructs its members not to write down important information, lest it be vulnerable to disclosure under the Freedom of Information Act."¹⁵ As previously discussed, there are certain legitimate reasons for this secrecy. The entire mission of JSOC is dependent on it remaining in the shadows. To be successful, their global presence must be unseen and unknown.

Covert vs. Clandestine

Understanding the differences between covert missions and clandestine missions is vital to understanding how and why JSOC is so successful at what it does. According to the Department of Defense Dictionary, a covert operation is an "operation that is so planned and executed as to conceal the identity of or permit plausible denial by the sponsor."¹⁶ The Department of Defense Dictionary defines clandestine operations as an

operation sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment. A clandestine operation differs from a covert operation in that emphasis is placed on concealment of the operation rather than on concealment of the identity of the sponsor. In special operations, an activity may be both covert and clandestine and may focus equally on operational considerations and intelligence-related activities.¹⁷

While both types of missions are top-secret and highly classified, covert is typically held to a higher level of security. Deciding which type of mission it will be transcends all the way down through the training. In a recent phone interview with counter-terrorism expert, Ambassador Dell Dailey, he gave an example on the difference between the two mission types. If the mission is a clandestine mission, the operators will carry identification cards and travel in marked vehicles, such as a labeled helicopter, with markings showing who it belongs to.¹⁸ This is different for covert missions. During covert missions, operators carry no identification and travel in unmarked vehicles, such as blacked out helicopters. The reason for this is so they cannot be identified as

¹⁵ *Id.*

¹⁶ DEPARTMENT OF DEFENSE DICTIONARY 67 (JP 1-02).

¹⁷ *Id.* at 41.

¹⁸ Telephone Interview with Ambassador President Dell Dailey, Center for a New American Security (Mar. 28, 2013). [Hereinafter Dailey].

belonging to any one nation. Setting secrecy aside, “JSOC is not permitted to carry out covert action as the CIA can.”¹⁹ During a covert mission, “in which the U.S. role is to be kept hidden,” it “requires a presidential finding and congressional notification.”²⁰ Given this complexity, much of the media reports incorrect and often contradictory news with respect to JSOC. Part of this complexity is due to JSOC following a separate chain-of-command, one in which reports directly to the President of the United States. “Many national security officials, however, say JSOC’s operations are so similar to the CIA’s that they amount to covert action. The unit takes its orders directly from the president or the secretary of defense and is managed and overseen by a military-only chain of command.”²¹

The Success of JSOC in Present Times

Much of the war initiative in both Iraq and Afghanistan has been successful largely due to JSOC sanctioned missions. While the conventional military clears street by street, JSOC operators move in on specified targets. This has resulted in the conventional forces being more successful in their operations. Our “special operations forces in Iraq may work in the shadows, but they are making a larger contribution to the war than commandos in any other conventional military operation in U.S. history, according to senior military officials.”²² When a JSOC operation disrupts the command of al-Qaeda, it makes it easier for conventional forces to neutralize combatants. As previously stated, JSOC reports directly to the President. During the Bush Administration, “JSOC’s operations were rarely briefed to Congress in advance — and usually not afterward — because government lawyers considered them to be “traditional military activities” not requiring such notification. President Obama has taken the same legal view, but he has insisted that JSOC’s sensitive missions be briefed to select congressional leaders.”²³ JSOC’s success did not go unnoticed by the Department of Defense. Our “[s]pecial ops forces performed so well during the Afghanistan campaign that in January, Defense Secretary Donald Rumsfeld announced that for the first time, JSOC would have the option of leading global missions, instead of following directions from other regional commanders.”²⁴ When executive order was signed, it in a sense became a significant milestone for JSOC. It was “on Sept. 16, 2003, Rumsfeld signed an executive order cementing JSOC as the center of the counterterrorism universe. It listed 15 countries and the activities permitted under various scenarios, and it gave the preapprovals required to carry them out.”²⁵ While that executive order may make some civilians uncomfortable, it is important to note that the units that make up JSOC are highly trained elite units, far more tactically advanced than best units in the conventional forces. The operators in these units are experts in their fields, better than the best of the best. Typically when weapons and tactics are deemed “tried and tested” by the elite forces, they are

¹⁹ Priest, *supra* note 2.

²⁰ *Id.*

²¹ *Id.*

²² Lisa Burgess, *DOD Says Special Ops’ Role in Iraq Biggest Ever*, STARS AND STRIPES (Apr. 3, 2013, 9:43 PM), <http://www.stripes.com/news/dod-says-special-ops-role-in-iraq-biggest-ever-1.3939>. [Hereinafter Burgess].

²³ *Id.*

²⁴ Burgess *supra* note 19.

²⁵ Priest *supra* note 17.

slowly incorporated into the conventional forces. It was “those kind of techniques, by 2007-8, were used not just by the elite special operations forces, but also the so-called white special operations forces — Green Berets and other Navy SEAL elements, as well as conventional human intelligence brigades that were attached to combat units.”²⁶

In 2007, “the U.S. military and intelligence agencies launched a series of top-secret operations that enabled them to locate, target and kill key individuals in groups such as al-Qaeda in Iraq, the Sunni insurgency and renegade Shia militias, or so-called special groups.”²⁷ Even then both the military and administration officials appreciated the importance of secrecy. Several “[s]enior military officers and officials at the White House urged against publishing details or code names associated with the groundbreaking programs, arguing that publication of the names alone might harm the operations that have been so beneficial in Iraq.”²⁸

It may come as a surprise that JSOC has had such a profound impact on the war effort. That surprise is a result of secrecy. This command has operated virtually unnoticed by the public, few if any knew of its existence. Unfortunately, in May 2011, a blinding light was shone into the darkest shadows of JSOC, and with it, the floodgates were opened and an outpouring of sensitive information flowed.

Operation Neptune Spear

A little “after eleven o’clock on the night of May 1st, the assault team of 23 SEAL operators and additional support members lifted off from Jalalabad Air Field, in eastern Afghanistan.”²⁹ Once there, “[t]hirty to 40 U.S. Navy SEALs disembarked from the helicopters as soon as they were in position and stormed the compound. The White House says they killed bin Laden and at least four others with him.”³⁰ At 11:35 P.M., President Barack H. Obama announced to the world “that the United States has conducted an operation that killed Osama bin Laden, the leader of al Qaeda.”³¹ The President’s speech lasted some nine minutes, concluding at approximately 11:44 P.M.³² Barely five minutes later, at 11:49 P.M., The Huffington Post, among other media outlets, put out a story saying that “[t]he fight lasted only 40 minutes and was described by a senior administration

²⁶ Ackerman *supra* note 12.

²⁷ Bob Woodward, *Why Did Violence Plummet? It Wasn’t Just the Surge*, THE WASHINGTON POST (Mar. 14, 2013, 10:42 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090701847.html?hpid=topnews>.

²⁸ *Id.*

²⁹ Kevin H. Govern, *Operation Neptune Spear: Was Killing Bin Laden a Legitimate Military Objective?*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD, 355 (Claire Finkelstein, et al., eds., 2012). [Hereinafter Govern].

³⁰ Michael Murray, *Osama Bin Laden Dead: The Navy SEALs Who Hunted and Killed Al Qaeda Leader*, ABC NEWS (Apr. 3, 2013 9:14 AM), <http://abcnews.go.com/US/osama-bin-laden-dead-navy-seal-team-responsible/story?id=13509739#.UWeDtr9H304>. [Hereinafter Murray].

³¹ Macon Phillips, *Osama Bin Laden Dead*, THE WHITE HOUSE (Apr. 16, 2013 5:08 PM), <http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead>.

³² Murray *supra* note 25.

official as a “surgical raid” conducted by a Navy SEALs unit.”³³ In a very brief few moments, many went from not knowing Osama bin Laden was dead to knowing operational details. For anyone familiar with the SEALs, it would not be difficult to venture a guess as to which SEAL Team was responsible. While all of the Teams specialize in different things and receive similar training, only one is revered for being the counterterrorism team. Although officially DEVGRU does not exist, as addressed earlier, SEAL Team Six was designed for counterterrorism before it ceased to officially exist.

The question is inevitably begged, how could such sensitive information get out, and get out so quickly? The research conducted through this paper all seems to come to a common answer: it was leaked. These leaks clearly came long before any book deal was made with any insiders or operators pertinent to the mission, as this information came out instantly. It is interesting to note the backlash certain books received, when for the most part, the stories they tell are just more coherent and articulate versions of what was already circulating in the media. Ironically, “[t]he Obama administration has gone to extraordinary lengths to publicize details of the raid that killed Osama bin Laden, even as it threatens to file criminal charges against a former Navy SEAL because he provided the same type of mission rundown in his recently published book.”³⁴ The Washington Times even did a comparison between the two, and was hard pressed to find differences. The “examination by The Washington Times shows that several details in the book “No Easy Day” already have appeared in print based on interviews with administration officials and likely will be included in an upcoming movie and another book.”³⁵ Quite possibly the strongest condemnatory statement from The Washington Post’s article is that, “the most detailed account of the raid appeared in a 2011 New Yorker article based on authorized interviews with White House officials.”³⁶

In the summer after Operation Neptune Spear, The New Yorker ran an article. The author was able to interview administration officials who were candid about the operation. Although most of the details divulged by the administration official were similar to those which had been previously printed by other media outlets, there was new information to be found coming from the administration officials. In “the aircraft were twenty-three Navy SEALs from Team Six, which is officially known as the Naval Special Warfare Development Group, or DEVGRU.”³⁷ Although not confirmed, this very well could be the first time an administration official disclosed and confirmed (1) the existence of the nonexistent group, and (2) that DEVGRU was the unit involved with the

³³ Sam Stein & Jennifer Bendery, *Osama Bin Laden Dead, Obama Announces*, THE HUFFINGTON POST (Apr. 16, 2013, 5:31 PM), http://www.huffingtonpost.com/2011/05/01/osama-bin-laden-dead-killed_n_856091.html.

³⁴ Rowan Scarborough, *Details of bin Laden Raid Leaked First by Obama Aides*, THE WASHINGTON POST (Apr. 16, 2013, 5:45 PM), <http://www.washingtontimes.com/news/2012/sep/16/details-of-bin-laden-raid-leaked-first-by-aides/?page=all>. [Hereinafter Scarborough].

³⁵ *Id.*

³⁶ *Id.*

³⁷ Nicholas Schmidle, *Getting Bin Laden*, THE NEW YORKER (Apr. 16, 4:17 PM), http://www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle. [Hereinafter Schmidle].

operation. The unnamed official continued the disclosure of what else took place the night of Neptune Spear: “On the night of May 1st alone, special-operations forces based in Afghanistan conducted twelve other missions; according to the official, those operations captured or killed between fifteen and twenty targets.”³⁸ Granted, this is a normal night for JSOC, missions do not just happen once a month, they happen daily, and given the size of JSOC, simultaneously. The perplexity of the argument this paper is making is *why* was Neptune Spear so highly, and arguably pre-maturely, disclosed to the world?

JSOC runs numerous operations each night, yet Neptune Spear, one of thirteen missions that ran on May 1, 2011, is the only one being disclosed. One can rightly argue that the disclosure was owed to the American people, and the world, because it was that mission which neutralized the al-Qaeda leader, Osama bin Laden. That argument fails to answer the question posed: why disclose mission details. Surely the administration could have simply said *an operation was conducted which killed Osama bin Laden, the world can now rest a little easier*. Those are all the details we, the world, needed to know. Aside from the high-value-target, this mission was of little difference from any other mission JSOC conducts. The nonexistent group, “called Navy SEAL Team Six, probably won't claim the credit publicly, however.”³⁹

The Wake of Neptune Spear

It is absolutely shocking that any mission conducted by JSOC would receive any attention, let alone the sheer outpouring of details Neptune Spear has and still is receiving. Keeping Osama bin Laden's death a secret would have been an monumental, if not futile, task. Telling the world that bin Laden was dead would have been enough, disclosing anything more than that raises questions that should remain unasked and unanswered. Providing additional details only encourages investigative reporting and likely breaches in classified details. Once these details, whether true or false, are disseminated, anyone who had any level of involvement with the mission felt the need to set the record straight. Before long, details of the mission are being disclosed in articles, interviews, and book deals, detailing some of the most intimate aspects of the mission. Post-Neptune Spear has afforded numerous individuals to write their version of history through a variety of outlets, the most notable is likely “No Easy Day” by Mark Owen. “No Easy Day” is the first hand perspective of a DEVGRU operator who was on Operation Neptune Spear.⁴⁰ Much of the book details Mr. Owen's life and training leading up to May 1, 2011. By time the book came out, in the third-quarter of 2012, most of the mission details had already been printed and re-printed dozens of times through different articles - it was essentially old news by then. The recount by Mr. Owen did not sit well with administration officials. As a result, threats of litigation were made to Mr. Owen. “Clearly, the same administration that now is threatening [Mr. Owen] was knowingly releasing the same kind of detail a year earlier, the source close to the SEALs said.”⁴¹ The White

³⁸ *Id.*

³⁹ Dozier, *supra* note 3.

⁴⁰ MARK OWEN, NO EASY DAY, (2012).

⁴¹ Scarborough, *supra* note 29. Mr. Owen was added in place of the operators real name, based on his pen name.

House went on a campaign to make Neptune Spear the most important operation conducted in recent history. As a result, the “White House push to tell the bin Laden story has resulted in scores of pre-“No Easy Day” accounts of the raid in newspapers and magazines. The articles quote administration officials, White House aides and Pentagon sources.”⁴² It is certainly questionable as to why Mr. Owen received such backlash for re-telling the story that had been told with such vigor for the previous year. The position maintained by the Pentagon is, “regardless of what has been released by administration officials, the ex-SEAL violated rules by failing to have his manuscript reviewed.”⁴³

The fact of the matter is this, even without books like “No Easy Day,” the story was still told, and told with such details by the administration, that it is hypocritical for administration to go after Mr. Owen. While the rhetoric has been argued, the “White House has gone to great lengths to help Hollywood make a movie on the bin Laden raid,” “which was due to come out before the election” and “at the time the White House was helping filmmakers.”⁴⁴

On June 15, 2011, a month after the raid, White House communications aide Ben Rhodes wrote to spokesman Douglas Wilson at the Pentagon: “We are trying to have visibility into the [bin Laden] projects, and this is likely the most high-profile one. Would like to have whoever the group is that’s going around in here at the

WH to get a sense of what they’re doing/what cooperating they are seeking.”⁴⁵

Unfortunately, this is not the first time during this administration that our Special Forces have been depicted in Hollywood. Even a couple of “active duty SEALs were authorized — some in the community say ‘ordered’ — to appear in the movie ‘Act of Valor,’” which debuted in February” of 2012.⁴⁶ It is not known which Team those SEALs were part of, though it was likely not DEVGRU, the other Team’s are still highly specialized units that work in the Special Warfare community.

Exposure of JSOC in Pop-Culture & The Dangers it Creates

Some may argue that movies help to illustrate history in a way that books and documents can not do. While that may be true, the movies this paper discusses are not on the same lines as other military movies. There is a clear and obvious difference between movies like “Saving Private Ryan” and “Act of Valor.” “Hollywood fiction, like The Green Berets, starring John Wayne, those are fine. It inspires young people to think about the military.”⁴⁷ The dangers come from using real operators, or using closely related mission scenarios or training techniques. Ambassador Dailey believes “this absolutely tips [the enemy] off as to what we are competent at, it allows them to think at our level, and allows them to adapt to our training skills.”⁴⁸ Movies such as “Act of Valor”

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Dailey, *supra* note 16.

⁴⁸ *Id.*

and “Zero Dark Thirty” have a “potential to affect us”⁴⁹ in a number of ways. “Zero Dark Thirty is extremely revealing,” and “we don’t want our foes and adversaries to be aware of [our] tactics,” because that compromises success.⁵⁰

Beyond the danger to our future operations success, a more personal danger has been created. After “the White House identified SEAL Team 6 as those responsible, camera crews swarmed into their Virginia Beach neighborhood, taking shots of the SEALs’ homes.”⁵¹ Exposing the individual operators, especially in the media is incomprehensible. Operators in this unit work very closely with the intelligence community. Showing who they are, and what they do, directly threatens theirs and their families lives. If al-Qaeda was looking for someone to go after for the death of their leader, the media gave them photos and addresses. During the interview with the alleged “Shooter” of Osama bin Laden, it was noted: “‘Personally,’ his wife told me recently, ‘I feel more threatened by a potential retaliatory terror attack on our community than I did eight years ago,’ when her husband joined ST6.”⁵² Unfortunately, “[t]here is commerce attached to the mission, and people are capitalizing.”⁵³ With movies, books, and countless articles written about the mission, people are making plenty of money off JSOC’s exposure.

Politicizing JSOC

Although this is not intended to be a political paper, there is a political aspect of Neptune Spear which needs addressed. Beyond the money made from the operation, there has also been a substantial amount of politics being forcibly intertwined in it, and critics immediately took notice. Neutralizing bin Laden “was a staple of presidential-campaign brags. One big-budget movie, several books, and a whole drawerful of documentaries and TV films have fortified the brave images of the Shooter and his ST6 Red Squadron members.”⁵⁴ The President’s press announcement was “ridiculous, it was cheap politics.”⁵⁵ This sentiment is more about patriotism than it is about politics. Many Americans feel that the President took too much credit for the operation. Some of the harshest critics come from the special forces community. Of those, one group Special Operations OPSEC, a possible political think tank or lobbyist group, has accused “Obama of seeking political gain by disclosing successful secret operations.”⁵⁶ The group posted a “web video featuring former special forces officers accus[ing] President Barack Obama of taking too much credit for the killing of Osama bin Laden and allowing classified information about the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Phil Bronstein, *The Man Who Killed Osama bin Laden... Is Screwed*, ESQUIRE (Mar. 30, 2013, 2:33 PM), <http://www.esquire.com/features/man-who-shot-osama-bin-laden-0313>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Telephone Interview with Amos Guiora, professor of law at The S. J. Quinney College of Law, University of Utah (Mar. 24, 2013). [Hereinafter Guiora].

⁵⁶ Dugald McConnell & Brian Todd, *Former Special Forces Officers Slam Obama Over Leaks on bin Laden Killing*, CNN (Apr. 17, 2013, 1:46 PM), <http://www.cnn.com/2012/08/16/politics/former-seals-obama>.

raid to become public.”⁵⁷ Although its easy to pass this over as merely political rhetoric that took place during a campaign season, this group may have a valid point. While administration officials, like Vice President Joseph Biden, go around touting “we also got bin Laden,” and then immediately saying, “Let me correct that. The president of the United States and the special forces got bin Laden,”⁵⁸ it is easy to see the animosity. The way the administration has told this story, one might think the President himself was with DEVGRU on May 1, 2013 in Abbotabad. Supporters of the President say he deserves much of credit, and hinge their argument on a comment by then-counterterrorism advisor to the president, John Brennan, because he “praised the mission that killed Osama bin Laden as a ‘gutsy call.’”⁵⁹

The intelligence leading up to Neptune Spear spans much of the last decade, any president, be it George W. Bush or Barack H. Obama, would have made the decision that was made. That is the extent of it, the president made a decision while JSOC ran the operation. That is precisely why the critics of the president are upset, he made a decision, but the years of hard work gathering intelligence and the constant training on the part of the operatives, along with the countless lives that were lost in missions leading up to Neptune Spear appear to have minimized in the shadow of the president’s decision. While JSOC and its units, including DEVGRU, do not seek public recognition, it only seems right that credit be given to them, as they are the unsung heroes who did the deed, not the president. While the administration has gone around patting one another on the back, JSOC has pressed on, as Neptune Spear was all in a days work for them.

Many forget that before Osama bin Laden was neutralized, JSOC captured Saddam Hussein in a spider hole in Iraq. However, the response by the Bush Administration was quite different from that of the Obama Administration. Saddam Hussein was captured by SFOD-D, one of DEVGRU’s counterpart units in the JSOC fold. The differences in both units and operations are very different, yet very similar. SFOD-D “also played the principal role in the painstaking hunt for Iraq’s most violent terrorist leader, Abu Musab Zarqawi.”⁶⁰ The “Bush administration put out few details about how Zarqawi was found in a hideout north of Baghdad, and Delta remained in the shadows.”⁶¹ Ironically, both the capture of Saddam Hussein and Osama bin Laden came just one year before both reelection campaigns. Conversely, “the hunt and capture of Saddam with the bin Laden killing, President [George W.] Bush was very quick to congratulate the troops and move on,” . . . “what we see with the current administration is, it is being used for political leverage.”⁶² When SFOD-D “and conventional ground troops hunted down Iraqi dictator Saddam Hussein in 2003, found him a spider hole and flew him to Baghdad in a special ops “little bird,” the covert unit

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Megashyam Mali, *Brennan: Bin Laden Raid was a “Gutsy Call”*, THE HILL (Apr. 17, 2013, 7:50 PM), <http://thehill.com/blogs/blog-briefing-room/news/224421-brennan-says-bin-laden-raid-was-a-gutsy-call>.

⁶⁰ Rowan Scarborough, *Delta Force: Army’s “Quiet Professionals”*, THE WASHINGTON TIMES (Apr. 17, 2013, 8:20 PM), <http://www.washingtontimes.com/news/2012/jun/3/delta-force-armys-quiet-professionals/?page=all>. [Hereinafter Scarborough Delta].

⁶¹ *Id.*

⁶² *Id.*

received far less media focus and garnered no starring role in a movie.”⁶³ The way the Operation Red Dawn (the operation that captured Saddam Hussein) and Operation Neptune Spear were handled differ greatly, although all events surrounding them, including the political climate, are almost identical.

The same holds true the other way around, the military should not entangle itself in politics. Traditionally, the “paradigm of the soldier and the state and related concepts of military leadership and professionalism are based on a pure warrior ethic that calls for an unpolitical soldier, one clearly unsuited for civil-military operations in which political objectives predominate.”⁶⁴ Politicians should not use the military for political leverage, nor should military personnel use operations for personal gain.

Has Exposing JSOC Been Beneficial to the Special Warfare Community?

The short answer: no. Now that JSOC has received such unprecedented media attention, it has been subject to much ridicule and a number of accusations. Most notably, in what appears to be response to the movie “Zero Dark Thirty,” the self-proclaimed documentary, “Dirty Wars” has been released. In “the film Dirty Wars, co-written with David Riker and directed by Rowley, Jeremy Scahill is pulling back the curtain on [JSOC], which has lately exploded into the public eye with the torture-endorsing movie Zero Dark Thirty, about the killing of Osama bin Laden.”⁶⁵ The documentary refers to JSOC as a “death squad” and “secret assassins”⁶⁶ among other things. Jeremy Scahill and Richard Rowley, the journalists who created the documentary, “track this new model of US warfare that strikes at civilians and insurgents alike – in 70 countries.”⁶⁷ The duo “interview[ed] former [JSOC] assassins, who are shell-shocked at how the “kill lists” they are given keep expanding, even as they eliminate more and more people.”⁶⁸ Scahill and Rowley accuse JSOC of being lawless and unaccountable:

Our conventional forces are subject to international laws of war: they are accountable for crimes in courts martial; and they run according to a clear chain of command. As much as the US military may fall short of these standards at times, it is a model of lawfulness compared with JSoc, which has far greater scope to undertake the commission of extra-legal operations – and unimaginable crimes.⁶⁹

⁶³ *Id.*

⁶⁴ RUDOLPH C. BARNES, JR., *MILITARY LEGITIMACY: MIGHT AND RIGHT IN THE NEW MILLENNIUM* 92-93 (1996). [Hereinafter Barnes].

⁶⁵ Amy Goodman, *Dirty Wars: Jeremy Scahill’s Antidote to Zero Dark Thirty’s Heroic Narrative*, THE GUARDIAN (Feb. 2, 2013, 3:30 PM), <http://m.guardiannews.com/commentisfree/2013/jan/28/dirty-wars-jeremy-scahill-zero-dark-thirty>. [Hereinafter Goodman].

⁶⁶ Naomi Wolf, *JSOC: Obama’s Secret Assassins*, THE GUARDIAN (Mar. 20, 2013, 1:52 PM), <http://www.guardian.co.uk/commentisfree/2013/feb/03/jsoc-obama-secret-assassins>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

The duo have made other public accusations - through their documentary - such as, JSOC “has already been sent to kill at least one US citizen – one who had been indicted for no crime, but was condemned for propagandizing for al-Qaida.”⁷⁰ They are referring to Anwar al-Awlaki who was killed in a drone strike. The documentary also asserts that JSOC is running around killing innocent people on purpose.

In Gardez, US special operations forces had intelligence that a Taliban cell was having some sort of a meeting to prepare a suicide bomber. And they raid the house in the middle of the night, and they end up killing five people, including three women, two of whom were pregnant, and ... Mohammed Daoud, a senior Afghan police commander who had been trained by the US.⁷¹

If there are mission errors, it is likely not due to the operators, but more so on the part of the mission planners. This does not mean that mistakes do not occur, and when they do, they have very real, very human, consequences. Although the operators are an elite fighting forces, they are still human. Any “JSOC raid that also wounded or killed civilians, or destroyed a home or someone’s livelihood, became a source of grievance so deep that the counterproductive effects, still unfolding, are difficult to calculate.”⁷²

The operators in JSOC are people, and have emotions, to assert they are cold-blooded killers is just wrong. Beyond that, these are true American heroes who have made such costly sacrifices to defend our nation and protect our liberties. It is disgraceful that someone would say such disrespectful and heinous words about these brave men and women simply because they lack an understanding of JSOC, its purpose, and how it operates. An organization needs to exist to combat terrorism. It is better to neutralize terrorists in their dwellings than for innocent people to lose their lives when the terrorists attack. JSOC is that unit, though many may disagree with the tactics they use, the tactics JSOC employs are far better than anything the terrorists would do to them. In the world we live in, it takes great people to do unspoken things to ensure our freedoms are preserved. By unspoken, that is not to be interpreted as illegal, but to be understood as secret; secret for the safety of the operators and the public.

This paper is not advocating for cutting media access to the military, merely that certain exercises are best not to be reported on. Media responsibility is necessary, “[w]hen the media understands the need for military force it contributes to the public support required for military and political legitimacy--that is, so long as the standards of legitimacy are met.”⁷³ This is a two way street. Historically, the “interrelationship of legitimacy, public support, and the media make it essential to avoid “bad press” in sensitive and unforgiving peacetime environments.”⁷⁴ Though there is a “history of mutual suspicions between the military and the media, recent experience indicates the

⁷⁰ *Id.*

⁷¹ Goodman, *supra* note 58.

⁷² Priest, *supra* note 17.

⁷³ Barnes, *supra* note 64, at 53.

⁷⁴ *Id.*

two can be allies.”⁷⁵ To achieve this goal, several options are available, it “can be accomplished if military personnel understand and conform to the standards of military legitimacy and avoid conflicts between military and civilian values.”⁷⁶ The media is also capable of promoting military legitimacy as well. The mainstream “media can help maintain military legitimacy so long as the military remains a positive and constructive force promoting democracy, human rights, and the rule of law.”⁷⁷ Both the public and the military “should understand that it is shortsighted to restrict coverage of military operations for other than security reasons.”⁷⁸ That is precisely what this paper is arguing, media coverage is acceptable, but for security reasons, JSOC should be off-limits.

The media needs to know these limits, and respect them. There have been circumstances where the media has overstepped this line, for example, “in the pre-dawn darkness of December 1992 when the international press corps greeted Navy Seals on the beaches of Mogadishu with the blinding lights of network television. The farcical affair rendered night vision equipment inoperable; had there been opposition to the landing, American lives could have been lost.”⁷⁹ This is just a small example of what media exposure can do. The exposure of Neptune Spear is much larger than the Mogadishu example.

International Legal Ramifications

The senior adviser to the President said that “penetrating other countries’ sovereign airspace covertly is something that’s always available for the right mission and the right gain.”⁸⁰

There are legal restrictions on what the CIA can do in terms of covert operations. There has to be a finding, the president has to notify at least the “Gang of Eight” [leaders of the intelligence oversight committees] in Congress. JSOC doesn’t have to do any of that. There is very little accountability for their actions. What’s weird is that many in congress who’d be very sensitive to CIA operations almost treat JSOC as an entity that doesn’t have to submit to oversight. It’s almost like this is the president’s private army, we’ll let the president do what he needs to do. As long as you don’t get in trouble, we’re not gonna ask too many questions.⁸¹

These statements are not entirely accurate in their facts. However, these statements are publicized and taken at a face value. “JSOC is in a host nation country with permission of DOD and DOS as well as host country permission,”⁸² they do not arbitrarily show up in a sovereign nation and set up shop. There are potential international law related issues that this exposure raises. For example, in looking at the movie “Zero Dark Thirty” there was a scene where “special ops are going over a

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Schmidle, *supra* note 36.

⁸¹ Ackerman, *supra* note 14.

⁸² Dailey, *supra* note 18.

target area” and some “double taps occurred” on what appeared to be an unarmed individual, “through the way the movie depicts it, the double tap appears to be illegal, thereby raising “potential to violate UN protocol in shooting unarmed individuals.”⁸³ If these actions are “depicted in the movie, we tell the world that we are doing things against UN Protocol.”⁸⁴ This “occurs when movies get real close or accurate”⁸⁵ to the actual event they are depicting.

If movies that are very close and accurate to the actual event were not made, or were not granted cooperation from the government, JSOC would avoid claims that they are breaking protocol. These movies, besides demonstrating tactics and trainings, raise the potential for possible legal ramifications, even if those charges are completely baseless.

Is There Any Benefit for Missions to be Shared with the World?

There is “no reason whatsoever should missions be shared after the fact.”⁸⁶ Once the government discloses mission details to the world, we can no longer run an operation like that again. It tips off the enemy of what we might do. However, if the government did not say anything with respect to the mission, then similar plans could be reused or modified for future operations. There is no legitimate reason to divulge information on that level. Operation Neptune Spear should have been dealt with much the same way as Operation Red Dawn, simply acknowledge the high-value target has been caught or neutralized, and then move on. There is no need to dwell on the mission, scrutinize it, publicize it, or capitalize on it.

It is important to remember that neutralizing Osama bin Laden did not end the war with al-Qaeda, nor the War on Terror. Osama bin Laden was just a man, nothing more. The terrorists did not fight to promote bin Laden, they fought to promote what he preached. Radical militant Islam is a distorted ideology, and neutralizing bin Laden did not kill the ideology. An ideology is an intangible thing, and it is irrelevant who is leading the jihad to promote it, be it bin Laden, or his successor Ayman Mohammed Rabie al-Zawahiri. Though bin Laden is gone, the war rages on, and new targets are neutralized. JSOC did not stop all operations after Neptune Spear. Neutralizing bin Laden has significance in that it put an end to *his* reign of terror in which so many lives were lost, but it unfortunately did not end terrorism. Contrasting bin Laden’s demise with that of Adolf Hitler’s, when Hitler died, so did the Nazi’s. Al-Qaeda is still present, and just as deadly. We need command’s like JSOC to be ever vigilant and neutralize these terrorists.

The Push for Transparency and Drone Warfare

Transparency is a term that used frequently among politicians and the electorate. The people want our government to be more transparent, they want to know what our government is doing. In a recent telephone interview, counter-terrorism expert Amos Guiora said, “The government cannot

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

hide information in way traditionally hidden from people.”⁸⁷ There are reasons this cannot be done, for example “social media has had a huge impact”⁸⁸ on the way information gets out to the public at large. With respect to transparency, Guiora said, “It’s better for the government to bring [the information] out, rather than it coming from other sources.”⁸⁹ If the government divulges certain information, they can control what gets told, and how it gets told to the public. If the information comes from other sources, there is a high probability more information than is necessary could be divulged, and easily misinterpreted.

It is no secret that the United States uses drones as a military tool. Transparency has extended to the drone program as well. Guiora said, “everyone knows what we are doing,” and people want “transparency with drones” as well.⁹⁰ The best way to handle this situation is be upfront about it. The government should tell the people, “this is what we do, these our are guidelines, policy is policy” and “drone policy is the future of combat, and there is a lack of transparency” in this area.⁹¹

Transparency is good for certain things the government does, however, the drone program is complicated. Although not confirmed, some “drones likely fall under JSOC.”⁹² If there are drones that JSOC utilizes, that should be one area that remains non-transparent. By contrast, if the government uses drones in a search and rescue situation during a natural disaster, that is a scenario where the drone usage could be transparent. Drones are highly effective tools, and they appear to be an integral part of military operations moving forward, therefore it would be adverse to share such sensitive information.

Drones were likely used leading up to Operation Neptune Spear to catch bin Laden, whereby “Obama in turn drafted a memo to Panetta in June, 2009 directing the CIA to create a “detailed operation plan” for finding the AQ leader and to ‘ensure that we have expended every effort’ to track bin Laden down, as well as to intensify the CIA’s classified drone program.”⁹³ Furthermore, “Predator drones have reportedly been used “at least hundreds of times to fire on targets in Afghanistan, Pakistan, Yemen, Iraq, and elsewhere.”⁹⁴ Drone warfare has increased over the last few years, because “President Obama has authorized nearly four times the number of drone strikes for targeted killing in Pakistan in his first two years in office as President Bush did in his eight

⁸⁷ Guiora, *supra* note 54.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Govern, *supra* note 28, at 353.

⁹⁴ *Id.* at 351.

years.”⁹⁵ It appears that “Africa may end up becoming the next front in Obama’s drone war, and he may have bipartisan support.”⁹⁶

Both drone warfare and transparency will be hotly contested issues in the coming years, especially during campaign seasons. The people want transparency, the politicians will promise it, and all will conflict with national security. Certain drones could be disclosed to the public, but others must remain hidden. Any drone associated with JSOC should never be disclosed to the public. The operators in JSOC risk their lives on every mission, if there are drones that can help reduce that risk, there is no reason to disclose them, as there is no public benefit.

Conclusion

This paper has demonstrated why it is so important to keep JSOC a secret organization, exposure does nothing more than counteract all that JSOC is trying to accomplish. Exposing JSOC and its units only makes the command ineffective as a fighting force. JSOC was largely unknown before Operation Neptune Spear took place. Post-Neptune Spear, the entire world was privy to highly sensitive information. The leaking of this information was not for historical value, merely personal gain, which makes it utterly wrong. Operation Red Dawn was handled properly, whereby the world was made known of Saddam Hussein’s capture, and then moved on. Operation Neptune Spear was handled with much less care and wisdom, thereby jeopardizing the lives of the operators and possible success in future missions. The world needed to know Osama bin Laden was neutralized. The world did not need to know who did it, why it was done the way it was, how it was planned and executed, where it took place, and when each stage occurred.

Had the administration not leaked this highly sensitive information, the floodgates would never have been opened whereby countless news articles, television shows, books, and now movies advertise in great detail what our operators are capable of. JSOC operates successfully when left deep in the dark shadows. Shining blinding lights into places that ought not be illuminated with media only threatens the success of the command. From the beginning JSOC was designed in secret, and was to operate in secret, that was its ethos. The cloak of secrecy has been more than pierced, it has been completely ripped away by the onslaught of media outlets, journalists, and do-gooders out to set the record straight. The rationale by these groups is that Neptune Spear will forever be studied in the history books. That is highly unlikely as bin Laden’s death did not bring with it the collapse of al-Qaeda and all its terror cells in the same way Hitler’s death brought down Nazi Germany. If Neptune Spear makes in the history books of time, it will be nothing more than a small section buried in a chapter.

This paper is not stating Operation Neptune Spear or the death of Osama bin Laden are irrelevant or of no great importance, this paper argued that how that operation was conducted needed to be

⁹⁵ *Id.* at 366.

⁹⁶ Greg McNeal, *Terrorist Safe Havens in North Africa Threaten the United States Homeland*, FORBES (Apr. 3, 2013, 4:14 PM), <http://www.forbes.com/sites/gregorymcneal/2013/01/31/terrorist-safe-havens-in-north-africa-threaten-the-united-states-homeland/>.

kept a secret, as all of JSOC's countless missions should be. Classified or Top Secret information does not mean that it is only reserved for those with the necessary security clearances to divulge to the world, it means it should *not* be divulged at all.

JSOC was designed in secret, JSOC operates in secret, and therefore JSOC should remain a secret. Any exposure is too much exposure.

LAWFUL MILITARY SUPPORT TO CIVIL AUTHORITIES IN TIMES OF CRISIS

Kevin H. Govern

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Weeks prior to the devastating Boston Marathon bombings, and months after the disastrous effects of Hurricane Sandy, the US Department of Defense (DOD) issued an instruction clarifying the rules for the involvement of military forces in civilian law enforcement. The instruction establishes "DOD policy, assigns responsibilities, and provides procedures for DOD support to Federal, State, tribal, and local civilian law enforcement agencies, including responses to civil disturbances within the United States."

The DOD released DOD Instruction 3025.21, "Defense Support of Civilian Law Enforcement Agencies," on February 27, 2013, replacing several older directives on military assistance to civilian law enforcement and civil disturbances. The instruction requires that senior DOD officials develop "procedures and issue appropriate direction as necessary for defense support of civilian law enforcement agencies in coordination with the General Counsel of the Department of Defense, and in consultation with the Attorney General of the United States," including "tasking the DOD Components to plan for and to commit DOD resources in response to requests from civil authorities for [civil disturbance operations]." Military officials are to coordinate with "civilian law enforcement agencies on policies to further DOD cooperation with civilian law enforcement agencies" and the heads of the combatant commands are instructed to issue procedures for "establishing local contact points in subordinate commands for purposes of coordination with Federal, State, tribal, and local civilian law enforcement officials."

These policy changes must be read in light of an evolution, rather than revolution, involving over a century of federal troop deployments and 200-plus years of legal precedent. The Insurrection Act of 1807 was one of the first and most important US laws on this subject, and was followed some 71 years later by the Posse Comitatus Act of 1878, which further limited executive authority to conduct military law enforcement on US soil. Each of those laws has evolved over time — consistent with the times and the popular will expressed through Congress.

Considering those two acts in chronological order, the Insurrection Act, (codified, as amended, at 10 USC §331–335) has changed from its 1807 inception many times, with most notable alterations in the mid-twentieth century. It has consistently exempted federal (and federalized troops) from legal prohibitions on employment and deployment on US soil where troops provide federal aid for state governments (§331), are militia and armed forces enforcing federal authority (§332), are dealing with interference with state and federal law (§333), where there has been a proclamation to disperse in times of civil disturbance (§334), including Guam and the US Virgin Islands (§335),

and for a brief year, was expanded under the 2007 John M. Warner Defense Authorization Act, then brought back to longstanding language in the subsequent fiscal year.

The so-called Posse Comitatus Act, passed on June 18, 1878, prohibited federal troops from supervising confederate state elections in the latter portion of the Reconstruction Era. It originally applied only to the US Army, but was amended after the US Air Force was created to include those forces in 1956, then has applied by DOD regulation to include US Navy and US Marine Corps forces as well. The Posse Comitatus Act read then, and reads now, as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army [or the Air Force] as a *posse comitatus* or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

The Posse Comitatus Act has prohibited troops under federal authority (that is Title 10 Active Component troops and "federalized" Title 32 National Guard troops) from generally conducting law enforcement duties on US soil absent congressionally legislated or constitutionally enumerated authority or exception. Several such federal troop use exceptions to the Insurrection Act and Posse Comitatus Act would be troop employment and deployment during a biological, radiological, or nuclear event under 18 USC §831, or intelligence, military equipment, training, advice or facilities usage, amongst other matters, in support of civilian law enforcement under 10 USC §382.

An armed force that is bound neither by the Insurrection Act nor by the Posse Comitatus Act is the US Coast Guard (USCG). Under 14 USC §1, "[t]he Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times." Created long after the Posse Comitatus Act and the Insurrection Acts, the USCG is now under the Department of Homeland Security (DHS), and acts in peacetime as a law enforcement agency that can conduct activities on US soil. The USCG takes on a unique naval force role, however, under 14 USC § 3, as amended by section 211 of the Coast Guard and Maritime Transportation Act of 2006, upon declaration of war or when the president directs.

In their substance and spirit, neither the Insurrection Act of 1807 nor the Posse Comitatus Act of 1878 provide for the federal government to supersede the ordinary operation of US federal, state or territorial law, nor have either of the two acts ever proscribed federal troop employment and deployment during transitory crises, emergencies and disorders. Even prior to employment of assets and deployment of forces to assist in the fall 2012 Hurricane Sandy relief, or in April 2013 inter-agency support in the aftermath of the Boston Marathon bombings, there were many instances and exemptions whereby federal (or federalized) troops were called upon to conduct brief operations other than training on US soil in accordance with an Executive Order or Proclamation under the Insurrection Act or some other exemption to the Posse Comitatus Act.

In 1919, President Woodrow Wilson called out federal troops to quell race riots in 20 cities across the US. In 1932, President Herbert Hoover called upon General Douglas MacArthur, with the aid of his staff officers Majors George Patton and Dwight D. Eisenhower, to send US troops to displace and disperse a group of 20,000 aggrieved WWI veterans (the so-called "Bonus Marchers") encamped on or near the Washington Mall. During 1946, President Harry S. Truman sent out federal troops against striking railroad workers. The year 1957 saw President Eisenhower federalize Arkansas National Guard troops and send federal troops to Arkansas to counter desegregation violence. In 1962, President John F. Kennedy sent federal troops to Mississippi and Alabama to counter racial violence. President Richard M. Nixon sent federal troops to Wounded Knee, SD in 1973 to counter racial violence. President George H.W. Bush sent troops to St. Croix, US Virgin Islands, in 1989 ostensibly at the request of the Territorial Governor to quell civil disturbance and provide disaster assistance after Hurricane Hugo, and in 1992 sent federal troops to Los Angeles to quell civil disturbance after a controversial court decision. Most recently, in 2005, President George W. Bush sent federal troops to the Gulf Coast to quell civil disturbance and provide disaster assistance in the wake of Hurricanes Katrina and Rita.

When employed or deployed after civil disturbances or natural disasters, federal troops from the DOD would and will receive direction from the Federal Emergency Management Agency (FEMA) in accordance with the National Response Framework (NRF) to work solo or in concert with other federal agencies to provide personnel, equipment, supplies, facilities, and managerial, technical, and advisory services. Support scenarios could include: a Presidential Declaration of a Major Disaster; an Order to Perform Emergency Work Essential for the Preservation of Life and Property; and, a Presidential Declaration of an Emergency.

In all but the instance of a Presidential Declaration of Emergency, the governor of an affected state or territory must request assistance regardless of any state or local capacity to render disaster assistance. The NRF allows DHS to coordinate federal agencies that work alongside state and local agencies. In the words of past DHS Secretary Michael Chertoff, these scenarios do not "supersede the state and local government," but "fit with the state and local government in a comprehensive response plan."

Past is certain to be prologue when it comes to both causes and effects of natural and man-made disasters, and politicians, academics, government officials, and all others likely to be affected would do well to study the 206-year history of the Insurrection Act and the 135-year-old Posse Comitatus Act as military forces play an ever-essential role in cooperating with civil authorities consistent with law and policy.

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RELIGION, THE RULE OF LAW AND MILITARY LEGITIMACY

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Abstract/Introduction

Sovereignty is about the source and nature of national power, and the rule of law authorizes and limits the exercise of that power. Military operations are the most coercive extension of that power, and their legitimacy is determined by moral standards that go beyond those of the law. Religion shapes concepts of sovereignty, law and legitimacy, and this article will explore the pervasive role of religion as it relates to the rule of law and military legitimacy.

Sovereignty and human rights are opposite sides of the same coin; the former is related to the exercise of national power and the latter to legal restraints on that power, and there are contentious issues of legitimacy related to both. The standards for political and military legitimacy and law can differ dramatically based on religion and culture, especially between Western democratic cultures and Islamic cultures in the Middle East and Africa, and US national security strategy and military operations must take into account these differences.

A strategy that relies on conventional combat operations and clandestine strikes by commandos and drones to counter terrorism is inadequate where terrorist threats have broad public support in Islamic cultures. To counter such threats direct (hard) US military capabilities must be balanced with more indirect (soft) capabilities—trainers and advisors who can bridge the gap between the limits of diplomacy and combat operations. In Islamist cultures where US personnel are considered infidels, they must be diplomat-warriors who can lead from behind with indigenous forces out front conducting lethal operations.

These diplomat-warriors must not only train their indigenous counterparts in military matters but also promote the ideals of democracy and the rule of law in hostile cultural environments. They must ensure compliance with fundamental human rights while respecting local standards of legitimacy that can condone honor killings, brutality to women, discrimination against non-Muslims and violations of the freedoms of religion and expression. This can create a mission impossible for US trainers and advisors whose mission success requires rapport with their indigenous counterparts.

Military capabilities enable a nation to go to war, but their ultimate purpose is to preserve the peace. The wars in Iraq and Afghanistan and the emergence of democracies in the Middle East and Africa have underscored the volatile relationship between religion, the rule of law and military legitimacy. It is obvious that there can be no lasting peace among nations without peace among religions, and religious reconciliation requires that Jews, Christians and Muslims find common ground in matters of religion, law and legitimacy. *A common word* of love for God and neighbor in *the greatest commandment* represents such common ground and offers the hope of finding lasting peace in a world where religions continue to promote hate and violence.

Religion, sovereignty and human rights

Religion shapes the concepts of sovereignty that legitimize the use of national power as well as to the human rights that limit that power, and history has reflected a close and often volatile relationship between the exercise of national power and the rights of those victimized by it. Globalization has forced divergent religions and cultures to coexist in a smaller world, exacerbating the hate and violence traditionally associated with competitive religions. This has fueled terrorism and prompted military operations that have tested the limits of law and legitimacy, especially the delicate relationship between sovereignty and human rights.

Conflicting concepts of sovereignty, law and human rights based on religion complicate the protection of US security interests overseas. In Islamic cultures the sovereignty of God prevails, with Islamic law derived from the revealed and immutable word of God found in the Qur'an and the teachings of the Prophet Muhammad in the hadith. In Western democracies the secular sovereignty of man prevails, with government based on written constitutions that have the consent of the governed and that provide fundamental civil (human) rights and the flexibility of laws made by elected representatives.

These conflicting concepts of sovereignty are not easily reconcilable, given the inflexibility of ancient sacred laws that did not consider human rights or the many advances in science and knowledge that have occurred since they were written. Sovereignty and human rights have a natural tendency to conflict, and religion exacerbates that tendency.¹

Sovereignty, human rights and international law are rather recent innovations in the ancient rule of law. Until the 17th century the divine right to rule gave the world's rulers unlimited discretion to use their powers against other nations as well as their own people.² Then Hugo Grotius introduced the concept of sovereignty and secular law as the foundation stone of the law of nations, and together with Enlightenment thinkers they debunked the divine right to rule with the principles of libertarian democracy that allowed the governed to write their own constitutions, choose their own rulers and make their own laws, subject to inalienable civil (human) rights that protected individuals from the abuses of national power.

The libertarian values of the Enlightenment transformed the Western world but had little effect on the tribal cultures of the Islamic East; that is, until recently when public uprisings resulted in the overthrow of authoritarian rulers and the emergence of hybrid democracies in the Middle East that recognized majority rule but rejected the libertarian values of the Enlightenment that shaped Western concepts of democracy, sovereignty and human rights.

Today there are two paradigms for democracy that are competing for legitimacy in the Islamic world: The secular libertarian model based on the sovereignty of man versus the traditional authoritarian model based on the sovereignty of God. In Islam, submission to God's will is essential and divine revelation is the source of all knowledge, power and law, negating secular concepts of sovereignty and human rights such as the freedoms of religion and expression. In the emerging Islamist regimes of the Middle East and Africa, a tyranny of the religious majority is looming over religious minorities and women.

This reflects a growing geopolitical dichotomy between those Western systems of jurisprudence based on secular *libertarian* law and those of the Islamic East based on *holy* law that severely restricts secular law and human rights based on individual freedom. That dichotomy has long been evident in Saudi Arabia, Iran and Pakistan, and the Arab Spring of 2011 has produced more Islamist forms of democracy that have limited human rights and raised related issues of sovereignty.

Our challenge is to better understand these emerging Islamic democracies and how we can relate to them through the full spectrum of our national power, from foreign aid to military operations in peace and war. That understanding requires that we first examine our own perspectives of politics, religion and the rule of law as our frame of reference.

American exceptionalism has driven US foreign policy with a missionary zeal for the past century promoting the libertarian ideals of democracy, human rights and the rule of law to reshape the rest of the world into our own image. Those libertarian ideals are expressed in the third verse of *America the Beautiful: America! America! God mend thine every flaw. Confirm thy soul in self-control, thy liberty in law.* (Katherine Lee Bates, 1904)

This great hymn reflects the unique mix of politics and religion in US culture. Ours is a deeply religious culture in which the inalienable rights to life, liberty and the pursuit of happiness were first proclaimed in the Declaration of Independence and then in the fundamental freedoms of religion and expression that are guaranteed in the First Amendment to the US Constitution. Over the past 200 years the cultural evolution of libertarian political values, scientific discovery and the transforming power of reason have shaped most US religions into belief systems that in spite of their diversity have one thing in common: They have all accepted the legitimacy of the secular values of libertarian democracy and human rights.

In spite of this cultural evolution some fundamentalist religious sects in the West have resisted any change to their traditional beliefs by asserting the inerrant and infallible authority of their sacred texts, much like the Islamists in the East. Such religious fundamentalism has been a reaction to progress and modernity for Jews, Christians and Muslims alike,³ but as it relates to politics and the law it is most pervasive in the Islamism of the Middle East and Africa.

Most Islamic tribal cultures in the Middle East and Africa were little affected by the Enlightenment and over the years incorporated their traditional communal and patriarchal practices into a comprehensive and sacred body of Islamic law known as *Sharia*. It is considered God's law and interpreted by Islamist jurists, leaving little room for secular man-made libertarian laws, including human rights for religious minorities and women.

In Eastern Islamic cultures that have recently shed authoritarian rulers for democracy, most devout Muslims seem skeptical of libertarian Western culture with its displays of moral depravity, even as they desire the benefits of progress and modernity. As a result, many have embraced fundamentalist Islam, or Islamism, so that their forms of democracy, human rights and rule of law are quite different than those of the libertarian West.

Religion, the rule of law and concepts of legitimacy in the libertarian West and Islamic East

Legitimacy defines what is right in a culture and provides the moral authority for a nation to act. Religion is the primary source of the standards of legitimacy and as such shapes the law relating to sovereignty, democracy and human rights.

The standards of legitimacy include both voluntary moral norms and compulsory legal standards including those of sovereignty and human rights that can create conflicting concepts of morality and law. That is because standards of legitimacy are relative and differ among religions and cultures; what is acceptable in the libertarian West is not always acceptable in the Islamic East. For example, during the US buildup for *Desert Storm* in Saudi Arabia US forces openly used Bibles and women wore T-shirts and drove vehicles. This violated the norms of Wahhabi Islam and so upset the Saudis that it jeopardized the legitimacy of US forces.⁴

The relationship between competing religions and their effect on the rule of law creates fundamental differences in Western and Eastern concepts of legitimacy. This is evident in issues of sovereignty, whether based on the will of God expressed through divine revelation in the East or based on the will of man as expressed in the secular democracies of the West, and also in issues of human rights, whether based on individual freedom from government oppression in the West or for government entitlements for essential needs in the East.⁵ These competing concepts of legitimacy, religion and the rule of law are pervasive in matters of foreign policy and military operations, and they are not static; they are dynamic concepts in continuous evolution.

In the West cultural evolution has conformed religious doctrines to the secular values of libertarian democracy and capitalism while producing “kinder and gentler” forms of democracy and capitalism. This reflects the symbiotic relationship between religion and cultural values. Just as religion shapes culture, so secular cultural traditions shape religion. As Islamic tribal cultures experience the inexorable forces of progress and modernization Islam will most likely conform to more libertarian values as did Judaism and Christianity in the West. Such an evolution in Islamic values is already evident in the West where most Muslims have come to favor libertarian democracy and secular law over theocracy and traditional Islamic law.⁶

Over time secular cultural change can be expected to moderate religious differences, but in the meantime religious differences can be the source of intractable hatred and violence, especially when religion demands obedience to sacred laws that deny fundamental human rights. To be compatible with progress and modernity, Islam, like other modern religions, must promote its standards of legitimacy as voluntary standards of morality rather than as sacred law.⁷ Only then can Islamic regimes experience freedom, democracy and human rights.

The principle of sacrificial love—a voluntary matter of the heart and not of law—has been embraced as the moral imperative of mainstream Judaism and Christianity, and there are indications that it could also be embraced by Islam. A distinguished group of Islamic scholars has offered *a common word* of faith for Jews, Christians and Muslims alike. It is *the greatest commandment* to love God and neighbor, with neighbors including those of other religions.⁸

Competing concepts of democracy and human rights in the libertarian West and Islamic East

Democracy represents popular sovereignty, which is government based on the consent of the governed rather than on the dictates of a monarch (autocracy) or those of religious authorities under the sovereignty of God (theocracy). The Qur’an doesn’t prohibit democracy, but it demands submission to the sovereignty of God and obedience to a sacred rule of law (Sharia) based on the assumption that *God is the only legislator*.⁹ That not only limits individual freedom but it also denies democracy its primary purpose, which is to have elected representatives define the limits of *liberty in law*.

Democracy in a Muslim nation can produce theocracy, as it did in Iran in 1979. It is an example of how democracy can produce a tyranny of a religious majority where there is no freedom of religion and expression. Those fundamental freedoms do not exist in theocracies like Iran and Saudi Arabia, and are questionable in the evolving democracies of the Middle East and Africa. They are also being eroded in the mature Islamic democracies of Pakistan, Indonesia and Turkey, where blasphemy and apostasy laws are being revived.

There is a sharp contrast between those libertarian human rights in the West that are based on individual freedom from government oppression and those in the East based on communal interests

and political aspirations. That contrast is evident in comparing the Universal Declaration of Human Rights of 1948 with the Cairo Declaration of Human Rights of 1990.¹⁰

Human rights such as freedom of religion and expression are at risk in emerging Islamist democracies where Sharia functions like a constitution¹¹ and defines individual obligations to both God and government, making no distinction between the two. This makes apostasy (leaving the Muslim faith) akin to an act of treason and negates any freedom of religion or expression. While the Qur'an states, *There is no compulsion in religion*,¹² blasphemy and apostasy laws in Islamist regimes represent the most blatant forms of religious compulsion.

The primary purpose of libertarian democracy is to balance communal needs with individual liberty. It can coexist with Islam if its standards of legitimacy are voluntary moral standards rather than coercive laws; and if the moral standard to love one's neighbor in *the greatest commandment* should become the primary guide to interpreting Sharia, it could lead to peace and religious reconciliation through shared political values. But that is yet to be seen.

Military legitimacy: When might must be right

Military operations are the ultimate extension of a nation's sovereignty and political power,¹³ and when the political objectives of military operations depend upon public support in the operational area then military legitimacy becomes a prerequisite for military success, and no amount of military force can overcome the lack of legitimacy. That was a painful lesson learned by the US first in Vietnam and later confirmed in Iraq and Afghanistan.¹⁴

Conflicting concepts of legitimacy require that the complex relationship between religion, law and legitimacy be better understood if the US is to protect its national security interests in Islamic cultures. Resulting conflicts of sovereignty and human rights can jeopardize the political objectives of US military operations.

History records an unholy relationship of military power with religion in ancient holy wars, crusades and modern jihad. From the time of Joshua's ethnic cleansing at Jericho through the campaigns of Muhammad and the Christian Crusades of the Middle Ages, military force has often been used with a divine vengeance to subjugate people without regard for popular sovereignty or human rights. And in recent history authoritarian leaders in the Middle East have used the military to gain and maintain their power, as in Iraq, Egypt Libya, and Syria.

Even in the US where the military is the last line of defense for freedom and democracy, the military is a heavily armed authoritarian regime within a libertarian culture and thus a potential threat to freedom and democracy. The Founding Fathers understood that danger and provided for civilian supremacy and other Constitutional checks and balances to guard against the concentration of military power, and every US soldier and sailor swears an oath of office to support and defend the Constitution.¹⁵

That is not the case in Islamist democracies such as Pakistan and Egypt where there is no civilian supremacy or other checks and balances to prevent military power from being used to subvert democracy, human rights and the rule of law. It seems hypocritical that in the Middle East the US has provided aid to authoritarian regimes and their military forces while advocating democracy and human rights, and even used US military forces to influence the politics of that region while prohibiting the US military from influencing domestic US politics.

Military regimes in Pakistan, Egypt and Saudi Arabia have been important US allies in the region, but they have also revealed the corrosive relationship between military power, politics and religion. Vast deployments of US military forces in Iraq and Afghanistan have only exacerbated religious and cultural animosities. Perhaps it is only poetic justice that the US is blamed by many Muslims in emerging democracies for creating their problems.

Religion and the rule of law shape the human terrain for US military trainers and advisors

Beyond strategic issues, conflicting concepts of religion, legitimacy and the law also impact US training and advisory missions. Long before 9/11 US military personnel were conducting low-profile training and advisory missions in remote areas, and they are likely to continue long after the last US forces are withdrawn from Afghanistan.

The massive deployments of US combat forces in Iraq and Afghanistan undermined their legitimacy since they were perceived as infidel occupiers. Foreign Internal Defense (FID) operations have the same political objectives as COIN, but they are conducted by a limited number of trainers and advisors who lead from behind. With the indirect approach and small military footprint of FID there is less danger that the legitimacy of US trainers and advisors will be compromised in a hostile cultural environment.¹⁶

The invasions of Afghanistan and Iraq were violations of sovereignty that were arguably justified, but COIN and FID operations are by invitation only. Even so, in hostile cultural environments US trainers and advisors in must be diplomat-warriors and compliance with human rights is a mission imperative. This creates unique issues of legitimacy in Islamic cultures that do not recognize human rights that are considered fundamental in the West.

Most US military trainers and advisors are members of Special Operations Forces (SOF) assigned the United States Special Operations Command (USSOCOM). For SOF, human rights have long represented the highest standards of legitimacy and law.¹⁷ To maintain that priority Congress has placed certain restrictions on foreign training missions to ensure compliance with human rights, and the Department of Defense has issued policy directives through its chain of command that require any violation of human rights be reported, and also require special training in human rights for US military trainers and advisors both in the schoolhouse and at the operational level whenever military advisors and trainers are deployed.¹⁸

The following *Background* is provided for USSOCOM Human Rights Policy:

One goal of US national security strategy is to champion aspirations for human dignity. Coupled with our effort to promote regional stability through democratic reform and our belief that all people are born with certain inalienable rights, our nation has focused efforts to protect the rights of all people throughout the world. The Department of State, with support of the Department of Defense (DOD), plays a key role in achieving the foreign policy goal of promoting human rights abroad. DOD accomplishes this goal by shaping the international security environment and influencing those nations and militaries that can affect or assist the US. ...By their nature as “warrior-diplomats” and “global scouts”, SOF must incorporate and fully support these regional programs and plans [of the Geographic Combatant Commands].

And the following is included in USSOCOM *Policies and Procedures*:

Human rights awareness, concepts, reporting requirements, and themes will be an integral part of SOF training with foreign forces. SOF will be prepared to teach and demonstrate by word and deed that the protection of human rights is imperative for military success in any environment, from garrison operations to conduct of war.¹⁹

This command policy is a reminder that SOF trainers/advisors must be diplomat-warriors who can bridge the formidable gap between the limits of civilian diplomacy and military operations. They must not only provide effective military training but also promote democracy and human rights, exemplifying the role of the military in emerging democracies overseas.

The promotion of human rights is essential to political and military legitimacy, and legitimacy has long been an operational imperative for SOF.²⁰ To that end SOF trainers/advisors have a legal obligation to report violations of fundamental human rights, but there is a problem: There is no definitive list of those fundamental human rights.²¹

In peacetime the lack of clarity as to which human rights are considered fundamental complicates issues of legitimacy. In wartime the doctrine of *lex specialis* has traditionally preempted human rights with the law of war, but that is changing: “...human rights are now the prism through which all military operations are viewed and judged [and]...the continued development of human rights law has arguably eclipsed that of the law of war.”²²

Some violations of human rights are clear: Genocide, murder, extra-judicial executions, torture, mutilation, slavery or the slave trade, including trafficking women or children for prostitution, prolonged arbitrary detention, kidnapping or taking hostages are all violations of fundamental human rights that must be reported. But real questions arise as to what constitutes “outrages upon personal dignity”, “...cruel, inhuman or degrading treatment or punishment” and “other flagrant denial of...liberty, or the security of a person.” Would condoning honor killings and the abusive treatment of women and non-Muslims, and trials and executions for blasphemy and apostasy be considered gross violations of human rights?

Questionable acts must be considered in the context of national policy and balance the promotion of democracy and human rights with the practical realities of accomplishing the training and advisory mission. This requires specialized staff support in Islamic cultures to provide guidance to trainers, advisors and operators that will enable them to negotiate the hazardous human terrain and report violations of fundamental human rights.

Human rights compliance is part of operational law support and normally the province of military lawyers, but because religion has a dominant role in defining human rights in Islamic cultures chaplains should be considered operational assets who can work with local Muslim religious leaders and assist military lawyers in providing the operational law support needed to negotiate hazardous human terrain.

There is a useful precedent for this: In the 1980s an increasing emphasis on rules of engagement expanded the role of military in providing operational law support for commanders. In like fashion, the increasing complexity and ambiguity of the human terrain in Islamic cultures has justified giving chaplains an operational support role in hostile cultural environments where religion shapes legitimacy and law. Training for military lawyers and chaplains in Islamic law could be provided at the International and Operational Law Center located at The Judge Advocate General's School in Charlottesville, VA, and at the Center for World Religions at the Chaplains' School at Ft. Jackson, SC.

It is axiomatic that US forces must respect local values and laws to maintain their legitimacy,²⁴ but when religious and tribal laws conflict with fundamental human rights military lawyers, chaplains and civil affairs personnel must collaborate with their indigenous counterparts to identify the limits of legitimacy.

The task could be made easier if *the greatest commandment* to love God and the *unbelieving* neighbor were accepted as *a common word* of faith in Islamic cultures. If that principle were to become a primary guide for interpreting Islamic law it would minimize conflicts in legitimacy and law and encourage the enforcement of fundamental human rights for religious minorities and women in Islamic cultures.²⁵ But until that ideal becomes a reality there are contentious issues of religion, law and military legitimacy that must be confronted by US trainers and advisors in Islamic cultures.

Back to the future: Finding a balance between sovereignty and human rights in the war on terror

Before 9/11 there were few issues of sovereignty to cloud the projection of US power and human rights were an operational priority for SOF.²⁶ But 9/11 produced an aggressive new strategy of preemptive defense with the invasions of Afghanistan and Iraq and the subordination of human rights to the more conventional military priorities of combat. Now it is *back to the future*, with more emphasis on using trainers and advisors to protect US security interests in strategically important regions rather than major deployments of combat forces.

There has been an evolution of military strategies in Afghanistan and Iraq from conventional combat operations to counterinsurgency (COIN) and then to counterterrorism (CT) operations, an evolution exemplified by General David H. Petraeus, who helped write the book on COIN doctrine, and General Stanley A. McChrystal, who exemplified CT operations as commander of the Rangers who took out Abu Musab al-Zarqawi in Iraq in 2006.

General McChrystal embraced COIN doctrine in 2009 when he became commander of forces in Afghanistan, and ironically, in 2010 General Petraeus gave CT preference over COIN when he took over command in Afghanistan from McChrystal. Petraeus "...took a tougher approach to Karzai and cast aside McChrystal's counterinsurgency guidance, which had emphasized restraint over aggression." The US Ambassador to Afghanistan, Karl Eikenberry, was right to question whether COIN strategy could achieve legitimacy when the Karzai government was pervasively corrupt.²⁷

It now appears that CT operations such as drone attacks and clandestine commando raids have supplanted COIN as the favored US strategy. "The Obama administration sealed its demise last year when it ordered the Army to stop using [COIN] doctrine in its planning for future conflicts. Meanwhile, the president has ramped up the lethal targeting machine that McChrystal built in Iraq. Today McChrystal's commandos are fighting an endless and secret war in far-flung locales such as Yemen, Afghanistan and Somalia."²⁸

But CT may not remain the dominant US strategy in countering terrorism. On January 11, 2013, President Obama announced that the mission of US forces in Afghanistan was changing to training, advising and assisting Afghan forces. Training and advising missions have long taken precedence over US combat operations in Africa, but have produced mixed results, characterized by The New York Times as "...a decade of missteps." The resurgence of Al Qaeda affiliated terrorist groups in Africa reflects a failure of the Department of Defense and Department of State to coordinate their activities in that strategically important region. It was reported that "...few of the US Special Forces instructors were conversant with in local culture or native languages, and they didn't pick up the cues [of religious and cultural conflicts]."²⁹

The deputy commander of the Africa command (AFRICOM), Christopher W. Dell, is a former ambassador who has stated that AFRICOM "...is searching to find the right balance between the press of current military operations and the vision of longer term engagement," and AFRICOM's commander, General Carter F. Ham, has acknowledged that "...the command's ability to address the terrorist threat in Africa has been 'mixed'." While General Ham insists that his command can carry out both combat and "soft power" missions, plans to bring in training teams from a Kansas brigade raise questions as to whether those personnel will have the language and cultural skills to be effective trainers and advisors in Africa.³⁰

In Afghanistan pervasive government corruption and public hostility to US military forces will make it difficult for US trainers and advisors to function effectively; and if the "decade of missteps" is an indicator of the capability of trainers and advisors in Africa, there is a lack of

diplomat-warriors who can gain the credibility of their indigenous counterparts in that region. If so, this represents a serious deficiency in the military capabilities required to protect vital US security interests overseas.

With coming budgetary constraints, hard choices will have to be made to provide the military capabilities needed for a balanced strategy. The projection of US power (sovereignty) must balance military capabilities for direct action combat and counterterrorism operations with the capability to provide trainers and advisors in hostile cultural environments where compliance with human rights is a priority, and the skill sets and professional development requirements for warrior-commandos are not interchangeable with those for diplomat-warriors.

It will be a challenge for USSOCOM to provide both direct and indirect action SOF capabilities in a time of budgetary constraints, but that is not a new issue for the Defense Department. A balanced strategy will require a close working relationship between agencies of the Department of Defense and Department of State to provide both the hard and soft power capabilities needed to protect US security interests in hostile cultural environments, and that will require overcoming past inter-agency competition that has often led to mission failure.³¹

Lawyers will continue to debate issues of sovereignty and human rights, both the legality of clandestine strikes and raids, whether by drones or SOF commandos, and the role of human rights in military operations; but issues of political and moral legitimacy will be as important as those of law and religion will play an important if not defining role in Islamic cultures. Balancing the extension of national power with the restraints of human rights will continue to be a challenge for US policy makers. Hard power combat capabilities must be balanced with soft power capabilities to train and advise indigenous forces in hostile cultural environments, and the latter capability requires diplomat-warriors whose effectiveness depends upon their understanding of how religion shapes the standards of legitimacy and law.

Conclusion

Military legitimacy is about might being right, and there are serious issues of legitimacy for a national security strategy that relies on clandestine raids and strikes, especially when public support is required to achieve US security objectives in Islamic cultures. Issues of legitimacy and law are shaped by religion and form the human terrain in Islamic cultures. A balanced US strategy requires diplomat-warriors as military trainers and advisors who can bridge the gap between the limits of diplomacy and military operations in hostile cultural environments.

Training and advisory missions conducted in Islamic cultures must consider the hazards of a human terrain shaped by interwoven issues of religion, legitimacy and human rights. It can be difficult to ensure compliance with fundamental human rights while respecting local standards that condone honor killings and brutality to women, and that discriminate against non-Muslims and deny the freedoms of religion and expression. It can seem like a mission impossible, even for highly trained

SOF diplomat-warriors. In hostile cultural environments there must be clear guidance on local standards of law and legitimacy and what human rights are fundamental. If a mission is to be terminated for violating human rights, those rights need to be clearly defined.

Religion has always had an uneasy and often volatile relationship with politics, and balancing political objectives with conflicting concepts of religion and human rights is a delicate matter. A balanced strategy requires diplomat-warriors who can complement combat warriors by training and advising indigenous forces in strategically important areas.

Military capabilities enable a nation to go to war, but their ultimate purpose is to preserve the peace. With the end of the wars in Iraq and Afghanistan and the emergence of democracies in the Middle East and Africa, the relationship between religion, the rule of law and military legitimacy in those regions has become evident. We should understand why there can be no lasting peace among nations until there is peace among religions, and religious reconciliation requires that Jews, Christians and Muslims find common ground in matters of their religion, legitimacy and law. *A common word* of love for God and neighbor in *the greatest commandment* represents the hope of finding such common ground in a world beset by religious hate and violence.

End Notes:

1. On the sovereignty of God in Islam, see Sharia: Islamic Law in the Contemporary Context, edited by Abbas Amanat and Frank Griffel, Stanford University Press, Stanford, California, 2007, at pp 15, 16, 113. On the conflict between sovereignty and human rights, see Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, London, 1996, at p 86 (hereinafter cited as Military Legitimacy). On the close relationship between religion, politics and the law, see Barnes, Religion and the Rule of Law: Shari'a, Democracy and Human Rights, 2011 Military Legitimacy Review, note 9, posted at www.militarylegitimacyreview.com.
2. Saint Paul expressed the *divine right to rule* in his letter to the Romans: "Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God." (Romans 13:1) Jesus told his disciples that "rulers of the Gentiles lord it over them" and that "whoever wants to become great among you must be your servant." (Mark 10:42-43) Jesus suggested a conflict in our secular obligations to government and our obligations of faith to God when he said, "Give to Caesar what is Caesar's and to God what is God's." (Mark 12:17)
3. Karen Armstrong has traced the evolution of religious fundamentalism as a reaction to the dynamic forces of progress and modernism among Jews, Christians and Muslims in The Battle for God: A History of Fundamentalism, Random House, 2000.
4. Religion as the moral foundation of legitimacy and law and its standards are discussed in Military Legitimacy (see note 1, *supra*), at pp 20-23, 53-60; for the conflicting standards that threatened the legitimacy of US forces in Saudi Arabia, see p 138.
5. Mark R. Amstutz (Amstutz, International Ethics: Concepts, Theories and Cases in Global Politics, Third Edition, Rowman & Littlefield Publishers, Inc., 2008, pp 95-102) has summarized

the differences between Western and Eastern concepts of human rights in the International Covenant on Civil and Political Rights (ICCPR) favored by the West, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) favored by the East, illustrating the pluralism of human rights well before the Cairo Declaration of 1991. (see note 4, *supra*) Amstutz notes “The limited consensus on human rights doctrines, coupled with the ever-expanding list of rights, has had a deleterious effect on the moral foundations and priority of international human rights claims.” (page 97) And affirming the conflict between sovereignty and human rights, Amstutz states “The idea of human rights is subversive [to sovereignty] because it establishes norms that if not fulfilled by a state can undermine its international legitimacy.” (p 99) Seyyed Hossien Nasr, a noted Islamic scholar, has asserted that Christians and Muslims “...believe in human rights, but ones that are combined with human responsibility toward God, human society and the natural environment.” Seyyed Hossein Nasr, *A Common Word Initiative: Theoria and Praxis, Muslim and Christian Understanding: Theory and Application of A Common Word*, Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, New York, 2010, p 25. In a widely used text on Islam, Nasr presented a traditional view of Islam and Shari’a that seems at odds with Western concepts of human rights. He defined Shari’a as “The Divine Law [which is] the ideal pattern for the individual’s life and the Law which binds the Muslim people into a single community. ...It is therefore the guide of human action and encompasses every facet of human life.” (pp 85, 86) Nasr acknowledged the similarity between Judaism (Jewish law comparable to Shari’a is known as *halakha*) and Islam and the contrast between those deontological religions and the more teleological Christianity, in which “...the Divine will is expressed in terms of universal teachings...but not in concrete laws which would be stated in the New Testament.” (p 86) He went on to say “The Semitic notion of law which is to be seen in revealed form in both Judaism and Islam is the opposite of the prevalent Western concept of law. It is a religious notion of law, one in which law is an integral aspect of religion.” (p 88) While Nasr affirmed the free will of man to accept or reject the “straight path” of Islam he criticized revisionist views that would make Islam and Shari’a compatible with modern culture: “The creative process...is not to remake the Law but to reform men and human society to conform to the Law.” And he characterized as an “anomaly...Those modern movements which seek to reform the Divine Law rather than human society.” (pp 88, 89) Nasr observed that “...the modern mentality...in the West with its Christian background cannot conceive of an immutable Law which is the guide of human society....” (p 89) As for interpreting Shari’a, Nasr noted that “The gate of *ijtihad* has been closed in the Sunni world...whereas in Shi’ism, the gate must of necessity be always open.” (p 98) As for democracy, Nasr asserted that “In the Islamic view *God is ultimately the only Legislator*. Man has no power to make laws outside the Shari’a, he must obey the laws God sent for him.” (p 100) As for human rights, Nasr supported those traditional patriarchal standards that deny equal rights to women by giving husbands dominance over their wives, allowing polygamy and denying women the right to choose their husbands. (pp 104-108) It is difficult to imagine Nasr’s ideals of Islam and Shari’a being reconciled with modern concepts of democracy, human rights and the secular rule of law. Seyyed Hossein Nasr, *Ideals and Realities of Islam*, New Revised Edition, ABC International Group, Inc., Chicago, 2000 (page references listed above). In contrast to Nasr, Harkristuti Harkrisnowo, a law professor and Director General for Human Rights in the Indonesian Ministry of

Justice and Human Rights, recognizes contrasting concepts of human rights in the East and West. She leaves to Islamic scholars and jurists the debate over how *ijtihad*, the Arabic term for interpreting Islamic law, relates Shari'a to human rights, and notes the many different interpretations of Islam. Harkrisnowo acknowledges the difficult task of defining human rights under Shari'a: "Some Indonesian Muslims are textualists who embrace the Qur'an very narrowly, in a manner somewhat reminiscent of those Christians who believe in a literal interpretation of the Bible. But, seriously, how many Muslims believe in stoning adulterers and cutting off the hands of thieves? Others believe that Shari'a requires only an ethical basis, which can be satisfied for some by an all-things-considered judgment, and for others by well-considered secular law. Whomever's viewpoint prevails makes a real, practical difference for anyone trying to implement the rule of law in the Islamic world." Harkristuti Harkrisnowo, *Multiculturalism in Indonesia: Human Rights in Practice, Muslim and Christian Understanding: Theory and Application of "A Common Word"*, Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, 2010, p 191.

6. Alan Wolfe has argued that the so-called secular American culture is actually religious, with a commitment to secular law which trumps those religious laws that conflict with democracy and human rights. As a result Wolfe sees a moderation of radical Islam coming from Muslims living in the West. See Alan Wolfe, *And the Winner Is...*, *The Atlantic*, March 2008, p 56). Wolfe has used a poll on wealth and religiosity to demonstrate that where religions have become secularized by surrounding culture—that is, where religions have made peace with capitalism and secular laws that protect individual freedom and human rights—there is little religious extremism, although people remain religious. That helps explain why Muslims in America are more moderate than those in the Middle East. A survey of Muslims by the Pew Research Center in May 2007 indicated that Muslims in the US are "highly assimilated, close to parity with other Americans in income and overwhelmingly opposed to Islamic extremism." Libertarian values in the US have moderated more radical and militant forms of Islam. See Alan Cooperman, *Survey: US Muslims Assimilated, Opposed to Extremism*, washingtonpost.com, May 23, 2007.

7. Believers in secular libertarian democracies can both accept the secular rule of law and believe that God's standards of right are higher than those of man-made law, but it requires understanding that God's standards of behavior are voluntary moral standards of belief rather than compulsory legal standards, leaving coercive legal standards to democratically elected legislators. Democratic processes will normally conform the law to prevalent moral standards, but not always. When there was a major disconnect between law and morality in the *separate but equal* laws of the Jim Crow South of the 1950s, Dr. Martin Luther King and his followers used peaceful civil disobedience to correct the injustice. His demonstrations asserted the moral supremacy of God's standards of legitimacy over man's law and succeeded in changing the law; but their peaceful civil disobedience required them to suffer the consequences of the law in order to change it.

8. See www.acommonword.com. Note that *the greatest commandment* has two parts, both of which were taken from the Hebrew Bible. The first part, to love God, was first given by Moses in his preface to the Deuteronomic Law; for Moses, loving God meant loving and obeying every provision of the Law (see Deuteronomy 6:1-9; 10:12,13; 31:10-13). The second part, to love your

neighbor as yourself, was part of God's instructions to Moses (see Leviticus 19:18), and like the first part, it was an integral part of Mosaic Law. Rabbi Akiva once called the requirement to love your neighbor as yourself the greatest principle of the Torah. Jesus brought these two commandments together to show that we love God by loving our neighbors as ourselves, and that our neighbors include those of other faiths. *The greatest commandment* to love God and neighbor is found in Matthew 22:34-40, Mark 12:28-33, and Luke 10:25-29, with *the story of the good Samaritan* following in Luke 10:30-36 as the response of Jesus to the question of "And who is my neighbor?" It was an apostate Samaritan who was the good neighbor to the Jew in the story, much like a Muslim stopping to help a Christian or a Jew today. The Apostle Paul was a Pharisee who had been a teacher of Jewish law before his conversion to Christianity in the 1st century church. He affirmed the love of neighbor to be the fulfillment of the law in his letter to the Romans church: "The commandments 'Do not commit adultery', 'Do not murder', 'Do not steal', 'Do not covet', and whatever other commandments there may be, are summed up in this one rule: 'Love your neighbor as yourself.' Love does no harm to its neighbor. Therefore love is the fulfillment of the law." (Romans 13:8-10) And he wrote to the Galatians: "The entire law is summed up in a single command: Love your neighbor as yourself." (Galatians 5:14). Recognizing the supremacy of love over law represented a dramatic turnaround for Paul, who had been a Pharisee who believed that Jewish laws very similar to those of Shari'a were God's laws, and who had been especially zealous in persecuting Christians for blasphemy. Paul struggled with the relationship of holy laws with God's will and came to believe that love of God and neighbor were voluntary and a matter of free will, and could not be made obligatory by holy law. (Romans 2:17-24; 3:19-28; 7:4-60; 2d Corinthians 3:17; Galatians 5:1, 13) Paul believed that God sent Jesus Christ to fulfill the law with God's love, as he elaborated to the Ephesians: "For he himself is our peace, who has made the two one and has destroyed the barrier, the dividing wall of hostility, by abolishing in his flesh the law with its commandments and regulations." (Ephesians 2:14,15) If more Jews, Christians and Muslims could, like Paul, make love of God and neighbor the common foundation of their faith and law, then religious reconciliation and peace could well be at hand.

9. Yusuf al-Qaradawi is a prominent Islamic jurist with the Muslim Brotherhood who has asserted that God is the only legislator and Sharia the immutable law of God. See Barnes, *Religion and the Rule of Law: Shari'a, Democracy and Human Rights*, 2011 *Military Legitimacy Review*, posted at www.militarylegitimacyreview.com, p 5 and note 48. Qaradawi is not alone. Seyyed Hossien Nasr is a noted Islamic scholar who has stated in a widely used text on Islam that "In the Islamic view *God is ultimately the only Legislator*. Man has no power to make laws outside the Shari'a, he must obey the laws God sent for him." See note 5, *supra*.

10. The First Amendment to the US Constitution (part of the Bill of Rights) provides: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*. Articles 18, 19 and 20 of the Universal Declaration of Human Rights (1948) provide for the freedom of religion and free expression; and Articles 18, 19 and 20 of the International Covenant of Civil and Political Rights (a 1966 treaty signed by the US in 1977 and ratified in 1992) protect those rights. Most Western and

Muslim nations are signatories to both the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, with the latter treaty making obligatory upon the signatories what was declared earlier as nonbinding policy in the Universal Declaration. The Cairo Declaration on Human Rights in Islam of 1990 has no provisions comparable to Articles 18, 19 and 20 of the Universal Declaration of Human Rights or the International Covenant of Civil and Political Rights, but following a Preamble that asserts the primacy of Shari'a in defining human rights, the following articles reveal the Islamic perspective of human rights. Article 11 provides in part: *Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High....* Article 18 provides in part: *Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property....* Article 19 provides in part: *All individuals are equal before the law, without distinction between the ruler and the ruled....* Article 22 provides: *(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah. (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah. (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith. (d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.* Article 24 provides specifically what the Preamble implies: *All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.* Article 25 provides: *The Islamic Shari'ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration.*

11. Frank Griffel has stated that Shari'a includes both legal and moral standards and functions much like a constitution, or legal template, for secular laws. See Griffel, Islamic Law in Contemporary Context: Shari'a, Edited by Abbas Amanat and Frank Griffel, Stanford University Press, Stanford California, 2007, p 13.

12. *Let there be no compulsion in religion. Truth stands out clear from Error. Whoever rejects Evil and believes in Allah has grasped the most trustworthy hand-hold that never breaks. And Allah hears and knows all things.* (Qur'an, Al Baqara 2:256)

13. The principle that "war is an extension of politics by other means" is usually attributed to Carl von Clausewitz. See Clausewitz, On War, edited and translated by Michael Howard and Peter Paret, Princeton University Press, Princeton, NJ, 1984, p 84. Cited in Military Legitimacy (note 1, *supra*) in note 1 to Chapter 3 at p. 72.

14. For lessons learned in legitimacy before 1995, see chapter 6 of Military Legitimacy (note 1, *supra*); those lessons learned in Iraq and Afghanistan seem to be a repeat of those lessons learned earlier.

15. See Military Legitimacy (note 1, *supra*), at pp 105-114.

16. On the distinction between COIN and FID, see Hasler, *Defining War*, Special Warfare, Mar/Apr 2007, p 23; also Mulbury, *ARSOE, General Purpose Forces and FID*, Special Warfare, Jan/Feb 2008.

17. See LTC Jeffrey F. Addicott, *Special Forces and the Promotion of Human Rights*, Special Warfare, December 1996), p 30.

18. See Department of Defense Instruction Number 5111.19, July 26, 2011, Enclosure 2, para 1c., which assigns to the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict and Interdependent Capabilities the responsibility to ensure compliance with the current “Leahy” human rights provisions of section 8058 of Public Law 112-10, and section 2378d of title 22, United States Code (also known as section 620J of the Foreign Assistance Act of 1961, as amended. See also Enclosure 2, at para 8g, which requires Geographic Combatant Commanders to verify that human rights vetting requirements and human rights training requirements have been met.

19. USSOCOM Directive 350-28cc, Training, Human Rights Policy, 11 May 2005, Section I, para 3a and Section II, para 4d.

20. For a discussion of the evolution of legitimacy as an operational imperative for SOF, see Barnes, *Military Legitimacy in OOTW: Civilians as Mission Priorities*, Special Warfare, Fall 1999, p 32. See also, Barnes, *The Rule of Law and Civil Affairs in the Battle for Legitimacy*, 2009 Journal on Military Legitimacy and Leadership, www.militarylegitimacyreview.com.

21. If a specific human right falls within the category of customary international law it is a “fundamental” human right binding on US forces during all overseas operations. Unfortunately *there is no definitive “source list” of those human rights considered by the US to fall within this category of fundamental human rights*. The source list for fundamental human rights includes, but is not limited to, the Universal Declaration of Human Rights, Common Article III of the Geneva Conventions, and the Restatement (Third) of the Foreign Relations Law of the US and authoritative pronouncements of US policy by ranking government officials. According to the Restatement (Third) the US accepts the position that certain fundamental human rights fall within the category of customary international law and a state violates such law, when, as a matter of policy, it “practices, encourages, or condones” a violation of such rights. Examples of such rights are “...cruel, inhuman or degrading treatment or punishment, ...and consistent patterns of gross violations of internationally recognized human rights.” See Operational Law Handbook, 2011, International and Operational Law Department, The Judge Advocate General’s Legal Center and School, Charlottesville, VA, Chapter 3, Human Rights, at page 45 and note 22. See *supra*, notes 15 and 16, on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Cairo Declaration of Human Rights of Islam. Little has changed since 2001 when the following lists of human rights were cited as standards for reportable violations: Those under Common Article 3 of the Geneva Conventions: (1) Violence to life and person—in particular, murder, mutilation, cruel treatment and torture; (2) Taking of hostages; (3) Outrages upon personal dignity—in particular, humiliating and degrading treatment; (4) Passing of

sentences and carrying out executions without previous judgment by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized people. Another list of gross violations of human rights is found in the Security Assistance law at US Code of Laws at 22 U.S.C.A. 2304(d)(1): (1) Torture; (2) Cruel, inhuman or degrading treatment or punishment; (3) Prolonged arbitrary detention without charges or trial; (4) Causing the disappearance of persons by the abduction and clandestine detention of those persons; (5) Other flagrant denial of the right to life, liberty, or the security of person. The Office of the Staff Judge Advocate at USASOC provided a combined list of offenses that are considered gross violations of human rights: (1) Genocide; (2) The murder or causing the disappearance of individuals, including extra-judicial executions; (3) Torture, mutilation, or other cruel, inhuman, or degrading treatment or punishment; (4) Slavery or slave trade, including the trafficking of women or children for prostitution; (5) Prolonged arbitrary detention; (6) Kidnapping or taking hostage of civilians; (7) Other flagrant denial of the right to life, liberty, or the security of a person or persons. See Barnes, *Human Rights and Legitimacy in the Foreign Training Mission, Special Warfare*, Spring 2001, at pp 5 and 6. President Obama clarified the US position on the freedoms of religion and speech at a speech to the UN General Assembly on September 25, 2012, following a week of destructive riots against the US across the Middle East in response to a crude video demeaning the Prophet Muhammad. President Obama said that we protect the right to produce even hateful writings and speech "...because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities," and added, "the strongest weapon against hateful speech is not repression; it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect." The *New York Times* editorial quoting the President went on to note that "Islamic leaders have recently revived a push for an international ban on blasphemy." See Editorial, *New York Times*, September 25, 2012. The day following President Obama's speech, President Morsi of Egypt provided an Islamist rejoinder echoing the conflicting standards of the Cairo Declaration (see note 16, *supra*) saying, "Egypt respects freedom of expression, but not a freedom of expression that targets a specific religion or a specific culture." See Anne Gearan, *Egypt President Morsi tells UN: Insults to Muhammad "unacceptable"*, *The Washington Post*, September 26, 2012.

22. See Bill, *Human Rights: Time for Greater Judge Advocate Understanding*, *The Army Lawyer*, June 2010, at pp 60, 62.

23. For an early article on military lawyers providing operational law support, see Barnes, *Operational Law, Special Operations and Reserve Support*, *The Army Lawyer*, December 1984; on Shari'a and human terrain, see Timothy K. Bedsole, *Religion: The Missing Dimension in Mission Planning*, *Special Warfare*, November-December 2006, p 8. On religion as a strategic operational priority, see Raymond Bingham, *Bridging the Religious Divide*, *Parameters*, Autumn, 2006, p 6. For an example of how a US Navy Chaplain supported his Afghan (mullah) counterparts in countering Taliban claims that Islam prohibited Muslims from working with those of other religions who were helping them, see Brian Mockenhaupt, *Enlisting Allah*, *The Atlantic*, September 2011, pp 28, 30. At a *shura* that the chaplain helped organize in contested territory, one of the mullahs said: "We should take charge of our own land and protect people ourselves. It is

shameful that they had to send Marines to do what we should be doing ourselves.” The article ended noting that the Navy chaplain “...who sat quietly through the discussion, had perhaps shaped the battlefield as powerfully as any bullet fired or bomb dropped across Afghanistan that day.”

24. See David Gordon, *Cultural Context, Religion and Shari'a in Relation to Military Rule of Law Operations*, 2011 *Military Legitimacy Review*, www.militarylegitimacyreview.com at p 59.

25. See note 8, *supra*.

26. See Barnes, *Human Rights and Legitimacy in the Foreign Training Mission*, *Special Warfare*, Spring 2001, p 2; and its sequel, Barnes, *Back to the Future: Human Rights and Legitimacy in the Training and Advisory Mission*, *Special Warfare*, January 2013.

27. See Greg Jaffe's review of *The Insurgents* by Fred Kaplan and *My Share of the Task* by Stanley A. McChrystal in *The Washington Post*, January 5, 2013.

28. *Idem*.

29. Craig Whitlock has characterized the SOF training and advisory mission in Africa as “...defined by a decade of missteps.” The resurgence of Al Qaeda affiliated terrorist groups in Africa reflects a failure of the Department of Defense and Department of State to coordinate their activities in that strategically important region. It was reported that “...few of the US Special Forces instructors were conversant with in local culture or native languages, and they didn't pick up the cues [of religious and cultural conflicts].” One former SOF member said, “Quite frankly, we weren't used to dealing with the Department of State and other agencies. When we get on the ground, they run the show, and that's what we struggled with.” Craig Whitlock, *US counterterrorism efforts in Africa defined by a decade of missteps*, *New York Times*, February 4, 2013.

30. General Carter F. Ham acknowledged that “...the command's ability to address the terrorist threat in Africa has been 'mixed'. ...We've focused exclusively on tactical and technical. We didn't spend probably the requisite time focusing on values, ethics and a military ethos that says that when you put on the uniform of your nation, then you accept the responsibility to defend and protect that nation, to abide by the legitimate civilian authority.” In a questionable solution to meet training and advisory needs in Africa, AFRICOM “...will send small teams from a 4,000 member brigade in Kansas to conduct nearly 100 exercises and training programs in 35 African countries.” Eric Schmitt, *Militant Threats Test Role of a Pentagon Command in Africa*, *New York Times*, February 11, 2013.

31. Robert M. Gates, former Secretary of Defense, emphasized the need for a balanced strategy that depended upon cooperation between agencies of the Department of Defense (DOD), Department of State (DOS), United States Agency for International Development (USAID) and the CIA in *A Balanced Strategy: Reprogramming the Pentagon for a New Age*, *Foreign Affairs*,

January/February 2009. Gates' call for a balanced strategy was cited to support more integrated DOD and DOS structures and operational units based on the experience of provincial reconstruction teams (PRTs) in Iraq and Afghanistan that met with only limited success due to interagency competition and bureaucratic issues that hampered cooperation. See Barnes, *The Rule of Law and Civil Affairs in the Battle for Legitimacy*, 2009 Journal on Military Legitimacy and Leadership, www.militarylegitimacyreview.com, *Looking Ahead* and notes 105-112). Similar recommendations for a balanced strategy with diplomat-warriors as trainers and advisors were made earlier. See *Military Legitimacy*, *supra*, note 1 at pp 155-158, 165,166, 171-174. David Ignatius has noted the need for such a balanced strategy that can "...shape events in an unstable world without putting 'boots on the ground' or drones in the air," and also noted that US stabilization missions lack a civilian agency to lead them and that the era of combatant commands like AFRICOM leading them "...is ending, because of budget strain and military overload, and there's nothing in sight to take their place." Ignatius cited USAID, CIA and the U.S. Institute for Peace as unsuited for a leadership role, and while he considered the newly created Bureau of Conflict and Stabilization Operations in DOS as theoretically well suited to provide such leadership, he said it "...doesn't have the heft to lead the State Department's activities, let alone the full government's." See Ignatius, *Can we close the power gap?*, The Washington Post (www.washingtonpost.com), March 2, 2013. Ignatius later identified USSOCOM as a focal point for providing the capabilities for such a balanced strategy, noting that "Often their missions will involve training and partnering with other nations, rather than shooting" with "SOCOM forces deployed in 78 countries, many teaching war-fighting skills to local special forces." But Ignatius concludes on a cautionary note: "The world is wary of forward-deployed US commandoes, no matter how important the mission." See Ignatius, *Drawing Down, but still projecting power*, The Washington Post, March 29, 2013. The mixed results of SOF missions in Afghanistan and Africa (see note 29, *supra*) indicate that the diplomat-warrior capability may be lacking and that more coordination with DOD/USSOCOM and DOS is necessary. AFRICOM offers that potential with a deputy commander from DOS to coordinate military operations with civilian agencies.

DRONE OPERATIONS IN CURRENT US COUNTERTERRORISM STRATEGY IN AFRICA

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The ongoing crises in Algeria and Mali have been commented about in recent Senate confirmation hearings for Central Intelligence Agency (CIA) Director nominee John Brennan and Department of Defense (DOD) Secretary nominee Chuck Hagel, as well as former US Secretary of State Hillary Clinton's congressional testimony. Both crises have involved unmanned drones in the war against terror. Also known as "unmanned aerial vehicles" or "unmanned combat air vehicles," drones are but one weapon of choice where host-nation, regional or UN authority exists to employ use of force by ground, sea or air to counter terrorist threats. The US conducted unarmed drone surveillance of the Algerian In Amenas gas plant where Algerian forces led an operation to free European and American hostages, and to hunt for Mokhtar Belmokhtar, Algeria's link to al Qaeda, who has claimed responsibility for the crisis. Both the US and France used drone surveillance for airstrikes in Mali — and possibly launched drone strikes against al Qaeda-backed insurgents. Neither the administrations of US Presidents George Bush or Barack Obama received blanket permission to transit Algerian airspace — owing to strained relations over counterterrorism — but may, at best, have received case-by-case authorization with advance notice to the Algerian government for surveillance of potential terrorist targets. The Mali operation, at the request of the host-nation government, aimed ostensibly at restoring "the sovereignty of Mali on its territory" and prevent northern Mali from becoming a "terrorist sanctuary in the heart of Africa."

Both Algeria and Mali are beset by al Qaeda in the Islamic Maghreb (AQIM) terrorist threats. Algeria is the birthplace of AQIM, which is al-Qaeda's affiliate in North Africa. It has produced most of AQIM's leadership and allies and is the nucleus from which terrorism has orbited beyond Algeria to Mali, Mauritania and Niger. African officials estimate AQIM consists of 2,500 - 3,000 Islamist fighters coming from Africa, Europe and Asia, while US officials estimate there are between 800 - 1,200 Islamist fighters. Regardless of their composition and strength, the conflict has forced 400,000 Malians to flee their homes, and wrought terror in North Africa's Sahara and Sahel, with the potential to expand well beyond those regions as a global threat.

Currently, the US has about 7,000 aerial drones of various nomenclature and capability compared with fewer than 50 a decade ago. That number is set to expand further under the administration's 2012 budget request [PDF] of \$4.8 billion for drones. Drone strikes are legal according to Obama administration lawyers under the 2001 Authorization for the Use of Military Force, which gives the president authority to capture or kill anyone suspected of having planned, executed or assisted in the attacks of September 11, 2001. Since 2008 alone, more than 300 drone strikes deliberately killed 2,500 or more people in Yemen, Pakistan, Somalia and elsewhere around the globe as part of

CIA and military targeted killing operations. The Obama administration accelerated work in the weeks before the 2012 election on explicit rules for the targeted killing of terrorists by unmanned drones. This policy-making process comes in the wake of an international investigation, reportage on a leaked 2010 Department of Justice targeted killing legal opinion "white paper," and continued domestic criticism and litigation regarding the US targeted killing process. These yet-to-be identified or disclosed policy standards and procedures will pertain to "personality strikes" against named terrorists, and "signature strikes" against groups of suspected, unknown militants.

Where are the US drones operating from in Africa? A former French Foreign Legion post referred to as Camp Lemonnier in Djibouti is reportedly the center of a "constellation of hush-hush [US] drone, commando or intelligence facilities in East Africa [including] Ethiopia, Kenya, Somalia and the island nation of the Seychelles." The DOD will neither confirm nor deny those locations, but Niger's ambassador to the US, Maman Sidikou, told CNN that his government has agreed to let US drones operate from its territory, a largely desert nation on the eastern border of Mali. Included among the 3,200 or so troops at Lemonnier are approximately 300 Special Operations personnel working on organizing raids and strategizing the drone strikes of eight or more Predator drones "flown" by pilots from thousands of miles away and eight F-15E fighter-bombers for other strike operations.

The US can and does operate more than drones as counterterrorism tools in Africa in the pursuit of a so-called "smart power" strategy: employing the "soft power" tools of diplomacy, economic assistance and communications to supplement or augment the traditional "hard power" capabilities of the military to defend and advance [PDF] US interests in Africa. The US and Algeria have concluded numerous treaties and bilateral agreements to increase near and long-term military, political and economic cooperation. Both nations reportedly consult closely on key international and regional issues such as law enforcement cooperation, have a customs mutual assistance agreement and signed a mutual legal assistance treaty. Both have conducted bilateral military exercises — as well as frequent military exchanges — and the US hosted an Algerian port visit for the first time in 2012. Algerians have granted overflight permission to French fighter jets, and perhaps also to US drone overflights as well. Algeria sealed their southern border with Mali, cutting off essential fuel supplies to the terrorists in northern Mali, but Algeria may be reluctant to support the fight against AQIM outside its borders. At present there is no unclassified US troop presence in Algeria to combat AQIM. Drone flights over Algeria, based from other African nations, and Special Operations support, keeps the US profile low in the ongoing "smart power" approach to combating AQIM in Algeria.

As a result of the March 2012 military coup, the US terminated all assistance to the government of Mali and suspended all assistance to Mali with the exception of humanitarian assistance, food security, health and elections support, on a case-by-case basis. The US has looked to act unilaterally, and in conjunction with other nations to intervene in Mali under the auspices of UN Security Council Resolution 2056, cosponsored by the US, which supports a comprehensive approach to overlapping governance, security and humanitarian crises affecting Mali.

In January 2013, the DOD started airlifting French equipment into Mali in support of 700 - 800 African Union (AU) troops from Benin, Nigeria, Togo, Burkina Faso and in anticipation of Senegalese troops en route. The US also encouraged the Economic Community Of West African States member nations to support a peace enforcement mission in Mali consistent with Chapter VII of the UN Charter, albeit in advance of UN authorization of offensive operations in Mali.

Another key regional player in the North African counterterrorism operations is the AU. The US has a strong partnership with the AU in areas of mutual interest spanning a variety of sectors, formalized in August 2010 by a \$5.8 million assistance agreement that supports AU projects in peace and security, democracy and governance, agriculture, health, trade and other fields, as well as general capacity-building. The US Department of State established the US Mission to the African Union (USAU) in 2006, the US dedicated significant resources to supporting the AU's peace and security programs, building capability for the AU to fulfill its aspirational defense goals under the 2009 AU Non-Aggression and Common Defence Pact.

The US assists the African Standby Force — a pan-African military corps — not just for counterterrorism but full-spectrum operational capability. Towards those ends, the US has provided training and equipment to develop and enhance the AU's Peace Support Operations Division, strategic communications, conflict monitoring and analysis and military planning capabilities which are critical to on-going and future AU peace support operations.

The newest regional unified combatant command formed by the DOD, US Africa Command (AFRICOM), leads this combined and interagency "smart power" promotion of US and African interests. Established under 10 USC § 161 and operating on a continent that has changed much since the independence movement, AFRICOM works closely with the AU, other regional African institutions and individual nations to "provide unique 'value-added' capabilities enhancing existing U.S. and international programs." On repercussions of troops with "boots on the ground," AFRICOM Senior Strategy Adviser J. Peter Pham said: "Drone strikes or airstrikes will not restore Mali's territorial integrity or defeat the Islamists, but they may be the least bad option." In hindsight, the outgoing deputy commander for military operations, retired Vice Admiral Robert Moeller, reflected on the challenges of civil-military operations in Africa and AFRICOM's "lessons learned" on the US approach to ongoing and future civil-military operations in Africa:

- Lesson 1: AFRICOM does not create policy.
- Lesson 2: AFRICOM must work hand in hand with the diplomatic corps.
- Lesson 3: Keep our footprint in Africa limited.
- Lesson 4: AFRICOM is most effective when it listens to the concerns of its African partners.
- Lesson 5: Don't expect instant results.

As military and diplomatic initiatives challenge AQIM and other threats to internal and regional

security in North Africa and beyond, the US must pursue a full spectrum of "smart power" capabilities, to include but not be limited to the use of drones for surveillance or targeted killing strikes. In every possible instance, the US should partner with African host nations and allied forces. In that manner, the US can fulfill ambitious policy goals to "add value" while advancing US and African economic, security and development policies.

Professor Govern began his legal career as an Army Judge Advocate, serving 20 years at every echelon during peacetime and war in worldwide assignments involving every legal discipline. In addition to currently teaching at Ave Maria School of Law, he is an Advisory Board Member and Affiliated Faculty for the Center for Ethics and the Rule of Law at the University of Pennsylvania Law School, has also served as an Assistant Professor of Law at the United States Military Academy, and teaches for California University of Pennsylvania. Unless otherwise attributed, the conclusions and opinions expressed are solely those of the author and do not reflect the official position of the US Government, Department of Defense or Ave Maria School of Law.

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