

2013

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Recommended Citation

Kuyers, Joshua. “Operational Preparation of the Environment”: “Intelligence Activity” or “Covert Action” by Any Other Name?” National Security Law Brief 4, no. 1 (2013): 21-40.

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“OPERATIONAL PREPARATION OF THE ENVIRONMENT”: “INTELLIGENCE ACTIVITY” OR “COVERT ACTION” BY ANY OTHER NAME?

JOSHUA KUYERS¹

I. INTRODUCTION

During its preparation of the House Report for the Intelligence Authorization Act for Fiscal Year 2010, the House Permanent Select Committee on Intelligence (House Intelligence Committee) publicly criticized the Department of Defense (DoD) for frequently labeling military activities as “Operational Preparation of the Environment” (OPE).² The House Intelligence Committee scathingly opined that “overuse of the term has made the distinction [between traditional military activities and intelligence functions] all but meaningless,” and that DoD “appl[ies] the OPE label where the slightest nexus of a theoretical, distant military operation might one day exist.”³ The House Intelligence Committee even threatened that it would “consider legislative action clarifying the Department’s obligation” to report its “intelligence activities,” if the DoD remained reticent in its reporting.⁴

Indeed, as the House Intelligence Committee noted, the United States government’s recent activities demonstrate that the “traditional” distinction between military and intelligence operations has become blurred.⁵ For instance, both the Central Intelligence Agency (CIA) and the DoD utilize Unmanned Aerial Vehicles, known colloquially as “drones,” to conduct missile strikes against al Qaeda and al Qaeda-affiliated terrorist elements around the globe.⁶ The legal framework that

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2 H.R. REP. NO. 111-186, at 48 (2009).

3 *Id.* at 48–49.

4 *Id.* at 49.

5 *Id.* at 48 (noting “with concern the blurred distinction between the intelligence-gathering activities carried out of the Central Intelligence Agency and the clandestine operations of the Department of Defense”).

6 See Siobhan Gorman, *Drones Evolve Into Weapon in Age of Terror*, WALL ST. J., Sept. 8, 2011, <http://online.wsj.com/news/articles/SB10001424053111904836104576556952946952670> (claiming that the CIA and the military split drone strike responsibilities, with the military conducting strikes in Afghanistan and the CIA conducting them in Pakistan); see also Greg Miller, *Joint Strike Is Latest Example of CIA-Military Convergence*, WASH. POST, Oct. 1, 2011, at A1 (noting that a combined CIA and Joint Special Operations Command drone strike killed al Qaeda in the Arabian Peninsula leader Anwar Al-Awlaki).

authorized the SEAL Team Six operation resulting in al Qaeda leader Osama bin Laden's death is perhaps even more illustrative of this military-intelligence convergence.⁷ In the aftermath of the operation, CIA Director Leon Panetta unequivocally asserted that the raid was a "Title 50 operation, which is a covert operation;" that he was in "command" of the mission; and that Vice Admiral William McRaven "was actually in charge of the military operation."⁸

Seemingly ambiguous terms like OPE and those used by Director Panetta can be confusing and are often misused.⁹ These terms are legal terms of art and part of the larger legal framework that authorizes and provides for executive and congressional oversight of military and intelligence operations. Given the increasing number of mixed CIA-DoD operations, establishing clear definitions for these terms and then using them appropriately is crucial for the national security of the United States.

A significant portion of this legal framework is found in Title 10 and Title 50 of the United States Code.¹⁰ Unfortunately, given both the plain language and the various interpretations of these statutes, many terms within these statutes are inherently ambiguous. This ambiguity has become further exacerbated due to the convergence of military and intelligence personnel and operations¹¹ and the previously mentioned problem of the DoD's classification of some of its activities such as OPE. When combined with the reality of the current "armed conflict" against al Qaeda and its affiliates,¹² the intricacies of the Title 10/Title 50 debate and the military-intelligence convergence provide a challenging set of legal and policy issues regarding exactly when and under what circumstances the DoD must receive presidential authorization and when it must notify the proper channels of congressional oversight.

This paper seeks to provide a certain level of clarity to the Title 10/Title 50 debate, particularly

7 Interview by Jim Lehrer with Leon Panetta, Director of CIA, on PBS Newshour (May 3, 2011), *available at* http://www.pbs.org/newshour/bb/terrorism/jan-june11/panetta_05-03.html; *see also* Matthew C. Dahl, Event Summary: The Bin Laden Operation – The Legal Framework, A.B.A. (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/law_national_security/covert_action_event.authcheckdam.pdf.

8 Interview by Jim Lehrer with Leon Panetta, *supra* note 7.

9 *See, e.g.*, Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike; Action's Legality, Effectiveness Questioned*, WASH. POST, Nov. 8, 2002, at A1 (describing a CIA drone strike as a "covert military action") (emphasis added); Sarah Miller, *Covert Action and the War on Terror: Reconciling Secrecy and Public Legitimacy*, 31 A.B.A. NAT'L. SEC. L. REP. 1, Jan./Feb. 2009, at 16, 18, *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/law_national_security/nslr_january_february_2009.authcheckdam.pdf (claiming that because legal constraints to covert action are complex, are defined by executive branch lawyers, and are rarely litigated, they are nearly unknown to the general public).

10 *See generally* 10 U.S.C. §§ 101-18505 (2012) ("Armed Forces"); 50 U.S.C. §§ 1-2932 (2006) ("War and National Defense").

11 *See, e.g.*, Priest, *supra* note 9 (describing a CIA drone strike as a "covert military action") (emphasis added).

12 *See* George W. Bush, President of the United States, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."); *see also* Letter from Barack Obama, President of the United States, to Congress on the War Powers Resolution (Jun. 15, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/06/15/letter-president-war-powers-resolution> ("As necessary, in response to the terrorist threat, I will direct additional measures against al Qaeda, the Taliban, and associated forces to protect U.S. citizens and interests. It is not possible to know at this time the precise scope or the duration of the deployments of U.S. Armed Forces necessary to counter this terrorist threat to the United States.").

with regard to the DoD’s use of OPE. Section IIA defines OPE and demonstrates its utility in the fight against al Qaeda and its affiliates. Section IIB describes the broader legal framework and clarifies the key terms in the Title 10/Title 50 debate, such as “intelligence activity,” “covert action,” and “traditional military activity.” Section IIC recognizes the potential congressional oversight issues facing the DoD due to the blurring of Title 10 and Title 50 authorities. Section III places OPE within the Title 10/Title 50 framework and emphasizes that DoD’s classification of OPE as a traditional military activity is consistent with its authority.

II. ANALYSIS

A. Defining Operational Preparation of the Environment

Before analyzing the more convoluted questions of legal authorization and congressional oversight over military and intelligence activities, a generalized understanding of the term “Operational Preparation of the Environment” and its use is necessary. The exact definition of the term “Operational Preparation of the Battlefield” is classified. Nevertheless, sufficient information about OPE can be gleaned from related terms and unclassified publications about OPE to provide a generalized understanding of the term and its use.

The *Department of Defense Dictionary of Military and Associated Terms* does not define OPE itself;¹³ however, it defines “Preparation of the Environment” as “an umbrella term for operations and activities conducted by selectively trained special operations forces to develop an environment for potential future special operations.”¹⁴ Furthermore, the term “OPE” appears to have evolved from the term “Operational Preparation of the Battlespace” (OPB).¹⁵ An older United States Special Operations Command (SOCOM) definition describes OPB as

Non-intelligence activities conducted prior to D-Day, H-hour, in likely or potential areas of employment, to train and prepare for follow-on military operations. OPB consists of both pre-crisis activities and, when authorized, advance force operations. OPB complements intelligence operations in the overall preparation of the battlespace.¹⁶

Based on its heritage, OPE is likely the new OPB with a less menacing and more forward-thinking name.

After discovering that his special operations forces required CIA assistance to enter Afghanistan

13 Interestingly, although the term “Operational Preparation of the Environment” is not defined in the current version of the *Department of Defense Dictionary of Military and Associated Terms*, the acronym “OPE” is included in Appendix A’s list of acronyms. J. Publ’n 1-02, *Department of Defense Dictionary of Military and Associated Terms*, Appendix A (Nov. 8, 2010) (as amended through Mar. 15, 2013), available at www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

14 *Id.* at 225.

15 See Jennifer D. Kibbe, *Conducting Shadow Wars*, 5 J. NAT’L SEC. L. & POL’Y 373, 380 (2012) (tracing the term “preparing the battlefield” to the term “operational preparation of the environment”).

16 Michael S. Repass, *Combating Terrorism with Preparation of the Battlespace* 32 (2003), available at <http://www.fas.org/man/eprint/respass.pdf> (citing SOCOM definition of OPB).

after September 11, 2001,¹⁷ then-Secretary of Defense Donald Rumsfeld pushed for a greater special operations role in OPE.¹⁸ Indeed, OPE is inherently a special operations activity.¹⁹ SOCOM is one of the few Combatant Commands with global reach and capabilities.²⁰ U.S. special operations personnel have a “unique ability to simultaneously blend direct and indirect approaches” which is critical in OPE,²¹ as special operations forces specialize in “innovative, low-cost, and small-footprint approaches to achieve [U.S.] security objectives.”²²

Functionally, OPE is primarily an enabling tactic that facilitates future military operations.²³ It is an amalgam of lesser activities combined to minimize surprise and manage uncertainty by leveraging the capabilities and assets at the disposal of special operations forces to shape the environment. The “environment” that is being shaped, or “prepared,” includes both the physical environment and “human terrain.”²⁴

OPE is made up of three major substantive components: 1) orientation activities, 2) target development, and 3) preliminary engagement.²⁵ Orientation activities include situational awareness, surveys and assessments, and knowledge of the quickest routes to and from objectives and potential

17 See Jim Pavitt, Deputy Director for Operations, CIA, Address to Duke University Law School Conference (Apr. 11, 2002), available at https://www.cia.gov/news-information/speeches-testimony/2002/pavitt_04262002.html (claiming that CIA paramilitary officers were some of the first into Afghanistan after 9/11 and that they paved the way for special operations personnel); Dana Priest, “Team 555” Shaped a New Way of War; Special Forces and Smart Bombs Turned Tide and Routed Taliban, WASH. POST, Apr. 3, 2002, at A1 (describing how CIA operatives were inserted before special operations forces to “designate landing zones, secure safe houses, vet anti-Taliban commanders, and supply their troops with weapons, communications gear, medical supplies, and clothing”).

18 See Gordon Corera, *Special Operations Forces Take Care of War on Terror*, JANE’S INTELLIGENCE REV., Dec. 13, 2002, at 1-2; Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT’L SEC. L. & POL’Y 539, 563 (2012); see also Rowan Scarborough, *Special Operations Forces Eye Terrorists, Command Draws Up War Plan*, WASH. TIMES, Aug. 12, 2005 (noting that some geographic combatant commanders have objected to special operations personnel operating outside of their chain of command when they are located in their geographical jurisdiction).

19 See Repass, *supra* note 16, at 9 (“The term OPB is seldom used outside of Special Operations Forces channels.”); see also Corera, *supra* note 18 (describing the highly specialized nature of special operations forces and their ability to work in non-traditional capacities); Linda Robinson, *Plan of Attack: The Pentagon Has a Secret New Strategy for Taking on Terrorists – and Taking Them Down*, U.S. NEWS & WORLD REP. (Aug. 1, 2005), available at <http://www.usnews.com/usnews/news/articles/050801/1terror.htm> (describing SOCOM as the global “synchronizer” in the war on terror, responsible for “conducting preparatory reconnaissance missions against terrorist organizations around the world”).

20 See 10 U.S.C. § 167 (2012); DoD Directive 5100.03, SUPPORT OF THE HEADQUARTERS OF COMBATANT AND SUBORDINATE UNIFIED COMMANDS, Enclosure 3 (2011); Posture Statement of Adm. William H. McRaven, USN Comdr., U.S. Special Ops. Command Before the 112th Congress S. Comm. on Armed Serv. Comm. 10 (Mar. 6, 2012), available at http://www.socom.mil/Documents/2012_SOCOM_POSTURE_STATEMENT.pdf.

21 Posture Statement of McRaven, *supra* note 20.

22 *Id.* at 7.

23 Maj. Michael T. Kenny, *Leveraging Operational Preparation of the Environment in the GWOT* 3, 6 (May 25, 2006), available at <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA450588>; Repass, *supra* note 16, at 13.

24 Kenny, *supra* note 23, at 33; see also Repass, *supra* note 16, at 9 (asserting that preparation of the battlespace consists of a “full range of intelligence functions and analytical activities”, the aim of which is to produce “actionable intelligence for executing forces”).

25 Kenny, *supra* note 23, at 1.

obstacles in between.²⁶ Target development is “a set of activities that acquire and pinpoint a target set.”²⁷ As part of target development, OPE facilitates persistent surveillance “by exploiting regional and local expertise and leveraging ISR [Intelligence, Surveillance, and Reconnaissance] assets to find and fix target sets.”²⁸ Target development may include both overt and clandestine engagement with host state counterparts, and cultivating relationships with influential members of host state society.²⁹ Preliminary engagement includes persistent surveillance, terminal guidance, and small-scale direct action.³⁰ It also may involve establishing caches and conducting area assessments of local infrastructure.³¹

OPE can also be separated into two temporal categories: 1) pre-crisis activities and 2) advance force operations.³² Pre-crisis activities are conducted during peacetime and in the time prior to a crisis. Pre-crisis activities include unilateral surveys and assessments, cover deployments and area visits, and training and engagement events with regional and local allies.³³ In contrast, advance force operations, which require Secretary of Defense approval, are undertaken immediately prior to conventional forces entering an area of operations.³⁴ Advance force operations include clandestine and source operation, such as “reconnaissance and surveillance; joint reception; staging; onward movement; information operations; terminal guidance; and other limited direct action operations.”³⁵

As former Secretary of Defense Donald Rumsfeld said,

The only way to deal with a terrorist network that’s global is to go after it where it is. The [alternative] . . . is to sit there and think you’re going to take the blows . . . [G]iven the increasing power and the reach of weapons today, that would be foolhardy and dangerous and self-defeating.³⁶

OPE provides special operations forces with a tool that brings the fight to al Qaeda and its affiliates. In fact, OPE is a particularly useful tool because of its proactive nature, its ability to reduce the targeting timeframe from find to finish, and its human intelligence (HUMINT) character.³⁷ OPE is proactive because it provides the DoD with access to and pre-positioned forces in areas of anticipated trouble. This forward posture, in turn, enhances the operational reach of U.S. forces by establishing infrastructure with personnel and equipment. Similarly, because special operations personnel are already engaged and training in locations of interest, they have the capacity to rapidly

26 *Id.* at 9; Repass, *supra* note 16, at 13–14.

27 Kenny, *supra* note 23, at 10.

28 *Id.* at 9; *see also* Repass, *supra* note 16, at 14 (discussing engagement programs to strengthen alliance capabilities).

29 Kenny, *supra* note 23, at 3, 7, 33.

30 *Id.* at 12; Repass, *supra* note 16, at 19.

31 Kenny, *supra* note 23, at 9.

32 Repass, *supra* note 16, at 13.

33 *Id.* at 13–14.

34 *Id.* at 13, 18.

35 *Id.* at 9, 13.

36 Donald H. Rumsfeld, U.S. Sec’y of Def., *News Briefing in Brussels*, U.S. DEP’T OF DEF. (Dec. 18, 2001), *available at* <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2667>.

37 Kenny, *supra* note 23, at 2–4.

re-orient and engage emerging targets.³⁸ Through orientation activities and target development, OPE also facilitates strikes against time-sensitive and narrow window-of-opportunity targets.³⁹ Finally, because it requires special operations forces on the ground in a designated threat area, OPE provides the U.S. military with an invaluable HUMINT capability. HUMINT is often the most difficult to achieve, and yet most critical, source of information; in crisis situations, it is direly needed.⁴⁰ Ultimately, these three features of OPE allow the United States to act in preemptive self-defense against the terrorist threat.

B. Legal Authorities in the Title 10/Title 50 Debate

As mentioned above, recent events have led both scholars and practitioners to express concern about military-intelligence convergence and unclear distinctions between the so-called “Title 10” and “Title 50” legal authorities.⁴¹ This concern has also extended to special operations forces’ use of OPE and DoD’s classification of OPE as a traditional military activity. To better understand how OPE fits into the larger Title 10/Title 50 debate, this Section provides background information on the legal framework governing military and intelligence operations and clarifies some of the key terms, particularly “intelligence activity,” “covert action,” and “traditional military activity.”

1. Defining Title 10 Authority

Scholars and practitioners use the term “Title 10 authority” as a catch-all phrase to describe the legal authority for military operations.⁴² Unfortunately, the use of the term in this manner is

38 *Id.* at 9.

39 *Id.* at 11.

40 *See* DEF. SCI. BD., DO D ROLES AND MISSIONS IN HOMELAND SECURITY iv (2003), available at http://www.au.af.mil/au/awc/awcgate/dod/dsb_hls_roles_v1.pdf (describing human intelligence collection as “arguably the most critical source of information in the war on terrorism”); STAFF OF H. PERM. SELECT COMM. ON INTELLIGENCE, IC21: THE INTELLIGENCE COMMUNITY IN THE 21ST CENTURY (1996), available at <http://www.gpo.gov/fdsys/pkg/GPO-IC21/html/GPO-IC21-9.html> (“In aggregate, the Strategic Intelligence Reviews clearly identify HUMINT as the most important source of intelligence for the subjects [terrorism, narcotics, proliferation, and international economics] treated.”).

41 *See, e.g.*, Chesney, *supra* note 18 at 544, 629 (arguing that the debate is mostly politics); Kibbe, *supra* note 15, at 384 (citing Rep. Rush Holt, who expressed concern over a growing number of activities that fall between Title 10 and Title 50); Andru E. Wall, *Demystifying the Title 10 – Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT’L SEC. J. 85 (2011) (urging Congress to revise the antiquated oversight structure to reflect “our integrated and interconnected world”); Jeff Mustin & Harvey Rishikof, *Projecting Force in the 21st Century – Legitimacy and the Rule of Law: Title 50, Title 10, Title 18, and Art. 75*, 63 RUTGERS L. REV. 1235, 1236 (2011) (“Conventional military forces, special operations forces, and intelligence professionals are all operating in the same area of operations . . . but using contradictory legal authorities to do so.”); Ann Scott Tyson, *Boots on the Ground, Now Also Eyes: Special Operations Forces Are Doing More Intelligence Gathering in Terror War*, CHRISTIAN SCI. MONITOR (Mar. 11, 2004), available at <http://www.csmonitor.com/2004/0311/p01s02-usmi.html> (noting that U.S. special operations “are taking on a far more robust and independent role in intelligence and undercover operations”); Greg Miller and Julie Tate, *Since Sept. 11, CIA’s Focus Has Taken Lethal Turn*, WASH. POST (Sept. 1, 2011), (reporting that personnel in the joint DoD-CIA special operations units in Afghanistan “wore civilian clothes and traveled in Toyota Hilux trucks rather than in military vehicles”).

42 Wall, *supra* note 41, at 91.

misleading because “Title 10 – Armed Forces” does not contain actual operational authorities; it merely describes the organizational structure of the Department of Defense.⁴³ The U.S. military’s true operational authority stems from the United States Constitution and the President’s Commander-in-Chief power.⁴⁴

The President’s constitutional power over the Armed Forces is not exclusive. The Constitution granted Congress the power to “declare war,” “raise and support armies,” “provide and maintain a navy,” and “make rules for the government and regulation of the land and naval forces.”⁴⁵ Together with Congress’ power over appropriations, these constitutional provisions provide for congressional oversight over the U.S. military.⁴⁶ Congress has exercised its legislative oversight authority over the Armed Forces many times throughout U.S. history, perhaps most significantly in the National Security Act of 1947,⁴⁷ Goldwater-Nichols Department of Defense Reorganization Act of 1986,⁴⁸ and the War Powers Resolution of 1973.⁴⁹

2. Defining Title 50 Authority

Like the term “Title 10 authority,” Title 50 authority is also a misnomer. Although it is often referred to as the CIA’s authority to conduct intelligence operations,⁵⁰ Title 50 of the United States Code is actually titled “War and National Defense.”⁵¹ In fact, the DoD undertakes the majority of intelligence activities under Title 50 authorities.⁵² Thus, the President and the DoD also possess significant authority to conduct intelligence operations under Title 50.

The President’s power to conduct intelligence activities stems from his powers as head of the Executive branch⁵³ and as the “sole organ of the federal government in the field of international relations.”⁵⁴ In *The Federalist* No. 64, for instance, John Jay suggested that the treaty-making power allowed the President to “manage the business of intelligence in such a manner as prudence may

43 See generally 10 U.S.C. §§ 101-18505 (2012).

44 U.S. CONST. art. II, § 2.

45 *Id.* art. I, § 8.

46 *Id.* art. I, §§ 8–9.

47 Pub. L. No. 80-235, §§ 201, 205–06, 61 Stat. 495 (1947) (merging the Departments of War and Navy into the “National Military Establishment,” which later became known as the Department of Defense).

48 Pub. L. No. 99-433, 100 Stat. 992 (1986) (reorganizing the Department of Defense to include a new “joint” structure of command and control).

49 Pub. L. No. 93-148, 87 Stat. 555 (codified as amended at 50 U.S.C. §§ 1541–48 (2006)).

50 See *Miller*, *supra* note 9 (focusing almost exclusively on CIA); *Wall*, *supra* note 41, at 91.

51 50 U.S.C. § 1 (2006).

52 RICHARD A. BEST, JR., CRS REP. FOR CONG., RL 30252, INTELLIGENCE AND LAW ENFORCEMENT: COUNTERING TRANSNATIONAL THREATS TO THE U.S. 4-5 (2001), available at <http://www.fas.org/irp/crs/RL30252.pdf>; see also Greg Miller, *DLA Sending Hundreds More Spies Overseas*, WASH. POST (Dec. 1, 2012), available at http://articles.washingtonpost.com/2012-12-01/world/35585098_1_defense-clandestine-service-cia-spy-agency (noting the massive increase in the number of spies sent abroad and trained by the CIA in 2012 and that these spies will be receiving their assignments from the DoD).

53 See U.S. CONST. art. II, § 1, cl 1.

54 See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–21(1936).

suggest.”⁵⁵

Nevertheless, as with Title 10 authority, the Constitution also grants Congress some power to constrain the President, at least indirectly, through the appropriations clause.⁵⁶ Yet even Title 50 legislation recognizes the limitations of congressional authority to conduct oversight on presidentially approved intelligence activities: “Nothing in this title shall be construed as requiring the approval of the congressional intelligence committees as a condition precedent to the initiation of any significant anticipated intelligence activity.”⁵⁷

3. Defining Key Terms

Arguably, the entire Title 10/Title 50 debate is based upon the differing and controversial interpretations of three key terms: “intelligence activities,” “covert action,” and “traditional military activities.” A U.S. government determination that an individual military or intelligence operation constitutes either an intelligence activity, covert action, or traditional military activity has a significant impact on both the legal authority under which the operation is conducted and the legislative notification regime that must be followed. Therefore, a clear understanding of these terms is key to the proper classification of OPE within the Title 10/Title 50 framework.

a. Intelligence Activities

The term “intelligence activities” is broad.⁵⁸ Indeed, Executive Order 12,333 merely defined intelligence activities in terms of activities that the Intelligence Community was authorized to conduct.⁵⁹ It authorized the Intelligence Community to conduct all

intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States, including the collection of information; production and dissemination of intelligence; counter-intelligence; special activities; administrative and support activities within the United States and abroad; and such other intelligence activities as the President may direct from time to time.⁶⁰

To be helpful, however, a more refined definition of “intelligence activities” is necessary.

Thus, for the purpose of the Title 10/Title 50 debate, “intelligence activities” are best defined in

55 THE FEDERALIST NO. 64 (John Jay), INDEP. J. (Mar. 5, 1788), available at <http://www.constitution.org/fed/federa64.htm>.

56 U.S. CONST. art. I, § 9 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a Regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

57 50 U.S.C. § 413(a)(2) (2006).

58 E.g., *id.* § 413(f); Exec. Order No. 12,333, *United States Intelligence Activities*, § 1.4, 46 Fed. Reg. 59,943 (Dec. 4, 1981).

59 See Exec. Order No. 12,333, 46 Fed. Reg. at 59,943.

60 *Id.*

the negative. Intelligence activities are those activities that do not amount to covert action,⁶¹ but are instead “generally considered [to be] clandestine in nature.”⁶² The Department of Defense Dictionary of Military and Associated Terms, for example, defines “clandestine operation” as

[a]n 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.⁶³

Defining intelligence activities as clandestine activities not amounting to covert action adds a layer of specificity that is particularly useful for congressional oversight purposes, which are discussed in further detail below.

b. Covert Action

For the majority of U.S. history, the term “covert action” remained undefined. Although seemingly unthinkable today, Congress may not have contemplated covert action as within the CIA’s purview when the National Security Act of 1947 first created the CIA.⁶⁴ Instead, what today constitutes “covert action” used to be known as the “fifth function,” in which the CIA was authorized “to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.”⁶⁵ In fact, the United States only decided to add covert operations to its foreign policy repertoire due to the Soviet Union and China’s use of covert activities against U.S. interests abroad.⁶⁶

Once implemented, however, Congress quickly assented to the use of these covert operations.⁶⁷ These above-mentioned “other functions and duties” later transformed into “special activities” with

61 *See id.* § 413a (2006) (“Reporting of intelligence activities *other than* covert actions”) (emphasis added); *id.* § 413b(e) (“Covert action . . . does not include activities the primary purpose of which is to acquire intelligence.”).

62 *See* 50 U.S.C. §§ 403–04a(f) (“[T]he Director of the Central Intelligence Agency shall coordinate the relationships between elements of the intelligence community and the intelligence or security services of foreign governments or international organizations on all matters involving intelligence related to the national security or involving intelligence acquired through clandestine means.”); Mustin & Rishikof, *supra* note 41, at 1240.

63 J. Publ’n 1-02, *supra* note 13, at 46.

64 L. BRITT SNIDER, *THE AGENCY AND THE HILL: CIA’S RELATIONSHIP WITH CONGRESS, 1946–2004*, 259 (2008).

65 Mustin & Rishikof, *supra* note 41, at 1242; *see also* National Security Act of 1947, Pub. L. No. 80-235, §102(d)(5), 61 Stat. 495, 498.

66 NAT’L SEC. COUNCIL, NSC 5412/2, ¶ 1, COVERT OPERATIONS, (1954), available at <http://history.state.gov/historicaldocuments/frus1950-55Intel/d250>.

67 Col. Kathryn Stone, “All Means Necessary” – *Employing CIA Operatives in a Warfighting Role Alongside Special Operations Forces* 8 (2003) (suggesting that congressional acquiescence and the legislative history of the National Security Act of 1947 provide evidence that the CIA’s mandate includes “covert action”).

Executive Orders 11,905,⁶⁸ 12,036,⁶⁹ and 12,333.⁷⁰ Since the end of the Cold War, covert action has transformed from preventing the spread of Communist ideology to preventing harm to the United States.⁷¹

The current definition of covert action is located in Section 503(e) of the Intelligence Authorization Act for Fiscal Year 1991.⁷² It defines covert action as “an activity or activities of the United States government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States government will not be apparent or acknowledged publicly.”⁷³ Nevertheless, operations that are primarily intelligence collection activities; that constitute traditional diplomatic, military, or law enforcement activities; or that provide routine support to these activities; avoid the “covert action” label.⁷⁴

In deciding to “define” covert action through statute for the first time, Congress tried to reassure the Executive branch that it was merely trying to clarify and not expand or limit any executive branch authority to conduct “covert action.”⁷⁵ Although he refrained from vetoing the bill, President George H.W. Bush refused to be bound to a legislative definition and argued that a legislative definition of covert action was unnecessary.⁷⁶ He viewed the notification requirement attached to “covert action” as impinging on the President’s inherent constitutional authority to withhold certain national security information.⁷⁷ Additionally, he asserted that he would continue to consider “the historic mission of the Armed Forces to protect the United States and its interests, influence foreign capabilities and intentions, and conduct activities preparatory to the execution of operations” when determining

68 Exec. Order No. 11,905, *United States Intelligence Activities*, 41 Fed. Reg. 7703, 7705 (Feb. 18, 1976).

69 Exec. Order No. 12,036, *United States Intelligence Activities*, 43 Fed. Reg. 3674, 3692 (Jan. 26, 1978).

70 Exec. Order No. 12,333, *United States Intelligence Activities*, § 1.4, 46 Fed. Reg. 59,942, 59,953–54 (Dec. 4, 1981) (“Special activities means activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions.”).

71 SNIDER, *supra* note 64, at 309–10.

72 Intelligence Authorization Act for Fiscal Year 1991, Pub. L. No. 102-88, § 503(e), 105 Stat. 429; 50 U.S.C. § 413b(e) (2006).

73 50 U.S.C. § 413b(e).

74 *Id.* § 413b(e)(1)–(4).

75 SELECT COMM. ON INTELLIGENCE, CONFERENCE REPORT FOR INTELLIGENCE AUTHORIZATION ACT FISCAL YEAR 1991, H.R. REP. NO. 102-166, at 28 (1991), *reprinted in* 1991 U.S.C.C.A.N. 243 (Conf. Rep.) (“The conferees further note that in defining for the first time in statute the term ‘covert action’ they do not intend that the new definition exclude any activity which heretofore has been understood to be a covert action, nor to include any activity not heretofore understood to be a covert action. The new definition is meant to clarify the understanding of intelligence activities that require presidential approval and reporting to Congress; not to relax or go beyond previous understandings.”).

76 George H.W. Bush, President of the United States, Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991 (Aug. 14, 1991), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=19899> (“These provisions cannot be construed to detract from the President’s constitutional authority to withhold information the disclosure of which could significantly impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.”).

77 *Id.*

whether particular military activities constitute covert action.⁷⁸

c. Traditional Military Activities

The term “traditional military activities” is best known as an exception to the definition of covert action above. Although it remains undefined by statute, the legislative history of the Intelligence Authorization Act of Fiscal Year 1991 provides a three-part test to define traditional military activities.⁷⁹ Applied on a case-by-case basis, this test helps determine whether an activity constitutes a traditional military activity, thereby avoiding the presidential finding and notification requirements of 50 U.S.C. § 413b.⁸⁰ According to this conjunctive formula, traditional military activities include those undertakings:

- 1) By military personnel;
- 2) Under the direction and control of a United States military commander; *and*
- 3) Preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities for the activities and for operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving United States military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly.⁸¹

The first two elements in the three-part test defining a traditional military activity make sense practically and historically. Congress’ inclusion of the third element, on the other hand, expanded the temporal scope of the traditional military activity exemption, while also requiring that either the President or Secretary of Defense would have to approve the specific operation to qualify as a traditional military activity.⁸² Thus, Congress added a subtle note of accountability that would encourage internal executive branch vetting before traditional military activity decisions would be made.⁸³

The Conference Committee Report for the Intelligence Authorization Act also noted that activities meeting these three requirements constitute traditional military activities whether or not U.S. sponsorship of such activities is apparent or later acknowledged.⁸⁴ This last point is somewhat moot because, by definition, an activity in which the U.S. role is apparent or intended to be acknowledged publically *cannot* be a covert action.⁸⁵ Nevertheless, this emphasis does recognize that traditional mili-

78 *Id.*

79 H.R. REP. NO. 102-166, at 29–30 (1991).

80 *See* 50 U.S.C. § 413b (2006).

81 *Id.* (emphasis added).

82 Chesney, *supra* note 18, at 599.

83 *See id.* (noting that this requirement would preclude anyone lower in the chain of command from engaging in an “unacknowledged” operation, other than in times of overt hostilities).

84 H.R. REP. NO. 102-166, at 29–30.

85 *See* 50 U.S.C. § 413b(e) (2006) (defining covert activity in situations where the role of the U.S. government is not intended to be made public); *see also* Chesney, *supra* note 18, at 595–96 (“[T]he definition of covert action already

tary activities can include *clandestine* operations.

C. Congressional Oversight Problem of Title 10/Title 50 Convergence

The true problem with Title 10/Title 50 convergence and confusion is not based on the specific operational authorities necessary to approve particular DoD covert or clandestine activities, but is instead based on congressional assertions that the DoD is attempting to avoid congressional oversight. Thus, Section II's definitional splicing of whether a particular activity is classified as an intelligence activity, covert action, or traditional military activity is important because of the disparate levels of oversight requirements that attach to activities carried out under Title 50 as opposed to Title 10.⁸⁶

As demonstrated below, Title 50 oversight is strict and laid out in detail. Title 10 oversight, on the other hand, is less strenuous. Thus, as with the controversy surrounding OPE, the congressional intelligence committees are concerned that the DoD will simply label its activities as traditional military activities so as to avoid Title 50 oversight requirements.⁸⁷ According to the House Intelligence Committee, this is problematic, because “[c]landestine military intelligence-gathering operations . . . carry the same diplomatic and national security risks as traditional intelligence-gathering activities.”⁸⁸

1. Oversight Over Intelligence Activities

Operations determined to constitute “intelligence activities” are subject to strict congressional oversight requirements. Section 413 of Title 50, for example, tasks the President with generally ensuring that Congress is “kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this subchapter.”⁸⁹ Additionally, Congress imposes a reporting requirement that includes “all intelligence activities, other than a covert action . . . which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States government, including any significant anticipated intelligence activity and any significant intelligence failure.”⁹⁰

The clear and broadly encompassing language of these statutory provisions suggests that Congress anticipates that the Executive will report *all* intelligence activities, regardless of whether carried out by the United States or on behalf of the United States.⁹¹ The reporting requirement also makes clear that Title 50 oversight authority applies to all U.S. government departments, agencies, and entities—not just the CIA.⁹² It is also notable that the Executive must notify Congress of any significant

excluded operations in which the U.S. role was intended to be acknowledged.”).

86 *See id.* § 413a(a) (intelligence activity reporting requirement), 413b(a) (covert action presidential finding requirement), 413b(b) (covert action reporting requirement).

87 SELECT COMM. ON INTELLIGENCE, INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010, H.R. REP. NO. 111-186, at 48 (2009).

88 *Id.* at 49.

89 50 U.S.C. § 413(a)(1) (2006).

90 *Id.*

91 *Id.* §§ 413(a)(1), 413a(a)(1).

92 *Id.* § 413a(a)(1).

anticipated intelligence activities and any significant intelligence *failure*.⁹³

2. Oversight Over Covert Action

Operations classified as “covert actions” are subject to both a presidential finding and a congressional notification requirement.⁹⁴ Title 50, section 413b(a) (Presidential findings) affirms,

The President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government *unless* the President determines such an action is necessary to support identifiable foreign policy objectives of the United States *and* is important to the national security of the United States⁹⁵

The finding must be in writing and specify exactly who is authorized to fund and participate in the covert action.⁹⁶ The finding must also clarify that the covert action does not violate the Constitution or any U.S. domestic statute.⁹⁷

Although no President would authorize any covert operation without determining that it was “necessary to support identifiable foreign policy objectives” and “important to the national security of the United States,”⁹⁸ the true power behind the presidential finding requirement is that it imposes an internal review of covert operations on the Executive branch and makes it more difficult for the President to deny knowledge of an operation if it ends in disaster.⁹⁹ Thus, despite Congress’ lack of operational authority, the presidential finding requirement allows Congress to insist on a measure of public accountability for covert action that the Executive could otherwise deny.

Section 413(b) of Title 50 requires the President to keep the congressional intelligence committees “fully and currently informed” of all ongoing covert actions.¹⁰⁰ It also requires the President to report his presidential finding to the intelligence committees “as soon as possible after such approval and *before* the initiation of the covert action.”¹⁰¹ However, in “extraordinary circumstances affecting vital interests of the United States,” this prior notification requirement can be limited to the so-called “Gang of Eight.”¹⁰² Although the prior notification requirement is limited in these extreme

93 *Id.*

94 *Id.* §§ 413b(a)(1), 413b(a)(3)-(4), 413b(b)(1), 413b(c)(1), (c)(3).

95 *Id.* § 413b(a) (emphasis added).

96 *Id.* § 413b(a)(1), (3)-(4).

97 *Id.* § 413b(a)(5).

98 *Id.* § 413b(a).

99 Chesney, *supra* note 18, at 589 (“The real impact of the finding requirement, instead, was its procedural aspect, in that obliging the President to take this step eliminated the possibility of denying knowledge in the event of failure- thus harnessing presidential self-interest more directly to the task of ensuring against unduly risky or ill-conceived covert action projects”).

100 50 U.S.C. § 413b(b).

101 *Id.* § 413b(c)(1).

102 *Id.* § 413b(c)(2). The “Gang of Eight” includes the chairmen and ranking minority members of both congressional intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

cases, it is important to note that, at least under the statutory authority, the President simply cannot refuse to notify Congress.¹⁰³

Like the presidential finding requirement, the congressional notification requirement is about Executive accountability. The Executive's employment of covert action implies that U.S. national interests are so great that they must be protected outside the normal international legal and diplomatic channels.¹⁰⁴ Congress justifiably worries that if the President could employ atypical means without any political consequences, the Executive would likely be more involved in covert action.¹⁰⁵ Thus, although it is not a true substantive constraint, the notification requirement makes presidential "plausible deniability" impossible, thereby increasing Executive accountability to the American public.¹⁰⁶

The timing of the notification requirement is also important. Since, under normal circumstances, the Executive must report its finding authorizing a covert action *before* undertaking the actual covert action, Congress can take both formal (funding) or informal (leaks to the press or disclosure on public record) steps to stop or limit covert actions that it deems controversial.¹⁰⁷ Interestingly, the secrecy surrounding covert action "both makes it easier to initiate and easier to terminate, relative to the political consequences of either authorizing or terminating overt hostilities involving the military."¹⁰⁸

3. Oversight Over Traditional Military Activities

Unlike intelligence activities or covert actions, "traditional military activities" are not subject to congressional oversight under Title 50. Instead, they are subject to Title 10 oversight. As demonstrated below, Title 10 oversight includes both congressional oversight and executive oversight.¹⁰⁹

The House and Senate Armed Services Committees conduct congressional Title 10 oversight over traditional military activities. The Armed Services Committees' primary mechanism of public accountability is the War Powers Resolution, which incidentally is located in Title 50.¹¹⁰ The War Powers Resolution contains both consultation and reporting requirements that apply to the "introduction of United States Armed Forces into *hostilities*, or into situations where imminent involve-

103 See generally *id.* §§ 413, 413(a)(2) (stipulating that the President must provide notification, even if in *de minimis* form prior to the action in extraordinary circumstances or after the action, providing the reasons for not doing so beforehand; non-notification is not an option nor is implied anywhere). *But cf.* George H.W. Bush, Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991, *supra* note 76 ("These provisions cannot be construed to detract from the President's constitutional authority to withhold information the disclosure of which could significantly impair foreign relations, the national security . . .").

104 Stone, *supra* note 67, at 15.

105 See e.g., Chesney, *supra* note 18, at 588 (stating that there was a public uproar after the public learned of the CIA's involvement in preventing Salvador Allende from winning the Chilean presidential election under President Nixon).

106 Chesney, *supra* note 18, at 588–89.

107 50 U.S.C. § 413b(c)(1) (2006); Chesney, *supra* note 18, at 589.

108 Chesney, *supra* note 18, at 589.

109 See 50 U.S.C. § 413(c)(1).

110 War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48 (2006)).

ment in hostilities is clearly indicated by the circumstances.”¹¹¹

However, exactly what military operations constitute “hostilities” is ill-defined in the current global armed conflict against al Qaeda and its affiliates and is therefore problematic when determining whether congressional oversight is appropriate.¹¹² Furthermore, the War Powers Resolution does not impose congressional restraints or requirements on military activities that are not “hostilities.”¹¹³ Indeed, military forces operating clandestinely do not have extra legal requirements or precautions beyond those that they must undertake anyways for regular military operations.¹¹⁴

Additionally, the level of specificity required in War Powers Resolution reports does not reach the same level of detail as those required by Title 50 oversight authorities. Under the War Powers Resolution, the President only has to submit “the circumstances necessitating the introduction of United States Armed Forces; the constitutional and legislative authority under which such introduction took place; and the estimated scope and duration of the hostilities or involvement.”¹¹⁵ These broad categories allow the Executive to speak in broad terms when providing periodic reports consistent with the War Powers Resolution.¹¹⁶ President Barack Obama, for instance, spoke in very general terms and referenced a classified annex in his June 2011 War Powers report.¹¹⁷

The Executive branch also maintains internal oversight over the Armed Forces. The Department of Defense has internalized, or perhaps more appropriately “operationalized,” its Title 10 authority through DoD Directives, Instructions, Reports, and other publications. Although these documents are statements of policy and are not legally binding, they still constrain DoD actions and provide for internal oversight processes. DoD Directive 2311.01E, for example, requires the DoD to conduct all military operations in accordance with the laws of war.¹¹⁸

Despite the dual nature of Title 10 oversight, some scholars worry that Title 10 is an insufficient accountability mechanism in the face of Executive power.¹¹⁹ L. Britt Snider, for example, snubs the oversight role of the House and Senate Armed Service Committees and suggests that the intelli-

111 50 U.S.C. § 1542 (2006) (consultation requirement); *id.* at § 1543(a) (requiring a written report, in the absence of a declaration of war, “in any case in which United States Armed Forces are introduced 1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; 2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces”).

112 Chesney, *supra* note 18, at 543–44.

113 *See id.* at 588.

114 Maj. Keith A. Pellegrini, *Operateurs Sans Frontiers: SOF’s Answer to the Transnational Terrorist Threat* 7 (Feb. 14, 2005).

115 50 U.S.C. § 1543(a)(3)(A)–(C) (2006).

116 *Id.* § 1543(c).

117 *See, e.g.*, Letter from Barack Obama, President of the United States, to Congress on the War Powers Resolution (Jun. 15, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/06/15/letter-president-war-powers-resolution>.

118 DoD DIRECTIVE 2311.01E, DoD LAW OF WAR PROGRAM, ¶ 4.1 (2006) (certified current as of Feb. 22, 2011) (“Members of the DoD components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”) (emphasis added).

119 *See* SNIDER, *supra* note 64, at 310 (citing the President’s ability to delay or limit notice to Congress as well as the President’s use of the Contingency Reserve Fund, which does not require congressional approval); Chesney, *supra* note 18, at 543–44 (suggesting that Congress should add a statutory notification requirement to deployment of military forces “outside the geographic confines of a state where the United States has an overt combat presence”).

gence committees provide the “only significant check and balance outside the executive branch.”¹²⁰ Similarly, Jennifer Kibbe notes that in 2009 the Senate Select Committee on Intelligence had forty-five staffers tasked solely with analyzing the intelligence budget while the Senate Appropriations Subcommittee on Defense had just five staffers assigned to intelligence issues, in addition to their other responsibilities.¹²¹ Additionally, Robert Chesney worries that internal Executive branch oversight is a weak form of accountability, because the Secretary of Defense has an institutional commitment to the interests of the Department of Defense. Therefore, he may not be as privy to, nor carefully police, the foreign or domestic political risks involved in a particular operation, that are outside his purview.¹²²

III. OPERATIONAL PREPARATION OF THE ENVIRONMENT AND TITLE 10/TITLE 50 CONVERGENCE

The question of exactly where OPE fits into the Title 10/Title 50 debate is difficult. In fact, one scholar claimed that OPE embodies “the fundamental problem” of intelligence-military convergence.¹²³ The legal architecture of the Title 10/Title 50 debate, as explained above in Section II, should provide a clear mechanism to resolve the problem. Unfortunately, the problem of classifying OPE within the Title 10/Title 50 debate is less about clarifying the legal framework of Title 10 and Title 50 than it is about the breadth of the various lesser activities that combine to form the amorphous concept of OPE. Contrasting OPE and intelligence activities as “different authorities, somewhat different purposes, [and] mostly indistinguishable activities,” during his nomination hearing, Air Force General Michael V. Hayden seems to agree.¹²⁴

The viewpoints of the main stakeholders in the debate are illustrative of this confusion. The House Intelligence Committee describes the purpose of OPE operations as intelligence gathering and is concerned that DoD is not properly accountable to the legislature.¹²⁵ It also questions the traditional military activity label as disingenuous.¹²⁶ It may have a point, particularly since the CIA has performed OPE, or at minimum OPE-like, activities in the past.¹²⁷

Executive branch officials, on the other hand, have expressed publicly their opinion that OPE does not fall under Title 50 oversight authority. The DoD does not consider OPE operations as intelligence collection and further claims that OPE is not covert action.¹²⁸ Instead, it suggests that OPE is a traditional military activity; therefore, OPE falls within the traditional military activity exception to congressional notification requirements for covert action and does not need to be

120 SNIDER, *supra* note 64, at 310.

121 Kibbe, *supra* note 15, at 383.

122 Chesney, *supra* note 18, at 605.

123 Chesney, *supra* note 18, at 611.

124 *Nomination of General Michael V. Hayden, USAF to Be Director of the Central Intelligence Agency*: Hearing Before the S. Select Comm. on Intelligence, 109th Cong. 124 (2006), available at <http://www.intelligence.senate.gov/109808.pdf> (statement of Gen. Hayden).

125 H.R. REP. NO. 111-186, at 48–49 (2009).

126 *See id.* (expressing hope that the DoD will be more “fulsome” in its reporting in the future).

127 *See Green Berets Take on Spy Duties*, WASH. TIMES, Feb. 19, 2004; Chesney, *supra* note 18, at 563.

128 MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 9 (2013), available at <http://www.fas.org/sgp/crs/intel/RL33715.pdf>.

reported to the intelligence committees.¹²⁹ During his confirmation hearing before the Senate Select Committee on Intelligence, CIA Director Panetta agreed.¹³⁰ He recognized that “military operations or ‘preparation of the environment’ – though clandestine in nature – are operations that, if discovered, could not be officially denied by the U.S. government.”¹³¹

A. Subjecting Operational Preparation of the Environment to the Traditional Military Activity Test

Ultimately, subjecting OPE to the conjunctive traditional military activity definition expounded in Section II suggests that the DoD is likely correct in asserting that OPE constitutes a traditional military activity. To recount, a traditional military activity is an activity undertaken

- 1) By military personnel;
- 2) Under the direction and control of a United States military commander; *and*
- 3) Preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities for the activities and for operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving United States military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly.¹³²

Consistent with the first element, OPE is certainly undertaken by special operations personnel.¹³³ Special operations personnel are specifically authorized to carry out “counterterrorism” operations and “such other activities as may be specified by the President or the Secretary of Defense.”¹³⁴

Second, special operations forces operate under the direction and control of SOCOM.¹³⁵ SOCOM is a combatant command.¹³⁶ According to Title 10, section 164(b)(2)(A), commanders of combatant commands perform their duties “[s]ubject to the direction of the president . . . under the authority, direction, and control of the Secretary of Defense.”¹³⁷

Finally, consistent with the third element, special operations personnel undertake OPE preceding

129 *Id.*

130 *Nomination of the Honorable Leon E. Panetta to Be Director of the Central Intelligence Agency*: Hearing Before the S. Select Comm. on Intelligence, 111th Cong. 94–95 (2009), available at <http://www.intelligence.senate.gov/pdfs/111172.pdf> (“Title 10 operations, though practically identical to Title 50 operations, may not be subjected to the same oversight as covert actions, which must be briefed to the Intelligence Committees.”).

131 *Id.*

132 H.R. REP. NO. 102-166, at 29–30 (1991) (emphasis added).

133 See Repass, *supra* note 16, at 9 (“The term OPB is seldom used outside of Special Operations Forces channels.”); Corera, *supra* note 18; Robinson, *supra* note 19 (describing SOCOM as responsible for “conducting preparatory reconnaissance missions against terrorist organizations around the world”).

134 10 U.S.C. § 167(j)(7), (10) (2012).

135 See *id.* § 167(a)–(d).

136 See DoD DIRECTIVE 5100.03, *supra* note 20.

137 10 U.S.C. § 164(b)(2)(A).

and related to anticipated hostilities. In this case, OPE activities precede and are related to anticipated hostilities against al Qaeda and its affiliates. OPE is, by definition, a preparatory activity.¹³⁸ General Hayden described operational preparation of the battlefield as “the ability of Defense to get into an area and know it prior to the conduct of military operations.”¹³⁹

With regard to the *anticipated* sub-element, it seems quite likely that “a great deal of operational planning for overt operations against an array of transnational terrorist entities has been authorized,”¹⁴⁰ particularly given President George W. Bush’s proclamation of a Global War on Terror.¹⁴¹ In fact, the U.S. military, special operations forces in particular, may have been authorized to conduct attacks against al Qaeda and its affiliates outside of war zones since the promulgation of a classified order, reportedly named the “Al Qaeda Network Execute Order (ExOrd)” in late 2003 or early 2004.¹⁴² This order supposedly streamlined the approval process for operations that were time sensitive and not located in Iraq or Afghanistan, but in fifteen to twenty other states.¹⁴³ Even with the order, high-level approval – at minimum Secretary of Defense authorization – had to be provided on a case-by-case basis.¹⁴⁴

B. The Implications of Operational Preparation of the Environment as a Traditional Military Activity

Despite the intelligence committees’ concerns about OPE’s classification as a traditional military activity, as demonstrated in Section II, OPE activities do not escape congressional oversight under the Title 10 paradigm. The Armed Services Committees all but specifically declare their oversight authority over OPE. The House Armed Services Committee has jurisdiction over “tactical intelligence and intelligence-related activities of the Department of Defense.”¹⁴⁵ Likewise, the Senate Armed Services’ Subcommittee on Emerging Threats and Capabilities has specific oversight responsibility for counterterrorism policies and programs, special operations programs, and emerging operational concepts.¹⁴⁶ Additionally, as of March 1, 2012, the Secretary of Defense must provide Armed Services Committees with quarterly briefings on DoD counterterrorism operations and related special

138 Kenny, *supra* note 23, at 1.

139 *Nomination of General Michael V. Hayden*, *supra* note 124, at 124 (emphasis added) (statement of Gen. Hayden).

140 Chesney, *supra* note 18, at 604.

141 George W. Bush, *supra* note 12.

142 Kibbe, *supra* note 15, at 376; Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid Al Qaeda*, N.Y. TIMES, Nov. 10, 2008, at A8; Dana Priest & William M. Arkin, “Top Secret America”: A Look at the Military’s Joint Special Operations Command, WASH. POST, Sept. 2, 2011.

143 Schmitt & Mazzetti, *supra* note 142.

144 Priest & Arkin, *supra* note 142.

145 H. COMM. ON ARMED SERVICES, 112TH CONGR., OVERSIGHT PLAN, 2–3 (2012), available at <http://armedservices.house.gov/index.cfm/oversight-plan> (citing clause 1(c) of rule X of the Rules of the House of Representatives).

146 S. COMM. ON ARMED SERVICES, 112TH CONGR., SUBCOMMITTEE STRUCTURE FOR THE COMMITTEE ON ARMED SERVICES (2012), available at <http://www.armed-services.senate.gov/SASC%20SUB%20STRUCTURE%20112TH.pdf>; see also H. COMM. ON ARMED SERVICES, ABOUT THE SUBCOMMITTEE ON EMERGING THREATS AND CAPABILITIES (2012), available at <http://armedservices.house.gov/index.cfm/emerging-threats-and-capabilities>.

operations activities.¹⁴⁷ These mandated briefings, albeit after the fact, will almost certainly cover OPE activities.

In fact, certain OPE activities might even fall under the reporting requirements of the War Powers Resolution, which requires a written report “*in any case* in which United States Armed Forces are introduced . . . into the territory, airspace or waters of a foreign nation, while *equipped for combat*, except for deployments which relate *solely* to supply, replacement, repair, or training of such forces . . .”¹⁴⁸ Special operations personnel are certainly equipped for combat when they enter into foreign states to conduct OPE. Moreover, although preparation of the environment may include supply and training, it is not exclusively these activities. Thus, the War Powers Resolution may require the Executive to notify Congress of its introduction of special operations forces into foreign states to conduct OPE.

Furthermore, because Secretary of Defense authorization is required to move OPE activities from low-risk pre-crisis activities to “operational preparation and conduct of counterterrorist or other contingency operations,” OPE has a built-in internal accountability mechanism.¹⁴⁹ Special operations forces can only conduct more high-risk advance force operations, such as small-scale direct action and terminal guidance, after a Presidential or Cabinet-level order.¹⁵⁰ These terminal guidance¹⁵¹ and direct action missions¹⁵² are likely the OPE operations that most worry the congressional intelligence committees and are certainly part of the rationale behind Congress’ desire for oversight authority in the first place.

As Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict Thomas O’Connell notes, however, the majority of OPE is non-intrusive, “non-hostile recon [sic].”¹⁵³ Additionally, the desired final effect of OPE is not necessarily, indeed perhaps not typically, the “killing or kinetic solution.”¹⁵⁴ Instead, the ultimate effect of OPE is simply “changing or shaping the environment” in a manner that facilitates future operations.¹⁵⁵ In these situations, violence is a “complementary rather than controlling” means in special operations forces’ toolkit.¹⁵⁶

147 National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 1031, 125 Stat. 1298 (2011).

148 50 U.S.C. § 1543 (2006) (emphasis added).

149 Repass, *supra* note 16, at 20.

150 *Id.*

151 Terminal guidance includes “ground-to-air communications for airborne strike forces, laser designation of targets, or ground support for airland or air assaults.” *Id.* at 19. The DoD defines terminal guidance operations as “those actions that provide electronic, mechanical, voice or visual communications that provide approaching aircraft and/or weapons additional information regarding a specific target location.” J. Publ’n 1-02, *supra* note 13, at 289.

152 Direct action missions include the interdiction of critical communication and transportation nodes, diversionary attacks, or deception operations. Repass, *supra* note 16, at 19. The DoD defines direct action as “[sh]ort-duration strikes and other small-scale offensive actions conducted as a special operation in hostile, denied, or diplomatically sensitive environments and which employ specialized military capabilities to seize, destroy, capture, exploit, recover, or damage designated targets.” J. Publ’n 1-02, *supra* note 13, at 84.

153 Robinson, *supra* note 19.

154 Kenny, *supra* note 23, at 31 (citing Col. Mark Rosengard, USSOCOM OPE Conference (Sept. 12-15, 2005)).

155 *Id.* at 31; *see also* Robinson, *supra* note 19, (describing OPE as “gathering information in trouble spots around the world to prepare for possible missions”).

156 Kenny, *supra* note 23, at 31 (citing Robert D. Kaplan, IMPERIAL GRUNTS, THE AMERICAN MILITARY ON THE GROUND 192 (2005)).

IV. CONCLUSION

Despite academic assertions to the contrary,¹⁵⁷ the current legal framework governing Title 10 and Title 50 operations still functions. Checks and balances exist within the Title 10/Title 50 legal framework to keep the Executive branch accountable to the will of the democratic population. To this end, the determination of whether Title 10 or Title 50 authority is applicable to a particular operation is important and needs to be conscientiously clarified and applied. Yet, although congressional oversight of clandestine and covert military operations is important, it is not always the correct answer, either legally or practically.

In the current threat environment, global terrorist groups pose the greatest threat to U.S. security. To counter this threat, clandestine operators need the authority and ability to act quickly and decisively. OPE provides special operations forces with a legal and beneficial tool in the United States' arsenal of traditional military activities against al Qaeda and its affiliates. In the face of such a rapidly evolving and unconventional threat, U.S. leaders must allow the Executive to weigh the potential costs and benefits of shaping the environment, whether through low-risk pre-crisis activities or high-risk advance force operations, without undue influence. OPE should not be abandoned simply due to congressional discomfort with internal Executive oversight of traditional military activities.

¹⁵⁷ Wall, *supra* note 41, at 92 (suggesting that this “stovepiped view” of the distinction between Title 10 and Title 50 is “legally incongruous and operationally dangerous”).