

EXCEPTION(S) TO THE RULE(S)

*Civilian Harm, Oversight, and
Accountability in the Shadow Wars*



**CENTER FOR
CIVILIANS IN CONFLICT**
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November 2020

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Center for Civilians in Conflict (CIVIC) is an international organization dedicated to promoting the protection of civilians caught in conflict. CIVIC's mission is to work with armed actors and civilians in conflict to develop and implement solutions to prevent, mitigate, and respond to civilian harm. Our vision is a world where parties to armed conflict recognize the dignity and rights of civilians, prevent civilian harm, protect civilians caught in conflict, and amend harm.

CIVIC was established in 2003 by Marla Ruzicka, a young humanitarian who advocated on behalf of civilians affected by the war in Iraq and Afghanistan. Building on her extraordinary legacy, CIVIC now operates in conflict zones throughout the Middle East, Africa, Europe, and South Asia to advance a higher standard of protection for civilians.

At CIVIC, we believe that parties to armed conflict have a responsibility to prevent and address civilian harm. To accomplish this, we assess the causes of civilian harm in particular conflicts, craft practical solutions to address that harm, and advocate for the adoption of new policies and practices that lead to the improved well-being of civilians caught in conflict. Recognizing the power of collaboration, we engage with civilians, governments, militaries, and international and regional institutions to identify and institutionalize strengthened protections for civilians in conflict.

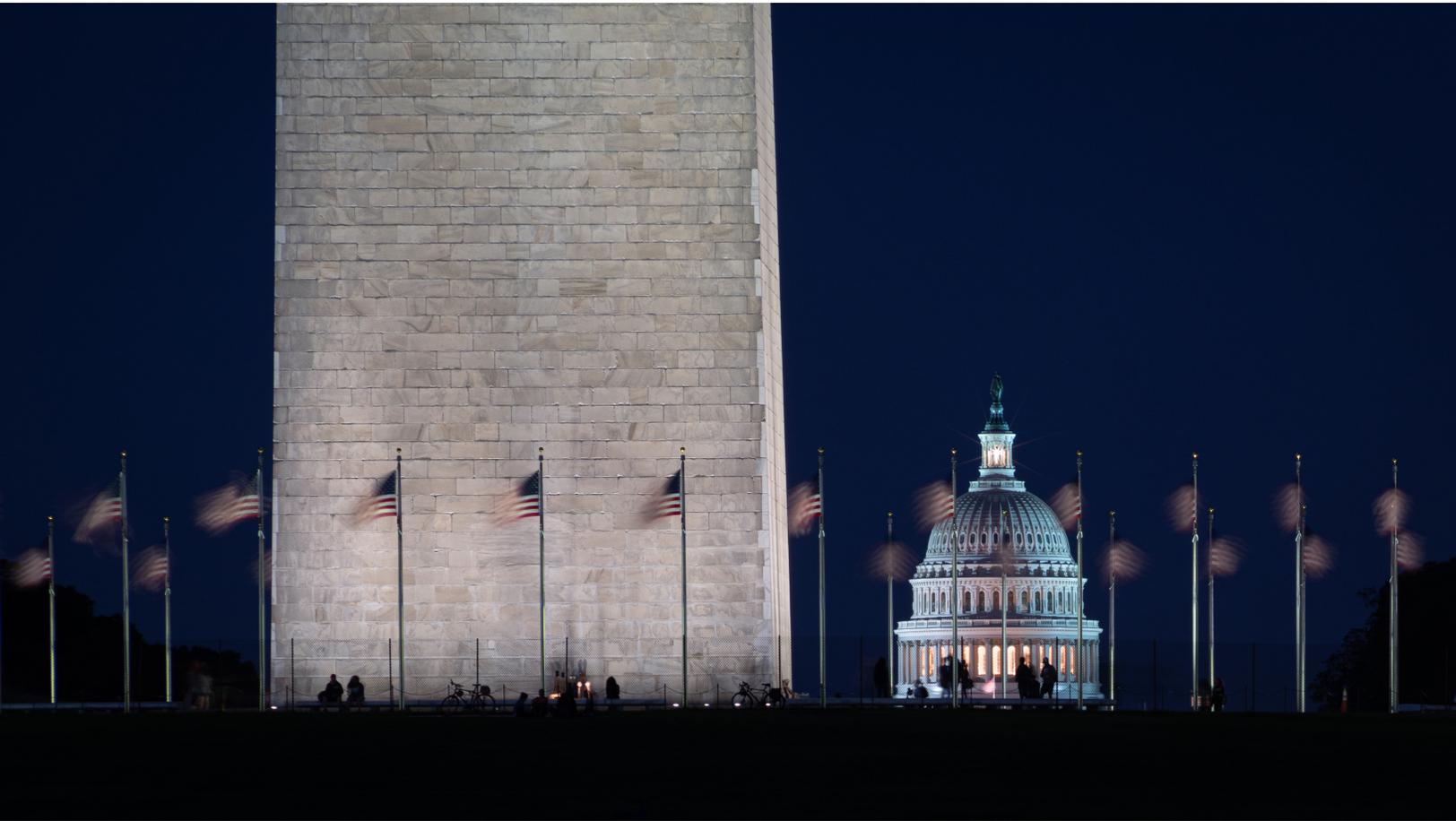
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Security Assistance Monitor is a program of the Center for International Policy that tracks and analyzes U.S. security sector assistance and arms sales programs worldwide. By informing policymakers, media, scholars, NGOs, and the public (in the United States and abroad) about trends and issues related to U.S. foreign security assistance, we seek to enhance transparency and promote greater oversight of U.S. military and police aid, arms sales, and training.

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Capital Dome Peeking Out From Behind the Washington Monument

Credit: Official White House Photo

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A man walks past a graffiti, denouncing strikes by U.S. drones in Yemen, painted on a wall in Sanaa November 13, 2014.

Credit: REUTERS/Khaled Abdullah

I. Introduction

Nearly twenty years after the terrorist attacks of 9/11, and a decade after the death of Osama Bin Laden, the President of the United States continues to draw from a quiver of legal, policy, and technological instruments to use lethal force in secret, directly or through proxies, in countries around the world. Many of the authorities claimed as available to the President to use lethal force today were justified as necessary based on the perception of an urgent threat two decades ago. To enable flexibility and speed, several secret programs and activities were exempted from traditional legal controls, expectations of transparency, and congressional oversight. Meanwhile, covert lethal strikes by armed drones and paramilitary operations with surrogate forces continue to be associated with a lack of accountability for civilian casualties, human rights violations, and U.S. involvement in wars not specifically authorized by Congress.

Recognizing the risks involved with insufficiently unbounded authority to use force, some members of Congress and civil society have sought to curtail the President's war powers in a "global war on terror" by focusing attention on repealing or constraining the 2001 Authorization for the Use of Military Force (AUMF). Of equal importance but less commonly examined or scrutinized are the expansive legal arguments, policies, and instruments by which successive administrations have used force with little to no oversight or accountability. Even if calls to end endless war are successful and the AUMF is repealed, these tools, and the power to wield them without oversight, will remain intact. Reestablishing responsible and accountable U.S. foreign policy -- especially as the U.S. turns its focus towards great power competition -- demands an urgent reevaluation of the sufficiency of legal and policy controls on the use of force and paramilitary operations.

The report's main assertion is that the continued availability and use of a range of "parallel" authorities risk fatally undermining rules that govern and control the use of force.

This report, produced by Center for Civilians in Conflict (CIVIC) in partnership with the Stimson Center and Security Assistance Monitor, examines the tradeoffs and consequences involved with the continued use and availability of certain counterterrorism authorities and practices as the "endless war" enters its twentieth year. In examining these tradeoffs, it focuses on the proliferation and normalization of authorities and tools for employing lethal force, including modes of security cooperation where the use of lethal force and civilian harm are reasonably foreseeable outcomes. It focuses on three specific programs that are subject to fewer rules and much narrower forms of congressional oversight than other "conventional" military and intelligence programs, especially those forms of oversight that govern national decisions to go to war; the prevention and accountability for civilian casualties; and the protection of internationally recognized human rights.

The programs and activities covered by this report are 1) the covert use of lethal force by the Central Intelligence Agency (including CIA drone strikes conducted under the authority of U.S.C. Title 50); 2) the provision in secret (covert or clandestine) of support to irregular forces or government security forces by the CIA; and 3) the provision of support to regular and irregular partner forces by U.S. military special operations forces under a specific fiscal authority created after 9/11, namely U.S.C. Title 10, § 127e. The report's main assertion is that the continued availability and, in fact, increased use of a range of "parallel" authorities risk fatally undermining rules that govern and control the use of force.

This report also concludes that:

- A policy that allows the use of covert, lethal force under the laws of armed conflict outside of the context of an armed conflict undermines the protection of internationally recognized human rights and international law.
- The use of covert lethal force, to include airstrikes and paramilitary operations, undermines the ability of the U.S. government to acknowledge, investigate, report, or account for civilian harm caused by operations involving lethal force.
- CIA paramilitary operations involving support to surrogate forces (non-state armed groups or state forces) lack effective safeguards to prevent association with, or enabling, human rights violations.
- The use of funds authorized by 10 U.S.C. § 127e, which may be considered exempt from human rights safeguards (such as the Leahy laws) to conduct operations with and through partner forces introduces the risk that the U.S. may support units or individuals that have committed gross violations of human rights or war crimes.
- Increased dependency on programs and activities funded by 10 U.S.C. § 127e (Special Operations Support for Counterterrorism) diminishes the value of Defense Department efforts to monitor and evaluate the effects and effectiveness of U.S. security cooperation activities as a whole.
- The use of the same authority to underwrite support to surrogate forces can increase the risk that combat-equipped U.S. forces will become involved in hostilities not otherwise authorized by the Congress.
- The limited reporting requirements established by the congressional committees with jurisdiction for intelligence and defense governing the role of the CIA and special operations forces in support to partner security forces critically impairs the oversight role of the main committees of jurisdiction over foreign affairs (House Foreign Affairs and Senate Foreign Relations Committees).
- The use of lethal force by the CIA increases the risk that the President can enter the U.S. into hostilities without adequate congressional oversight or approval.

This report further contends that a reform agenda that focuses too narrowly on any one gap risks missing the emergence of a more problematic phenomenon, in which the gradual accumulation of legal loopholes allows the President to “forum shop” for the least burdensome source of authority in any decision to use lethal force or to support partner forces. Moreover, the findings together call attention to the consequences wrought by the expansive interpretation of executive war powers (and narrow definition of hostilities) assumed by consecutive presidential administrations. The report provides a set of recommendations for the next administration and Congress to ensure that U.S. national security practice is defined by the rules it follows, rather than by the exceptions it employs.

Recommendations for the Next Presidential Administration:

1. Consistently and publicly demonstrate that its use of force policies and practices comply with all applicable bodies of international law that constrain the use of force and protect the right to life.
2. Ensure U.S. forces have the appropriate authorization under the War Powers Resolution if “imminent involvement in hostilities is clearly indicated by the circumstances” including cases where there is a significant and foreseeable risk that U.S. forces participating in advise, assist, and accompany missions are likely to become involved in hostilities in self defense.

3. Finalize the transfer of authority for the U.S. government's armed drone program to the Defense Department.
4. Place exclusive responsibility for current and future paramilitary support activities that resemble security cooperation programs with the Defense and State Departments.
5. Rescind any outdated "global" presidential findings authorizing the covert use of force.
6. Ensure any new covert action findings include measures to mitigate the risk of enabling human rights violations.
7. Develop, and make public, a policy requiring human rights due diligence, and clarifying the procedures for reporting and investigating reports of human rights violations and civilian harm for all CIA paramilitary activities. This can be done through a U.S. government policy, if necessary for classification reasons.
8. Sunset, or greatly reduce, the President's request for funds under U.S.C. § 127e for special operations support for counterterrorism.
9. Ensure all security activities, including those funded under the 10 U.S.C. § 127e authority, are subject to the Defense Department policies governing Assessment, Monitoring, and Evaluation.

Recommendations for Congress:

1. Sunset 10 U.S.C. § 127e. At minimum amend the statute with a requirement for human rights due diligence, and a war powers rule of construction in parallel with 2018 NDAA § 1202, and expand reporting requirements to include the committees with jurisdiction for foreign relations.
2. Amend 10 U.S.C. § 130f to remove the blanket reporting exemption for sensitive military activities in Iraq, Afghanistan, and Syria.
3. Amend existing legislation to require a plan from the Defense Department for ensuring that civilians are able to report harm resulting from partnered operations involving U.S. forces or U.S.-funded contractors.
4. Conduct regular oversight hearings and request briefings on the next administration's strategy for covert operations.
5. Establish a legal requirement for conducting human rights due diligence and reporting for CIA paramilitary support operations.

This report begins by providing a brief description of three secret programs involving lethal force, or the risk of lethal force, including CIA drone strikes, CIA-led partnered operations with regular and irregular forces, and special operations support to counterterrorism operations (commonly known as "127e" programs from their source in U.S. law, i.e. Title 10 U.S.C. § 127e). Each summary provides the reader with a short history of the use of the program, and how the program might be in use today according to public sources. The report also contains three appendices to provide the reader with a summary of the relevant sources in statute and congressional notification and reporting regimes.

Definitions:

Covert Actions: “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.”¹

Paramilitary Operations and Paramilitary Support Operations: The Defense Department defines paramilitary forces as “forces or groups distinct from the regular armed forces of any country, but resembling them in organization, equipment, training or mission.” In this report, the term “paramilitary support operations” will be used to describe clandestine or covert partnered operations conducted by the CIA whose officers and employees are not part of the armed forces of the United States.²

Security Cooperation: “Activities undertaken by the DOD to encourage and enable international partners to work with the United States to achieve strategic objectives. It includes all DOD interactions with foreign defense and security establishments, including all DOD-administered security assistance programs, that: build defense and security relationships that promote specific U.S. security interests, including all international armaments cooperation activities and security assistance activities; develop allied and friendly military capabilities for self-defense and multinational operations; and provide U.S. forces with peacetime and contingency access to host nations.”³

Sensitive Military Operations: “A lethal operation or capture operation conducted by the armed forces or conducted by a foreign partner in coordination with the armed forces that targets a specific individual or individuals” or “an operation conducted by the armed forces in self-defense or in defense of foreign partners, including during a cooperative operation.”⁴

Traditional Military Activities: Traditional military activities are excluded from the scope of the Covert Action Statute, and include any “activities conducted by military personnel under the direction and control of a United States military commander.”

1 U.S. Code 50 (2019), § 3093e.

2 U.S. Library of Congress, Congressional Research Service, *Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress*, by Richard A. Best Jr. and Andrew Feickert, RS22017 (2009); Joint Chiefs of Staff, *Counterinsurgency*, Joint Publication 3-24 (2018), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_24pa.pdf.

3 Defense Security Cooperation Agency, *Electronic Security Assistance Management Manual* (2020), <https://www.samm.dsca.mil/listing/esamm-glossary>.

4 U.S. Code 10 (2020), § 130f.

II. Methodology

This report is the product of a collaborative project involving the U.S. Program of Center for Civilians in Conflict, Stimson Center, and Security Assistance Monitor. Research for this report was conducted between May of 2020 and October of 2020.

To evaluate the current state of congressional oversight with respect to the specific programs and activities covered by this report, the research team conducted an in-depth review of the history of applicable legislation and oversight covering the period from the passage of the National Security Act (1948) to present, and interviewed a number of current and former congressional staff.

To better understand the nature of CIA operations and special operations forces activities, the research team consulted with more than a dozen current or recently retired special operations and intelligence sources with directly relevant experience, including 13 special operations officers and contractors, two recently retired CIA officers with Afghanistan experience, and two current members of other intelligence community organizations. Because these experts spoke to us on the condition of anonymity, the report refrains from making any analytical judgement based on their input that can not also be attributed to at least one or more public sources. Their views and experiences helped direct our research and have informed the project throughout.

The project team also conducted an experts workshop, hosted by the Stimson Center, in May of 2020 attended by ten recognized experts in the fields of national security policy, security cooperation, international humanitarian law, and human rights, to scope the most important issues and questions worthy of covering in a report relating to covert and clandestine programs in the context of presidential and congressional elections.

For as much information as this report attempts to distill, it does not attempt to provide an exhaustive history of all of the programs or the major controversies involved with covert lethal action, nor does it relitigate most of the terms of debate surrounding the competition or convergence of Defense Department and CIA authorities and roles; all of which has been ably covered elsewhere. And although U.S. special operations forces carry out activities that should be subject to intense policy scrutiny for their lack of transparency and the frequency with which they are employed, this report does not attempt to examine in any depth the full range of roles played by U.S. special operations forces. The report instead focuses rather narrowly on the use of U.S.C. Title 10 § 127e to enable special operations forces to plan and control combat missions fought by surrogate forces.

The reasons for this approach are threefold. First, special operations forces, even when involved in secret combat missions, act under clear legal authorities such as the 2001 AUMF. Unlike the CIA, special operations forces are subject to transparent procedural and regulatory requirements that

The report contends that over the course of the last twenty years, and in the context of a “global war on terror,” the U.S. government has increasingly relied on, and normalized, a set of exceptional policies, authorities, and legal theories that enable the direct and indirect use of lethal force in secret, to include in ways that place civilians at greater risk of harm with less reliable access to redress.

contain clearly established thresholds for reporting and investigations.⁵ Second, all operations, including drone strikes, conducted by the Defense Department and its components that result in civilian casualties are subject to congressional reporting requirements that have yielded an increasingly detailed, if still incomplete, public accounting of DOD activities. Third, unlike CIA partnered arrangements and activities funded through U.S.C. 10 § 127e, conventional security cooperation activities led by special operations forces and carried out under most other security cooperation or security assistance authorities are subject to human rights due diligence (the Leahy law). For these reasons, we did not view most special operations activities as “exceptional” in the same light as the other programs included in this report.

5 For an in-depth description of U.S. military assessments and investigations, see Anna Khalfaoui and Daniel Mahanty, “In Search of Answers,” Columbia Law School Human Rights Institute/Center for Civilians in Conflict, February 13, 2020, <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.

III. Background

“When this is all over, the bad guys are going to have flies walking across their eyeballs.”⁶

**Cofer Black, former Director, CIA Counterterrorism Center,
White House Situation Room, shortly after 9/11**

On September 17, 2001, President George W. Bush convened a meeting of the Principals Committee of the National Security Council in the White House Situation Room. “The purpose of this meeting,” said President Bush, “is to assign tasks for the first wave of the war against terrorism. It starts today.”⁷

The President’s announcement, and the formal instructions and presidential findings for covert action issued in the days that followed, initiated a rapid process of developing new means and methods for countering the global threat posed by transnational terrorism. Convinced of the insufficiency of the traditional law enforcement approach that had been used to counter terrorism, the Bush administration set about shifting the paradigm from a framework – and the language – of transnational crime to one of an armed conflict with no defined geographic or temporal boundaries. The story of the “global war” against Al Qaeda that followed has been well-documented; its last chapter, the death of Osama bin Laden in 2011; its epilogue the emergence of the Islamic State (ISIS) from the ruins of the Iraq war. Many of the policies and instruments that were designed to allow the global pursuit and elimination of the architects of 9/11 and their supporters in the immediate aftermath of that tragedy remain available twenty years later, even as the policy context in which they were incubated, nurtured, and spread has shifted.

The below section provides a very brief background on three programs that have become associated with the use of force in the “war on terror,” each of which represents one or more challenges to oversight, accountability, and transparency. The subsequent section outlines key policy issues and recommendations for the next administration and Congress.

Targeted Killings: Covert Lethal Strikes by the CIA

The CIA’s modern role in covert lethal operations traces its roots to a “worldwide” covert action finding issued by President Reagan in 1986 approving the establishment of CIA “action teams” authorized to use lethal force if doing so would preempt a terrorist attack.⁸ The decision was made at that time in spite of significant reservations among some senior officials within the Reagan administration for whom the memory of CIA scandals involving human rights abuses and

6 Kevin McMurray, “Cofer Black, Out of the Shadows,” *Men’s Journal*, November 20, 2013, <https://www.mensjournal.com/features/cofer-black-out-of-the-shadows-20131120/>.

7 U.S. National Commission on Terrorist Attacks upon the United States, *9/11 Commission Report: The Official Report of the 9/11 Commission and Related Publications* (July 17, 2004), 333, <https://govinfo.library.unt.edu/911/report/911Report.pdf>.

8 Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001* (New York: Penguin Press, 2004), 139.

“You’ve taken an agency that was chugging along and turned it into one hell of a killing machine”.

Anonymous official to the Washington Post, September 1, 2011⁹

assassination attempts, and the raft of congressional reforms that followed, remained fresh.¹⁰ The debate about the appropriateness of a CIA role in using lethal force resurfaced during the administration of President Bill Clinton, first during the war in the Balkans and then after attacks on two U.S. Embassies in Nairobi and Dar Es Salaam, but remained unresolved.

Within days after 9/11, a Bush administration National Security Council Deputies Committee settled the matter in short order and with little debate, concluding “that it was legal for the CIA to kill Bin Laden or one of his deputies with [an armed] Predator” drone.¹¹ The shock of the attacks provided the mandate necessary to overcome any residual apprehensions about involving the nation’s spy agency in targeted killings.

At first, while the focus of the “global war on terror” remained primarily in Afghanistan, the use, pace and prevalence of CIA-led strikes was relatively limited. The first reported CIA drone strike occurred in Yemen against a senior al-Qaeda figure and suspected mastermind of the attack on the USS Cole in 2002,¹² but the next known strike didn’t occur for another two years, with the killing of former Taliban fighter, Nek Muahammad, in southern Pakistan in 2004. But before long, the allure of using a secret, low-risk option for conducting lethal strikes against suspected terrorists only grew, especially as those directly responsible for the September 11 attacks remained at large, and new groups claiming association with Al Qaeda proliferated.

Proponents of drones have always argued that their use actually allows for more discriminating and precise operations, and fewer civilian casualties than other, more conventional modes of lethal force.¹³ Drones also involve much less risk for U.S. government or military personnel. But the covert use of drones by the CIA offers an additional enticement. Unlike their military equivalent, CIA drone strikes conducted under the authority of covert action (see Appendix 1) provide the cover to officially deny American involvement. This exceptional feature of CIA strikes provided a convenient and appealing feature for American political leaders and the leaders of Pakistan and Yemen alike, where U.S. counterterrorism operations were highly unpopular.

President Obama reportedly approved two CIA drone strikes in Pakistan just three days after taking office, and during the first three years his first term, the CIA conducted 300 lethal strikes in Pakistan, or at least one every three days.¹⁴ Around 2011, the focus of the CIA’s drone program also grew to targeting members and leaders of Al Qaeda in the Arabian Peninsula (AQAP) in Yemen, where the U.S. military had also conducted a sustained campaign of air strikes and partnered operations for nearly a decade, and where the administration grew increasingly anxious about threats to the United States. By 2011, the CIA’s Counterterrorism Center, which was responsible for targeting suspected terrorists and managing the Agency’s growing fleet of armed drones had grown 566% larger, from 300 to 2,000 personnel.¹⁵

9 Greg Miller and Julie Tate, “CIA Shifts Focus to Killing Targets,” *Washington Post*, September 1, 2011, https://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html.

10 Tim Weiner, “History to Trump: CIA was Aiding Afghan Rebels Before the Soviets Invaded in ‘79,” *Washington Post*, January 7, 2019, <https://www.washingtonpost.com/outlook/2019/01/07/history-trump-cia-was-arming-afghan-rebels-before-soviets-invaded/>.

11 U.S. National Commission on Terrorist Attacks upon the United States, 333.

12 Robert Chesney, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” *Journal of National Security Law and Policy* 14 no. 1 (2012): 567, <https://jnslp.com/wp-content/uploads/2012/01/Military-Intelligence-Convergence-and-the-Law-of-the-Title-10Title-50-Debate.pdf>.

13 Loren DeJonge Schulman, “Behind the Magical Thinking: Lessons from Policymaker Relationships with Drones,” *Center for a New American Security*, July 31, 2018, <https://www.cnas.org/publications/reports/behind-the-magical-thinking>.

14 Chesney, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” 569.

15 Miller and Tate, “CIA Shifts Focus to Killing Targets.”

During the same time, external scrutiny of the U.S. government's drone program (military and CIA alike) intensified, as human rights organizations decried the growing number of civilian casualties occurring with impunity as a result of suspected drone strikes.¹⁶ As an abundance of analysis would later show, claims about the precision of armed drones depend on several flawed assumptions, to include the availability of accurate intelligence about the identity of a human target, the absence of civilians from the proximity of a strike radius, and even the dependability of clear weather.¹⁷ Along with concerns about civilian casualties also came international scrutiny of the use of force by a civilian intelligence agency outside of the context of a recognized armed conflict.¹⁸ Over time and under external pressure, the President and other representatives of his national security team also grew wary that the United States was bearing more than its share of the blowback from covert strikes, to include those for which it bore no responsibility, but for which it could provide no public refutation.¹⁹

By 2013, the *New York Times* reported that President Obama had decided to transfer a majority of the CIA's drone operations to the Defense Department out of dual concerns that the CIA had taken on too much of a paramilitary mission, and worries that covert action was inhibiting the administration from providing a public justification for the drone campaign in light of growing criticism over civilian casualties.²⁰ CIA Director John Brennan frequently articulated the administration's clear interest in reducing the CIA's paramilitary role and refocusing its activities on espionage, intelligence collection, and analysis.²¹ The Obama administration also articulated the legal basis and policy parameters for using force outside of war zones in the form of the Presidential Policy Guidance for "procedures for approving direct action against terrorist targets located outside the United States and Areas of Active Hostilities."²² The policy was manifestly intended to reconcile the use of force outside of hot battlefields with the administration's desire to protect human rights and to preserve the rule of law. The President issued an Executive Order (13732) in July of 2016, requiring additional measures for preventing civilian casualties, and instituting an annual reporting requirement for any civilian casualties occurring as a result of U.S. government operations taking place outside of war-zones, including those conducted by the CIA.²³



President Barack Obama talks on the phone with President Ali Abdullah Saleh of Yemen in the Oval Office, Nov. 2, 2010. John Brennan, Assistant to the President for Homeland Security and Counterterrorism, stands at right.

Credit: Official White House Photo by Pete Souza

16 "“Will I Be Next?: U.S. Drone Strikes in Pakistan,” Amnesty International, October, 2013, <https://www.amnesty.org/download/Documents/12000/asa330132013en.pdf>.

17 See, e.g., Larry Lewis and Diane Vavricheck, *Rethinking the Drone Wars: National Security, Legitimacy, and Civilian Casualties in U.S. Counterterrorism Operations* (Quantico: MCUP/CNA, 2016), <https://fas.org/man/eprint/drone-war.pdf>.

18 Charlie Savage, U.N. Report Highly Critical of U.S. Drone Attacks, *New York Times*, June 2, 2010, <https://www.nytimes.com/2010/06/03/world/03drones.html>.

19 Greg Miller, “How Drones Became Obama’s Deadly Weapon in a High-Altitude, Perpetual War,” *Washington Post*, June 3, 2016, <https://www.washingtonpost.com/graphics/national/obama-legacy/drone-program-strikes.html>.

20 Charlie Savage and Peter Baker, “Obama, in a Shift, to Limit Targets of Drone Strikes,” *New York Times* May 23, 2013, <https://nyti.ms/11bE1CY>.

21 *Ibid.*

22 U.S. Department of Justice, *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities* (2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

23 “Executive Order 13732 of July 7, 2016, United States Policy on Pre- and Post-Strike Measures To Address Civilian Casualties in U.S. Operations Involving the Use of Force,” 81 U.S. Federal Register 130, (2016) <https://fas.org/irp/offdocs/eo/eo-13732.pdf>.

“I don’t want our intelligence agencies being a paramilitary organization. That’s not their function. As much as possible this should be done through our Defense Department so that we can report, ‘Here’s what we did, here’s why we did it, here’s our assessment of what happened.’”

- President Barack Obama, April 2016²⁴

But weaning the government from the use of covert lethal strikes encountered internal and congressional resistance. Certain members of Congress including the former Chair of the House Permanent Select Committee on Intelligence Mike Rogers, and former Chair of the Senate Select Committee on Intelligence Diane Feinstein both fought to preserve a role for the CIA in lethal strikes, out of a stated concern that Defense Department programs might be subject to less, not more, oversight under the armed services committees.²⁵ Ultimately, the CIA retained the authority to conduct strikes in certain areas through the end of the Obama administration, even if its role was measurably diminished by comparison to military strikes. According to media reporting, the CIA conducted at most seven strikes in 2016, the fewest since 2007.²⁶ In the final analysis, the CIA’s drone program thrived for the better part of Obama’s tenure, which involved as many as ten times more covert air strikes than under his predecessor.²⁷

Once elected, Donald Trump proved all too willing to breathe new life into the slow-burning embers of the CIA’s covert drone program. Neither the new president nor his CIA Director, Michael Pompeo, signaled any of the concerns of his predecessor with the CIA’s paramilitary role, or with the complications involved with covert action when publicly claiming and justifying lethal strikes.²⁸ Two months after the presidential inauguration, the Trump administration reportedly revised and reissued the PPG as Principles, Standards, and Procedures, once again lowering the threshold for using force outside of warzones.²⁹ In March of 2019, the Trump administration issued a new Executive Order revoking all of the sections of the Obama-era Executive Order 13732 on civilian casualties with any bearing on CIA strikes, including the commitment to provide an annual public report.³⁰

24 Micah Zenko, “Obama’s Latest Admission on Drone Strikes,” *Council on Foreign Relations*, April 8, 2016, <https://www.cfr.org/blog/obamas-latest-admission-drone-strikes>.

25 In an interview, Congressman Rogers explained, “I was a proponent of the program ... I reviewed every single strike—I did all the after-action reviews; on very sensitive targets, they would brief me ahead of time, “Hey our target’s in the window,” or not. You know that didn’t always work, but if I was available and had the wherewithal to get that information in a classified setting, I did, and I reviewed every single one because I was such a vocal proponent publicly for the program and I believed it was my job as a member and chairman to make sure that, if we’re going to do this—this is a big deal, you’re taking someone’s life—so if something did go wrong, I could honestly and in good faith go and defend the program, the people in the program, and why we were doing it versus saying, “Oh my gosh, this is awful.” And I saw that happen too many times.” Peter Usowski and Fran Moore, “An Interview with Former Chairman of the House Permanent Select Committee on Intelligence, Mike Rogers,” *Studies in Intelligence* 64 no. 4 (December 2018): 9, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol-62-no-4/pdfs/mike-rogers-interview-Dec2018.pdf>.

26 Missy Ryan, “Trump Administration Increased Strikes and Raids in Yemen, Watchdog Finds,” *Washington Post*, October 28, 2020, https://www.washingtonpost.com/national-security/us-airstrikes-yemen-civilian-deaths/2020/10/27/97016ce0-1856-11eb-bb35-2dcfdab0a345_story.html.

27 Jessica Purkiss and Jack Serle, “Obama’s Covert Drone War in Numbers: Ten Times More Strikes Than Bush” *Bureau of Investigative Journalism*, January 17, 2017, <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>.

28 Gordon Lubold and Shane Harris, “Trump Broadens CIA Powers, Allows Deadly Drone Strikes,” *Wall Street Journal*, March 13, 2017, <https://www.wsj.com/articles/trump-gave-cia-power-to-launch-drone-strikes-1489444374>; Eric Schmitt and Matthew Rosenberg, “C.I.A. Wants Authority to Conduct Drone Strikes in Afghanistan for the First Time,” *The New York Times*, September 15, 2017, sec. U.S., <https://www.nytimes.com/2017/09/15/us/politics/cia-drone-strike-authority-afghanistan.html>.

29 Charlie Savage, “Trump Revokes Obama-Era Rule on Disclosing Civilian Casualties From U.S. Airstrikes Outside War Zones,” *New York Times*, March 6, 2019, <https://www.nytimes.com/2019/03/06/us/politics/trump-civilian-casualties-rule-revoked.html>.

30 “Executive Order 13862 of March 6, 2019, on Revocation of Reporting Requirement,” *U.S. Federal Register*, (2019) <https://www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requirement/>.

“We also have to work through sort of the dark side, if you will.”

Former Vice President Dick Cheney, Meet the Press, September 16, 2001

The precise frequency and breadth of CIA drone strikes under Trump remains classified, but the press has reported that covert strikes have been conducted by the CIA in Syria, Afghanistan, Libya and possibly even the Lake Chad Basin.³¹ Recent reports also suggest the possibility of a significant resurgence of CIA strikes in Yemen in 2019.³² Given the close partnership and coordination between the U.S. military and CIA in both drone programs, it is also possible that certain CIA-led strikes are claimed by the military under its Title 10 authorities.

Paramilitary Support Operations by the CIA

Much like its role in “direct” forms of lethal action, the CIA’s paramilitary role in supporting surrogate forces (both state forces and non-state armed groups) prior to 9/11 was most commonly associated with certain episodes during the early years of the Cold War in Latin America, Africa, and Southeast Asia, and later, its support to Afghan resistance fighters in their campaign against the Soviet Union in the 1980s.³³ And like its role in using force directly, its history of involvement in supporting surrogate forces, specifically with the intent of directing the use of lethal force against suspected terrorists originates in 1984, when President Reagan reportedly issued a covert action finding allowing the CIA to “train and support small units of foreign nationals in the Middle East which would conduct preemptive strikes against terrorists.”³⁴

After 9/11, President Bush reportedly issued another “worldwide” covert action finding giving the CIA, in the words of Bob Woodward, “the broadest and most lethal authority in [the CIA’s] history,”³⁵ authorizing pursuit of Al Qaeda suspects anywhere they might be found. Over the next several years, the CIA used the authority to run covert paramilitary support programs that exceeded the scale and ambitions of predecessor programs in the 1980s.³⁶ As the military directly pursued Al Qaeda and the Taliban in Afghanistan, the CIA provided weapons and training to local proxy armed groups, called Counterterrorism Pursuit Teams (CTPT).

According to public reporting from media and human rights organizations, the CTPTs in at least two regions of Afghanistan are, at the time of writing, still supported by the CIA.³⁷ According to several persons consulted for this report, the teams formerly known by nicknames such as Vipers, Tigers, and Mustangs, are now nominally numbered regional paramilitary units of the Afghanistan National Directorate of Security (i.e. NDS-02 in Nangarhar).³⁸ These paramilitary forces have been associated with patterns of serious human rights violations, including extrajudicial killings and attacks

31 Joe Penney, Eric Schmitt, Rukmini Callimachi and Christoph Koettl, “CIA. Drone Mission, Curtailed by Obama, Is Expanded in Africa Under Trump,” *New York Times*, September 9, 2018, <https://www.nytimes.com/2018/09/09/world/africa/cia-drones-africa-military.html>.

32 Ryan, “Trump Administration Increased Strikes and Raids in Yemen, Watchdog Finds.”

33 Tim Weiner, “History to Trump: CIA was Aiding Afghan Rebels Before the Soviets Invaded in ‘79,” *Washington Post*, January 7, 2019, <https://www.washingtonpost.com/outlook/2019/01/07/history-trump-cia-was-arming-afghan-rebels-before-soviets-invaded/>.

34 Bob Woodward, *Veil: The Secret Wars of the CIA, 1981-1987*, (New York: Simon & Schuster, 1987), 393.

35 Bob Woodward, *Bush at War* (New York: Simon & Schuster, 2002), 76,78, cited in Chesney, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” 563.

36 Dana Priest, “Covert CIA Program Withstands New Furor,” *Washington Post*, December 30, 2005, <https://www.washingtonpost.com/wp-dyn/content/article/2005/12/29/AR2005122901585.html>.

37 Mujib Mashal, “CIA’s Afghan Afghan Forces Leave a Trail of Abuse and Anger,” *New York Times*, December 31, 2018, <https://www.nytimes.com/2018/12/31/world/asia/cia-afghanistan-strike-force.html>. See also Patricia Gossman, “They’ve Shot Many Like This: Abusive Night Raids by CIA-Backed Afghan Strike Forces,” *Human Rights Watch*, October 31, 2019, <https://www.hrw.org/report/2019/10/31/theyve-shot-many/abusive-night-raids-cia-backed-afghan-strike-forces>.

38 Mashal, “CIA’s Afghan Afghan Forces Leave a Trail of Abuse and Anger.” See also Emran Feroz, “Is Afghan Intelligence Building a Regime of Terror With the CIA’s Help?” *Foreign Policy*, February 6, 2020, <https://foreignpolicy.com/2020/02/06/nds-afghanistan-intelligence-dissident-murder-cia-help/>.

on civilians.³⁹ A Human Rights Watch report released in 2020 documented myriad abuses carried out by Afghan paramilitary forces “recruited, trained, equipped, and overseen by the CIA,” including extrajudicial killings and disappearances, indiscriminate airstrikes, and attacks on medical facilities. The report catalogued 14 incidents of CIA-trained paramilitary abuses, including an October 2018 incident where an Afghan paramilitary force shot five civilians in a family home in Nangarhar province.⁴⁰

In 2013, President Obama also signed a presidential finding authorizing the CIA to covertly arm and train small groups of Syrian rebels at bases in Jordan through Operation “Timber Sycamore.” Over the next four years, the U.S. spent more than \$1 billion on the program.⁴¹ According to the *New York Times*, White House officials later received reports that the fighters had summarily executed prisoners and committed other violations of the laws of armed conflict.⁴² President Trump officially ended the program in 2017.⁴³ The full extent of the CIA’s covert paramilitary support operations in countries other than Afghanistan and Syria since 2001 is unknown.

To some extent, the CIA’s paramilitary operations have always had an association with human rights abuses, the most egregious of which led to several reforms imposed upon the Agency by Congress, and others instituted from within. Internal reforms enacted in 1996 by CIA Director John Deutch (known later as the “Deutch Rule”) in the wake of scandals in Latin America, reportedly resulted in a requirement to apply greater due diligence to the selection of informants and paid assets.⁴⁴ At the time, the reforms were described by one member of the House Permanent Select Committee on Intelligence as “cleaning out the [CIA’s] basement.”⁴⁵ The specific classified details of the reforms remain inaccessible to the public for review or scrutiny, and the CIA’s role in torture and illegal renditions casts reasonable doubt on the notion that the reforms survived long in the “global war on terror.” In any event, unlike programs carried out by the State or Defense Departments, the CIA has no known statutory requirement to ensure that the beneficiaries of its support have never conducted war crimes or gross violations of human rights.

In a response to a report by Human Rights Watch following that organization’s report about CIA support activities in Afghanistan, the CIA noted that:

“When we receive intelligence indicating that individuals associated with a foreign liaison partner—any foreign liaison partner—have engaged in human rights abuses, we thoroughly review the available information from both clandestine and open sources to determine whether the allegations are valid. If our review raises any concerns about the foreign partner’s conduct, we and other elements of the U.S. Government make our concerns known to the foreign partner, provide guidance and training on the applicable law and best practices, and take appropriate steps to reduce the likelihood of future abuses, including informing our oversight entities. In some cases, the U.S. Government suspends or terminates assistance to underscore the seriousness of our concerns; and in extreme cases, we have chosen to terminate our relationship with a foreign partner altogether.”⁴⁶

39 Gossman, “They’ve Shot Many Like This.”

40 *Ibid.*

41 Mark Mazzetti, Adam Goldman and Michael S. Schmidt, “Behind the Sudden Death of a \$1 Billion Secret CIA War in Syria,” *New York Times*, August 2, 2017, <https://www.nytimes.com/2017/08/02/world/middleeast/cia-syria-rebel-arm-train-trump.html>.

42 *Ibid.*

43 *Ibid.*

44 L. Britt Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004* (Washington, DC: Center for the Study of Intelligence, 2008), 70-71.

45 Walter Pincus, “CIA Steps Up ‘Scrub Down’ of Agents,” *Washington Post*, July 28, 1995, <https://www.washingtonpost.com/archive/politics/1995/07/28/cia-steps-up-scrub-down-of-agents/1a23e216-22d2-4735-9934-fb4402610888/>.

46 Gossman, “They’ve Shot Many Like This.”

Military personnel (e.g. from Joint Special Operations Command) supporting CIA-led programs remain subject to clear legal and procedural requirements to report suspected crimes, including war crimes. But, unlike the military, details about any requirements for CIA personnel to report allegations of human rights violations or war crimes that it observes or suspects for investigation, and how closely they are enforced, are unavailable to the public.⁴⁷

Special Operations Forces Support to Foreign Forces for Counterterrorism (10 U.S.C. § 127e)

While the September 11, 2001 attacks provided the impetus for involving the CIA in paramilitary activities, the event also opened the floodgates for an expanded role for special operations forces. In some ways, the role of special operations forces during the counterterrorism era has been anything but exceptional, even if U.S. security policies have grown increasingly reliant on these units.. Conducting authorized combat missions alone or alongside indigenous forces, and building partner capacity of foreign forces have both long featured as core activities of U.S. special operations forces, to include the Navy SEALs and Army Green Berets.⁴⁸ But efforts to combat terrorism *through* partner forces, i.e. where U.S. forces plan and resource operations conducted by foreign military units around the world but refrain from playing a direct combat role, have taken on much greater prominence since the beginning of the “war on terror.” These activities tend to reflect characteristics of both security cooperation and combat, and converge in the form of a fiscal authority, which originated as § 1208 of the Fiscal Year 2005 NDAA, now known by its source in U.S. law, U.S.C. Title 10 § 127e (or, “127e”).

The origin of the § 127e program stems from the earliest days after the invasion of Afghanistan in 2001. As U.S. special operations forces and CIA personnel began a covert effort to support the Afghan Northern Alliance to conduct military operations against the Taliban and Al Qaeda, Army Special Operations Command found that it lacked the authority to provide direct payments or support to its Afghan proxies. Instead, local special operations forces were dependent on CIA funding to provide direct support to Northern Alliance forces, which presented both practical and bureaucratic challenges.⁴⁹ The early experience in Afghanistan catalyzed a broader effort by U.S. Special Operations Command and offices within the Defense Department to provide special operations forces with new tools and authorities to enable flexible support to foreign indigenous forces aiding U.S. counterterrorism and irregular warfare operations.⁵⁰ By 2003, a Defense Department legislative proposal to expand the irregular warfare authority of special operations forces was among the top statutory priorities for the Pentagon, which culminated in the passage of § 1208 of the 2005 NDAA, later codified in § 127e of the U.S. Code. As it stands today, § 127e allows the Secretary of Defense to provide direct material and non-material support to foreign forces supporting U.S. counterterrorism operations by U.S. special operations forces.⁵¹ Though § 127e operations are classified, public reporting suggests that the authority has been used to underwrite partnered counterterrorism operations in Somalia, Kenya, Tunisia, Libya, Cameroon, Mali, and Niger, and likely in several other locations across the Middle East and North Africa.

47 “‘Will I Be Next?’: U.S. Drone Strikes in Pakistan,” *Amnesty International*, October, 2013, 36, <https://www.amnesty.org/download/Documents/12000/asa330132013en.pdf>.

48 U.S. Special Operations Command, *Fact Book* (Tampa, 2020), 25 <https://www.socom.mil/FactBook/2020%20Fact%20Book.pdf>.

49 Linda Robinson et al., *Improving the Understanding of Special Operations: A Case History Analysis* (Santa Monica: RAND Corporation, 2018), 111-123.

50 Robinson et al., *Improving the Understanding of Special Operations*, 114.

51 Dafna Rand and Stephen Tankel, “Security Cooperation & Assistance: Rethinking the Return on Investment,” *Center for a New American Security*, August 2015, https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Report_Security-Cooperation_FINAL.pdf?mtime=20160906081917.

“I didn’t know there was (sic) 1,000 troops in Niger...”

-Senator Lindsay Graham (R-South Carolina) on NBC’s Meet the Press, October 22, 2017

Although technically a fiscal authority, § 127e is often characterized by those involved with the program as an operational program, and “127 echo” has become shorthand for operations that are planned and controlled by combat-equipped U.S. special operations forces, and executed by partner forces that act in some ways as surrogates, rather than partners of the U.S. military.⁵² Unlike other security cooperation programs designed to build the capacity of partners or the familiarity of a foreign environment for U.S. forces (i.e. Joint Combined Exercises and Training), the program carries a strong and direct association with combat missions carried out against suspected terrorists and terrorist groups in environments marked by ongoing hostilities with armed groups. In his defense of the § 127e authority to the Senate Armed Services Committee, Commander of Special Operations Command (SOCOM) General Votel made sure to note that § 127e had “resulted in hundreds of successful tactical operations [that have] disrupted terrorist networks and their activities and denied them operating space across a wide range of operating environments, at a fraction of the cost of other programs.”⁵³

But unlike combat missions where U.S. forces are authorized to conduct offensive operations, special operations forces that are ostensibly serving in an advisory capacity with partner units do not operate on the basis of an explicit authorization for use of military force in order to initiate, plan, and control operations conducted by the partner. Lacking a specific authority for combat, U.S. forces are often required to remain behind “the last covered and concealed position” during the partner’s operations, but may become engaged if they or their partner are engaged by enemy forces.⁵⁴ § 127e has thus become representative of the increasingly blurred lines between security cooperation programs and authorized combat missions, wherein the activities sold to the Congress and public on the merits of their comparatively low cost (“light footprint”) and benign characterizations (i.e. “by, with, and through”), obscures the true risk that U.S. forces will become involved in an armed conflict.⁵⁵

52 Wesley Morgan, “Behind the Secret U.S. War in Africa,” *Politico*, July 2, 2018, <https://www.politico.com/story/2018/07/02/secret-war-africa-pentagon-664005>.

53 U.S. Congress, Senate, Armed Services Committee, *Advance Questions for General Joseph L. Votel, U.S. Army: Nominee for Commander, U. S. Central Command*, 114th Cong., 2d sess., 2016, https://www.armed-services.senate.gov/imo/media/doc/Votel_03-09-16.pdf.

54 Loren DeJonge Schulman, “Working Case Study: Congress’s Oversight of the Tongo Tongo, Niger, Ambush,” *Center for a New American Security*, October 15, 2020, <https://www.cnas.org/publications/reports/working-case-study-congresss-oversight-of-the-tongo-tongo-niger-ambush>.

55 For a superb analysis of this phenomenon, see Schulman, “Working Case Study: Congress’s Oversight of the Tongo Tongo, Niger, Ambush.”

IV. Key Issues with “Exceptional” Counterterrorism Programs and Activities

Over the last 20 years, options for using lethal force once seen as exceptional have become more common, more geographically widespread, and easier to use.

- Since 2001, operations involving the secret use of lethal force or secret partnered operations have taken place, at a minimum, in Afghanistan, Syria, Yemen, Iraq, Niger, Libya, Somalia, and Pakistan.
- The Trump administration’s removal of the requirement for high-level (White House) approval for lethal operations, that also allows for an expanded target set to include lower-level members of targeted groups, and less public reporting make it even easier for the President to use force in secret, against more groups, in more places.⁵⁶
- The total amount of funding allocated to secret missions carried out using funds authorized by § 127e has quadrupled since 2005, and doubled since the death of Osama bin Laden in 2011, from \$25 to \$100 million annually.⁵⁷

Once sworn in on January 20, 2021, the next President of the United States and his national security team, more than any before them, will have at their disposal the means to use lethal force almost anywhere in the world with few legal impediments, scant congressional oversight, and little public accountability. Where the President chooses not to use lethal force directly, he may provide material support to the security forces of other countries to do so, with little concern for human rights or civilian casualties, and in spite of the risk that U.S. forces could become involved in hostilities.

A reliance on the programs specifically covered by this report, which are emblematic of a larger set of activities and issues, has resulted in several unintended policy consequences and raises several questions worthy of serious consideration, which are further explored in this section.

The use of covert action, to include operations involving lethal force and paramilitary support activities led by the CIA, undermines the ability of the U.S. government to acknowledge, investigate, report, or account for civilian harm caused by its operations.

Supporters of the CIA’s drone program, including some in Congress, argue that operations conducted by the Agency are subject to more, not less, scrutiny and less ambiguous congressional oversight. The leadership of the Senate Select Committee on Intelligence even objected to the transfer of the drone program to the military in 2016, arguing that the CIA had proven itself capable of exercising the “patience and discretion specifically to prevent collateral damage.”⁵⁸ Moreover, public statements made by intelligence officials, and policy documents released by the Obama administration clarify that lethal strikes conducted by the CIA are done so in accordance with principles of international humanitarian law, namely distinction, proportionality, and necessity.⁵⁹

56 Charlie Savage and Eric Schmitt, “Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids,” *New York Times*, September 21, 2017, <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>.

57 Robinson et al., *Improving the Understanding of Special Operations*, 118.

58 Christopher Fuller, *See It/Shoot It: The Secret History of the CIA’s Lethal Drone Program* (New Haven: Yale University Press, 2017), 132.

59 U.S. White House, *Notice on the Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations*, March 12, 2018, https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf

But by its very nature, covert action, including that which involves the use of lethal force, is conducted without the intent of acknowledging the activity or the role of the United States, thus greatly complicating any response, transparency, or accountability in the event of civilian harm. CIA post-strike investigations are conducted with no known available channel to solicit information or evidence from external sources, raising questions about the objectivity and accuracy of the results.⁶⁰ When a lethal strike is conducted under a covert action, the United States is less likely, if not unable, to facilitate the receipt of reports of civilian casualties, cannot acknowledge the credibility of external reports of casualties, and is unable to account for harm with those who have been injured, suffered property damage, or lost family members. Acknowledging the U.S. government's role in civilian casualties from covert CIA strikes has been exceedingly rare. Moreover, as experts such as Micah Zenko have noted, the inability to acknowledge a role in strikes cedes strategic communications to both adversaries and partners alike, even allowing other actors, including the Taliban and ISIS, to shift the blame for harm they have caused to the United States government.⁶¹

Operations conducted by the U.S. military have led to the vast preponderance of civilian casualties caused by U.S. forces since 2001, and the military has much to improve to ensure that it more thoroughly responds to, and accounts for, civilian casualties. However, the military – unlike the CIA – is at least subject to a set of transparent regulations and policy protocols for investigating, reporting, and acknowledging civilian casualties that result from its operations. Moreover, as a result of congressional initiative, the Defense Department is currently developing a formal policy on civilian casualties, notionally informed by recommendations from civil society, that will establish standard rules and procedures for handling external allegations of harm resulting from its operations. No similar initiative is expected from the CIA, creating greater disparity between the two programs. Meanwhile, the Trump White House, which excised a provision (§ 3) from the Executive Order on civilian casualties (E.O. 13732) committing the government to publicly report on civilian casualties resulting from all U.S. government operations (including those conducted by the CIA), has thus far not complied with a congressional requirement established in the 2020 NDAA which codified the same requirement in law.⁶²

Secret military and CIA paramilitary support programs, without effective controls, increase the risk of enabling human rights violations.

While persons with knowledge consulted for this report claim that individual CIA officers are subject to internal reporting requirements related to human rights or civilian harm (consistent with the Agency's response to Human Rights Watch quoted earlier), CIA paramilitary support programs have traditionally lacked transparent or consistent policy or legal controls for more systematically preventing or accounting for human rights abuses. Moreover, these activities are subject to much narrower and less public, if more standardized, congressional oversight and reporting requirements than Defense Department security cooperation activities.⁶³ And much like the CIA's paramilitary support activities, but unlike other Defense Department security cooperation programs, the § 127e authority lacks a specific human rights due diligence requirement and may be excluded as a matter of policy from the scope of the Defense Department's application of the Leahy law (which prohibits the provision of training or assistance to units that have been credibly alleged to have

60 Steve Coll, "The Unblinking Stare," *New Yorker*, November 17, 2014, <https://www.newyorker.com/magazine/2014/11/24/unblinking-stare>.

61 Micah Zenko, "Transferring CIA Drone Strikes to the Pentagon," *Council on Foreign Relations*, April 16, 2013, <https://www.cfr.org/report/transferring-cia-drone-strikes-pentagon>.

62 "Executive Order 13862 of March 6, 2019, on Revocation of Reporting Requirement," *U.S. Federal Register*, (2019) <https://www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requirement/>.

63 Douglas Livermore, "Passing the Paramilitary Torch from the CIA to Special Operations Command," *Small Wars Journal*, September 2, 2019, <https://smallwarsjournal.com/jrn/art/passing-paramilitary-torch-cia-special-operations-command>.

committed gross human rights violations). Under certain circumstances, the presence and influence of U.S. forces could temper the risk of human rights violations. At the same time, the existing loopholes create a substantial risk that the U.S. government could provide material support to units or individuals responsible for gross violations of human rights, or otherwise enable human rights violations through willful blindness.

The increased dependence by the military on § 127e for counterterrorism activities, and the significant increase in the amount appropriated to activities under the same authority, diminish the value of efforts to monitor and evaluate the effects and effectiveness of U.S. security cooperation activities as a whole.

As Defense Department security cooperation programs grew in number and budget following September 11, evidence mounted from experiences from Iraq to Mali that partner capacity building in the context of misaligned interests, poor security governance, and corruption would more likely fail or lead to unintended consequences. Yet, until 2016, little effort had been made to systematically evaluate whether, and under what circumstances, security cooperation programs provided an effective means of advancing U.S. interests, including building capacity, fostering relationships, and achieving shared security objectives such as countering terrorism; and how best to design and implement programs in order to maximize the desired impact. In 2016, Congress finally introduced a new requirement for the Defense Department to consolidate and evaluate its security cooperation programs, and the Department subsequently issued a comprehensive assessment, monitoring, and evaluation policy through DOD Instruction 5132.14 in early 2017.⁶⁴ However, activities – including material support – provided to partner forces under § 127e are tacitly excluded from the scope of the policy because they do not constitute security cooperation programs (defined by the Defense Department as “all activities undertaken by the Department of Defense to encourage and enable international partners to work with the United States to achieve strategic objectives”).⁶⁵ Instead, the provision of assistance, material, and general capacity building to partner forces under § 127e is viewed as incidental to the American counterterrorism operation it is supporting. The distinction, while of little practical consequence on the ground, exempts § 127e from emerging assessment, monitoring, and evaluation regimes, and spares recipients from vetting procedures as well as Leahy Law oversight.

Given the claims frequently made by senior military officials about the operational impact that § 127e has had in countering terrorism, the rationale for submitting activities funded thereunder to the Department’s policy for evaluation would seem as strong – or stronger – than for other security cooperation programs for three reasons. First, characterizing § 127e as a purely operational authority risks understating the similarities between the activities it funds – including training and equipping partner forces – and activities funded by other security cooperation authorities, which are now subject to systematic evaluation. Second, excluding § 127e programs from efforts to evaluate security cooperation could aggravate the risk of understating or overstating both the risks and benefits associated with providing material support to “specialized” partner units. The use of surrogate forces has been shown to exacerbate conflict, embolden local forces, spark escalation from rival patrons, and provide non-indigenous proxies access to resources that corrupt their fundamental relationship with their host communities.⁶⁶ Finally, the four-fold increase in available

64 U.S. Department of Defense, Office of the Under Secretary of Defense for Policy, *DOD Instruction 5132.14 Assessment, Monitoring, and Evaluation Policy for the Security Cooperation Enterprise* (Washington, DC, 2017), https://open.defense.gov/portals/23/Documents/foreignasst/DoDI_513214_on_AM&E.pdf.

65 Melissa G. Dalton, Hijab Shah, Tommy Ross, and Asya Acka, “Shifting the Burden Responsibly,” *Center for Strategic and International Studies*, April 2019, 15, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/190424_Dalton%20et%20al_ShiftingBurdenResponsibly_WEB_v2_0.pdf; Linda Robinson et al., *Improving the Understanding of Special Operations: A Case History Analysis*, 112.

66 Brittany Benowitz and Anthony Ayres, “The Legal Framework for Regulating Proxy Warfare,” *ABA Center for Human Rights & Rule of Law Initiative*, December 2019, 6-7, https://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf.

funding for the authority to \$100 million, combined with the omission of the activities it funds from monitoring and evaluation and human rights vetting requirements, could create an incentive to draw upon § 127e as an alternative to conventional security cooperation programs.

The use of § 127e to underwrite support to surrogate forces in counterterrorism operations increases the risk that U.S. military forces become involved in hostilities not otherwise specifically authorized by the Congress.

Any circumstance in which U.S. special operations forces accompany partner forces, other than those specifically designated as a combat mission, arguably carries some risk of U.S. military involvement in hostilities. Although traditionally required to stay behind “last cover and concealment”⁶⁷ during a partner’s operations, U.S. forces could become involved in hostilities in self-defense, or, when authorized by rules of engagement, in defense of their partners under the theory of “collective self-defense” extended to partner units.⁶⁸

While technically a fiscal authority, § 127e has been publicly justified and defended on the basis of its operational impact. The availability of \$100 million presumably enables partnered counterterrorism operations that might not otherwise be possible, to include operations planned by U.S. forces but executed by partner forces. And although the authority specifies that it can only be used to support partner forces that are engaged in “supporting or facilitating authorized ongoing military operations,” the statute never clarifies the level or source of authority required to meet the intent of the law. For example, nowhere does the law limit operations supported by § 127e to those directed against adversaries covered by an existing authorization for the use of military force. As a result, the authority may enable operations, conducted by surrogates, against adversaries or in locations not covered by an existing authorization for the use of military force or the parameters of an existing war powers notification, but in which the likelihood of U.S. forces becoming involved in hostilities is clearly indicated by the circumstances.⁶⁹ Although U.S. forces acting in self defense do not need an authorization to use force, the likelihood of using force in self defense under some circumstances, e.g. accompanying partner forces on raids where the objective is to engage an adversary with force, is clearly greater than in others. The circumstances surrounding the tragic death of four U.S. special operations forces service members following a firefight with local armed groups in Tonga Tonga, Niger serve to illustrate this risk, even though the Trump administration belatedly claimed that the group in Niger was covered by the scope of the 2001 AUMF⁷⁰ (by inference, a local armed group in Niger had somehow “planned, authorized, committed, or aided” the terrorist attacks of September 11, 2001⁷¹).

Reflecting an understanding of this risk, when the Congress passed a provision similar to § 127 for “irregular warfare” in the 2018 National Defense Authorization Act (§ 1202), the authors included a rule of construction that proscribed the funds from use for any operation conducted by a partner that

67 According to U.S. Marine Corps doctrine, “Cover is protection from the fire of hostile weapons. Concealment is protection from observation or surveillance from hostile air and ground observation, but not from hostile fire.” (Marine Corps Warfighting publication 3-113).

68 U.S. Army, *Operational Law Handbook* (Virginia, 2015), https://www.loc.gov/rr/frd/Military_Law/pdf/OLH_2015_Ch5.pdf

69 e.g. The language in the 2013 War Powers notification to Congress for Niger read, “This deployment will provide support for intelligence collection and will also facilitate intelligence sharing with French forces conducting operations in Mali, and with other partners in the region. The total number of U.S. military personnel deployed to Niger is approximately 100. The recently deployed forces have deployed with weapons for the purpose of providing their own force protection and security.” U.S. White House, *Letter from the President Concerning Niger*, February 22, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/02/22/letter-president-concerning-niger>

70 U.S. Department of Defense, *Oct 2017 Niger Ambush Summary of Investigation* (2018), https://dod.defense.gov/portals/1/features/2018/0418_niger/img/Oct-2017-Niger-Ambush-Summary-of-Investigation.pdf.

71 U.S. Congress, Joint Resolution, *Authorization for Use of Military Force of 2001*, Pub.L. 107–40, 107th Cong., 1st sess., <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>.

U.S. forces would not, themselves, be authorized to conduct; and clarified that the authority does not constitute an authorization for the introduction of U.S. forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances.⁷²

The limited reporting requirements established by the committees on intelligence and defense for both covert action and partnered operations critically impair the ability for the House Foreign Affairs and Senate Foreign Relations Committees to serve their proper oversight role in congressional war powers and security sector assistance activities.

While covert CIA strikes conducted over the last twenty years may have targeted persons or groups named by the 2001 AUMF, consecutive administrations have left ambiguous whether they view CIA covert strikes as a form of military force subject to constitutional war powers.⁷³ Moreover, Presidents, including President Obama, have consistently and publicly recalled the President's authority to use military force "in the absence of specific, prior congressional approval." The covert use of lethal force by the CIA is thus not explicitly subject to oversight by either committee of jurisdiction for foreign affairs in the Congress, in spite of the risk that the use of covert lethal action could conceivably draw the United States into armed conflict. Nothing in statute requires the CIA to inform either committee when it uses force that, for all intents and purposes, approximates the military force that would necessitate reporting under the terms of the War Powers Resolution or require an explicit authorization from Congress. This is true whether or not force is employed on the basis of an inherent constitutional authority under Article II of the Constitution (e.g. self-defense). Although the CIA is clearly not a component of the U.S. Armed Forces, it could be argued its increased role and use as a paramilitary organization undermines the ability of the Congress to play an effective oversight role on questions of war so long as CIA paramilitary activities are exempt from forms of oversight and transparency that apply to the military.

Similarly, counterterrorism support programs and activities funded under the § 127 authority, while requiring Chief of Mission concurrence, are not reported to either congressional committee of jurisdiction for foreign affairs. Given the significant potential for § 127e programs to affect a broad range of interests in the countries where they take place, a highly selective reporting regime prevents those members of Congress responsible for overseeing foreign affairs from understanding, or even being aware of, matters of significant foreign policy consequence.

The prolonged existence of parallel capabilities between the CIA and the U.S. military for conducting secret lethal strikes creates a risk of "forum shopping," tempting the White House to place responsibility for strikes on the basis of its preferences for oversight and transparency, rather than within the most appropriate government agency.

The operational character and immediate operational effects of covert lethal drone strikes conducted by the CIA, and those conducted in secret by the Defense Department, are practically indistinguishable.⁷⁴ In fact, for most drone strikes, the two agencies cooperate at every step of the process, making it difficult for the public to understand the specific role played by each; a phenomenon sometimes described as "convergence," that has replaced Clinton-era debates

⁷² *National Defense Authorization Act for Fiscal Year 2018*, 131 Stat. 1283 (2017), <https://www.congress.gov/115/plaws/publ91/PLAW-115publ91.pdf>.

⁷³ Robert Chesney, "CIA Drone Strikes and the Public Authority Justification," *Lawfare*, September 6, 2014, <https://www.lawfareblog.com/cia-drone-strikes-and-public-authority-justification>.

⁷⁴ Livermore, "Passing the Paramilitary Torch."



Special Operations Task Group prepare for a helicopter insertion

Credit: Photo by LS Paul Berry Australian Government Department of Defence

between the Air Force and CIA over the drone program. Beyond the implausibility of accountability for covert action, the statutory authority by which a strike is conducted, and the agency that oversees it, also impair consistent congressional oversight. Covert CIA strikes conducted under Title 50 are subject to the rigid requirements of the covert action statute, but oversight is limited to only a handful of congressional leaders. Meanwhile, military strikes are subject to a more arcane system of congressional reporting (e.g. for sensitive and non-sensitive military operations), but more clearly subject to provisions requiring public estimates of civilian casualties (under § 1057 of the 2018 NDAA, as amended) and more plainly subject to requirements under the War Powers Resolution.

The exclusion of Afghanistan, Iraq, and Syria from 10 U.S.C. § 130f (statutory reporting requirements for sensitive military operations) creates a reporting loophole for military operations involving lethal force or involvement in hostilities.

On January 3, 2020, President Trump ordered a lethal strike against Iranian Quds Force Major General Qassem Soleimani. On the same day, the military (unsuccessfully) launched a companion

strike against Iranian Quds Force Commander Abdul Reza Shahla'i in Yemen.⁷⁵ Although both strikes clearly constituted a sensitive military operation by definition under 10 U.S.C. § 130f (i.e. “a lethal operation or capture operation conducted by the armed forces ...that targets a specific individual or individuals”), the Iraq operation was exempt from the reporting requirements due to the exclusion of activities in Iraq, Afghanistan, and Syria, while the Yemen strike was notified, presumably within the 48 hours required by law.⁷⁶ Similarly, in March of 2020, targeted strikes conducted against Kata'ib Hezbollah in Iraq also fell outside of the § 130f reporting requirement (and also outside of War Powers reporting).⁷⁷ If the depth of U.S. military involvement changes in Afghanistan, Iraq, and Syria toward a “lighter footprint,” the exclusion of these countries from the sensitive military operations reporting requirement is less justifiable.

A policy that allows for the secret use of lethal force outside of the context of an armed conflict, under the rules of war (international humanitarian law), provides a dangerous precedent and undermines the legitimacy of American aims.

Human rights groups and international legal experts have long contended that a U.S. policy that allows for strikes outside of “hot battlefields” (or areas of active hostilities) using the laws of war (international humanitarian law) runs contrary to international law. Summarizing this view in *Just Security*, representatives from several human rights organizations (including CIVIC) wrote that “[h]uman rights law prohibits lethal force unless it is as a last resort in response to an imminent threat that poses a substantial risk to human life that cannot be otherwise addressed by, for example, arresting the person. In the context of a recognized armed conflict, use of lethal force must comply with the law of armed conflict principles of distinction, proportionality, military necessity, and humanity. Past administrations’ use of lethal force in and outside of recognized armed conflict has frequently violated these laws.”⁷⁸ For their part, defenders of the policy have contended that a situation of armed conflict, and therefore the applicable legal framework, may apply outside of areas of “active” hostilities, justifying the use of force in accordance with the laws of war.⁷⁹ Whether or not the legal debate will be settled in the next administration, the cost of breathlessly asserting the validity of the use of lethal force using the paradigm of a global battlefield may very well exceed the benefits. First, the United States risks further distinguishing itself as an international outlier through its overly permissive interpretation of international law, rather than by setting norms that enhance human rights protections. Moreover, the U.S. risks providing other states with the core elements of a legally defensible argument for using force against anybody identified as a member of an organized armed group. Finally, the U.S. government risks undermining the legitimacy of its national security aims in the court of domestic and international public opinion.

75 John Hudson, Missy Ryan, and Josh Dawsey, “On the Day U.S. Forces Killed Soleimani, They Targeted a Senior Iranian Official in Yemen,” *Washington Post*, January 10, 2020, https://www.washingtonpost.com/world/national-security/on-the-day-us-forces-killed-soleimani-they-launched-another-secret-operation-targeting-a-senior-iranian-official-in-yemen/2020/01/10/60f86dbc-324-5-11ea-898f-eb846b7e9feb_story.html.

76 Robert Chesney, “Targeting Shahla'i in Addition to Soleimani: Unpacking the Legal Questions,” *Lawfare*, January 10, 2020, <https://www.lawfareblog.com/targeting-shahlai-addition-soleimani-unpacking-legal-questions>.

77 C. Todd Lopez, “U.S. Strikes 5 Kata'ib Hezbollah Targets in Iraq”, *U.S. Department of Defense*, March 13, 2020, <https://www.defense.gov/Explore/News/Article/Article/2111698/us-strikes-5-kataib-hezbollah-targets-in-iraq/>

78 Rita Simieon et al, “Toward a New Approach to National and Human Security: End Unlawful, Secret, and Unaccountable Use of Lethal Force”, *Just Security*, September 11, 2020 <https://www.justsecurity.org/72375/toward-a-new-approach-to-national-and-human-security-end-unlawful-secret-and-unaccountable-use-of-lethal-force/>

79 Ryan Goodman, “Why the Laws of War Apply to Drone Strikes Outside ‘Areas of Active Hostilities’ (A Memo to the Human Rights Community),” *Just Security*, October 4, 2017, <https://www.justsecurity.org/45613/laws-war-apply-drone-strikes-areas-active-hostilities-a-memo-human-rights-community/>.



Flintlock 2018 training in Tahoua, Niger

Credit: U.S. Army photo by Sgt. Heather Doppke/79th Theater Sustainment Command

VI. Recommendations:

The following recommendations are intended to ensure accountability and transparency for civilian harm; to improve congressional oversight and to ensure the correct balance of congressional war powers; and to ensure that U.S. security cooperation activities are subject to appropriate and uniform standards of quality and human rights due diligence.

Recommendations for the Next Presidential Administration:

1. Consistently and publicly demonstrate that its use of force policies and practices comply with all applicable bodies of international law that constrain the use of force and protect the right to life.
2. Ensure U.S. forces have the appropriate authorization under the War Powers Resolution if “imminent involvement in hostilities is clearly indicated by the circumstances” including cases where there is a significant and foreseeable risk that U.S. forces participating in advise, assist, and accompany missions are likely to become involved in hostilities in self defense.
3. Finalize the transfer of authority for the U.S. government’s armed drone program to the Defense Department.
4. Place exclusive responsibility for current and future paramilitary support activities that resemble security cooperation programs to the Defense and State Departments.
5. Rescind any outdated “global” presidential findings authorizing the covert use of force.
6. Ensure any new covert action findings include measures to mitigate the risk of enabling human rights violations.
7. Develop, and make public, a policy requiring human rights due diligence, and clarifying the procedures for reporting and investigating reports of human rights violations and civilian harm for all CIA paramilitary activities. This can be done through a U.S. government policy, if necessary for classification reasons.
8. Sunset, or greatly reduce, the President’s request for funds under § 127e for special operations support for counterterrorism.
9. Ensure all security activities, including those funded under the § 127e authority, are subject to the Defense Department policies governing assessment, monitoring, and evaluation.

Recommendations for the Congress:

1. Sunset § 127e. At minimum amend the statute with a requirement for human rights due diligence, and a war powers rule of construction in parallel with 2018 NDAA § 1202, and expand reporting requirements to include the committees with jurisdiction for foreign relations.

2. Amend 10 U.S.C. § 130f to remove the blanket reporting exemption for sensitive military activities in Iraq, Afghanistan, and Syria.
3. Amend existing legislation to require a plan from the Defense Department for ensuring that civilians are able to report harm resulting from partnered operations involving U.S. forces or U.S.-funded contractors.
4. Conduct regular oversight hearings on the use of lethal force, civilian casualties, and security cooperation activities, and request briefings on the next administration's strategy and basis for covert action.
5. Establish a legal requirement for conducting human rights due diligence and reporting for CIA paramilitary support operations, should they continue.



Appendix 1: STATUTORY BASIS FOR CIA DRONE STRIKES AND PARAMILITARY ACTIVITIES

Covert, lethal drone strikes or other paramilitary activities are primarily governed by the Covert Action Statute, in Title 50 of the U.S.C. Code § 3093.⁸⁰

According to the law, authorized covert actions are “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.”⁸¹ Covert action can include propaganda activities, pushing an administration’s perspective through the CIA’s covert channels; political covert action, providing financial aid (bribes) to foreign partners or other “agents of influence;” economic covert action, slowing or destroying adversaries’ economies; and paramilitary covert action, “the most lethal of all” arrows in the CIA’s quiver.⁸² According to the statute, the President may authorize a covert action after finding the action to be both necessary to support foreign policy objectives and important to national security. Such a “Finding” is written and provided to the congressional Intelligence Committees immediately after the President’s decision to authorize the action. Otherwise, where “immediate action is required,” then “a written record of the President’s decision must be contemporaneously made and shall be reduced to a written finding as soon as possible” but no later than 48 hours after the decision to engage in the action is made.

The statute, as amended, specifically excludes “traditional...military activities or routine support to such activities” among other traditional and supportive ventures from this definition.⁸³ In spite of some debate about whether or not CIA drone strikes count as “traditional military activities,” experts (such as legal scholar Robert Chesney⁸⁴) generally recognize that the CIA’s lethal drone program qualifies as covert action based on the explanatory statement provided in the conference report accompanying the Intelligence Authorization Act of 1991, in which the Congress clarified that traditional military activities “include activities by military personnel under the direction and control of a United States military commander.”⁸⁵

Title 50’s enumeration of CIA functions is not limited to covert action. It includes a sweeping authority to perform “other functions and duties related to intelligence,” generally known as the “fifth function.” For decades, this generic language provided the statutory foundation for covert action, of course, but it is not necessarily coextensive with the covert action category. By its terms, it could encompass CIA operational activity that for whatever reason did not qualify as covert action as later statutes have defined it.⁸⁶

CIA Lobby Seal Credit: Central Intelligence Agency, Released into the public domain

80 Some legal experts contend that strikes may also need to satisfy the requirements established in other sources of law, such as the War Powers Resolution. See Chesney, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate,” 616.

81 *U.S. Code 50* (2019), § 3093e.

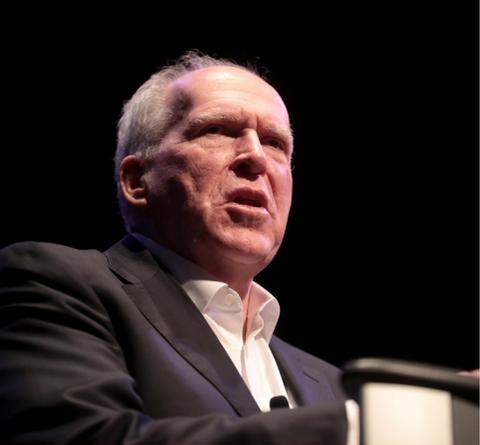
82 Loch K. Johnson, *National Security Intelligence: Secret Operations in Defense of the Democracies* (Cambridge: Polity Press, 2012), 82-94.

83 *U.S. Code 50* (2019), § 3093.

84 Robert Chesney, “More on CIA Drone Strikes, Covert Action, TMA, and the Fifth Function,” *Lawfare*, September 7, 2014, <https://www.lawfareblog.com/more-cia-drone-strikes-covert-action-tma-and-fifth-function>.

85 U.S. Congress, House of Representatives, *Intelligence Authorization Act, Fiscal Year 1991: Report (to accompany H.R. 1455)*, 102nd Cong., 1st sess., July 25, 1991, H.Rept. 102-166, 29-30.

86 Robert Chesney, “CIA Drone Strikes and the Public Authority Justification,” *Lawfare*, September 6, 2014, <https://www.lawfareblog.com/cia-drone-strikes-and-public-authority-justification>.



Appendix 2: CONGRESSIONAL REPORTING AND NOTIFICATION REQUIREMENTS

Covert Action Involving Lethal Force:

If the CIA conducts an operation involving lethal force under Title 50 authorities, then the United States Government must notify the Congressional Intelligence Committees pursuant to at least three provisions contained in the National Security Act of 1947 (as amended): 50 U.S.C. §§ 3091-3093. There are important distinctions between these provisions, but all three relate to reportable intelligence activities:

- § 3091 generally establishes the Congressional Intelligence Committees' expectation of intelligence information from the executive branch, mandating that the President "ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States" and requiring the President and the Congressional Intelligence Committees to create procedures necessary to transmit and receive such information securely.⁸⁷
- § 3092 elaborates on the notification requirements for "all intelligence activities, other than a covert action."⁸⁸
- § 3093 extends this notification requirement to covert actions and details the legal approval processes for such activities. If the President either engages agencies in a "significant undertaking" of an action approved by a Finding or "significantly change[s]...a previously approved covert action," then the executive must also notify the Congressional Intelligence Committees pursuant to § 3093, usually through a so-called "Memorandum of Notification" (otherwise known as a "Congressional Notification"). Findings may be amended through the issuance of a new Memorandum of Notification.⁸⁹

Sensitive Military Operations:

The Secretary of Defense is required to notify the Congressional Armed Services Committees of sensitive military operations pursuant to 10 U.S.C. § 130f, enacted in 2013. Sensitive military operations are defined as "a lethal operation or capture operation conducted by the armed forces or conducted by a foreign partner in coordination with the armed forces that targets a specific individual or individuals" or "an operation conducted by the armed forces in self-defense or in defense of foreign partners, including during a cooperative operation."⁹⁰ Sensitive military operations are thus comparable to covert actions (and their notification system). An intent of the oversight system created to capture these operations was to "minimize oversight dropoff when it is [Joint

Photos, left to right: Former Director of the Central Intelligence Agency John O. Brennan Credit: Gage Skidmore; Lt. Gen. Thomas Waldhauser, former Commanding General, AFRICOM Credit: SSG Michelle Gonzalez; FOX NEWS: Trump CIA Director Gina Haspel Credit: Ansar Raza

⁸⁷ National Security Act of 1947, U.S. Code 50 (2010), § 3091.

⁸⁸ National Security Act of 1947, U.S. Code 50 (2010), § 3092.

⁸⁹ National Security Act of 1947, U.S. Code 50 (2019), § 3093.

⁹⁰ U.S. Code 10 (2020), § 130f.

Special Operations Command] rather than CIA that is conducting a kill/capture mission outside the 'hot battlefield' areas.”⁹¹

However, the reporting requirement includes exceptions that could grow in significance as the U.S. military footprint changes in the next administration. Originally, the statute applied only to operations occurring “outside a theatre of major hostilities.” The statute was later amended to specify that the statutory exclusions specifically applied to Afghanistan, Syria, or Iraq. When Congress later attempted to close the reporting gap by stripping Afghanistan from the list of excluded regions in the 2016 NDAA, the Obama administration issued a Statement of Administration Policy “strongly object[ing] to Section 1032” because the “amendment would place an undue burden on the Executive branch, which already reports extensively to Congress on U.S. operations in Afghanistan.”⁹² Although the FY 2017 NDAA again removed the Afghanistan exemption, it was re-added through the FY 2019 NDAA and remains in place.

Title 10 § 127e:

10 U.S.C. § 127e provides United States Special Operations Command with the fiscal authority (up to \$100 million) to aid foreign partnered forces in support of special operations forces in counterterrorism operations. § 127e(d) requires notification to the Congressional Armed Services Committees whenever a mission is funded citing § 127e as its fiscal authority. Notifications to the Defense committees must be made before the mission is conducted—unless the Secretary of Defense determines “extraordinary [national security] circumstances” exist, in which case the Defense committees must be notified no later than 48 hours after the beginning of the mission—and include the type of support provided with a detailed description of such support, a description of the foreign forces being supported, the amount obligated to provide support, the legal and operational authorities related to the ongoing operation, and the duration of such support being provided.⁹³

The reporting requirements of the statute, which draws its origins from § 1208 of the FY2005 NDAA, has undergone a series of amendments over time:

- In FY2008, the NDAA amended the § 1208 authority to include more detailed reporting requirements to congressional defense committees, including annual summaries of § 1208 recipients and the assessed outcomes of aid provided.
- Congress made further changes to the authority in 2009, which added the Chief of Mission Concurrence requirement, and in 2010, a reporting requirement for any changes to funding levels, more information about the types of recipients, and more detailed description of the operations funded under the authority.
- The FY2016 NDAA added a 15-day notification requirement prior to the initiation of a § 1208 supported operation or, in cases of extraordinary circumstances, post facto notification no later than 48 hours after the initiation of a § 1208 supported operation.
- The FY2020 NDAA added several additional reporting requirements, to include, inter alia, “a description of the foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating the authorized ongoing operation who will receive support”, and a “detailed description of the legal and operational authorities” related to the operation.

91 Robert Chesney, “Expanding Congressional Oversight of Kill/Capture Ops Conducted by the Military: Section 1036 of the NDAA,” *Lawfare*, December 8, 2016, <https://www.lawfareblog.com/expanding-congressional-oversight-killcapture-ops-conducted-military-section-1036-ndaa>.

92 Robert Chesney, “Eliminating the Afghanistan Exception to the Oversight Regime for Military Kill/Capture Ops,” *Lawfare*, June 19, 2015, <https://www.lawfareblog.com/eliminating-afghanistan-exception-oversight-regime-military-killcapture-ops>.

93 *U.S. Code* 10 (2019), § 127e.

Appendix 3: LETHAL FORCE REPORTING REQUIREMENTS

		COVERT CIA OPERATION		SENSITIVE MILITARY OPERATION	
		<i>outside of “areas of active hostilities”</i>	<i>within “area of active hostilities”</i>	<i>Other than Iraq, Syria, Afghanistan</i>	<i>Iraq, Syria, Afghanistan</i>
	Statutory Authority	Title 50	Title 50	Title 10	Title 10
	Legal Basis	Article II	Article II	2001 AUMF	2001 AUMF 2002 AUMF Article II
	Notification Requirements	Covert Action Statute	Covert Action Statute	10 U.S.C. § 130f	2018 NDAA § 1264
	Notified	Congressional intelligence committees or “Gang of 8” “As soon as possible but in no event more than 48 hours after the decision is made”	Congressional intelligence committees or “Gang of 8” “As soon as possible but in no event more than 48 hours after the decision is made”	Congressional defense committees “No later than 48 hours following such operation”	Annually and not later than 30 days if use of force constitutes change to existing legal and policy frameworks notified to Congress
	Foreign Relations committees notified?	No	No	Only if on basis of War Powers Resolution	Only if on basis of War Powers Resolution
	Civilian Casualties Reported?	Total global estimate of strikes and non-combatant casualties reported annually by May 1 until 2022 (2020 NDAA § 1723)	No	Annual Civilian Casualties Report (2017 NDAA § 1057) US AFRICOM Quarterly Report	Annual Civilian Casualties Report (2017 NDAA § 1057) Operation Inherent Resolve monthly reports



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