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978-1-107-10934-6 -Borderless Wars: Civil Military Disorder and Legal Uncertainty

Antonia Chayes

Excerpt

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I

Introduction

Liber Scriptus proferetur

In Quo totum continetur

Unde mundus judicetur

The Written Book shall be brought

In which all is contained

Whereby the world shall be judged

Dies Irae from the Requiem Mass

“Are you saying that a U.S. citizen targeted by the United States in a foreign country has no constitutional rights?” demanded Judge Rosemary Collyer of the Federal District Court of the District of Columbia on July 19, 2013. Facing her was Brian Hauck, a deputy assistant attorney general. “How broadly are you asserting the right of the United States to target an American citizen? Where is the limit to this?”

Then the judge answered her own question: “The limit is the courthouse door.”¹

The case was a civil action against four officials, including General David Petraeus, then Director of the Central Intelligence Agency (CIA), and Leon Panetta, then Secretary of Defense.² The father of

¹ Scott Shane, “Judge Challenges White House Claims on Authority in Drone Killings,” *The New York Times*, July 20, 2013, <http://www.nytimes.com/2013/07/20/us/politics/judge-challenges-white-house-claims-on-authority-in-drone-killings.html> (accessed September 28, 2014).

² The two additional defendants in the case of *al-Awlaki v. Panetta* included the Commander of U.S. Special Operations Command, Admiral William H. McRaven, United States Navy, and the Commander of the Joint Special Operations Command,

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Anwar al-Awlaki brought the lawsuit. A terrorist leader of al-Qaeda in the Arabian Peninsula, al-Awlaki had been a master propagandist who allegedly inspired the mass shootings at the U.S. army base at Fort Hood, Texas, in 2009, and masterminded an attempted attack on an American airplane. His son was killed accidentally two weeks later in a drone strike against Samir Khan, a publicist in the same al-Qaeda offshoot.

Although Judge Collyer, a George W. Bush appointee who also sits on the Foreign Intelligence Surveillance Court, ultimately dismissed the case in April 2014,³ the lawsuit raised fundamental legal issues that have been the subject of ongoing debate regarding how U.S. laws are construed.

The judge's remarks also raised much broader issues about the nature of contemporary warfare and the changes in the roles of the military vis-à-vis the many different civilian actors with whom it works. This shift in roles has been especially dramatic since 9/11. Along with senior civilian leadership, Congress at the policy level, and diplomats and aid workers at the operational level, many more civilians are now relevant in any discussion of civil-military relations. They include the CIA in a paramilitary role;⁴ almost every U.S. federal government agency and many agencies at state and local levels; the U.S. courts; and a growing army of civilian contractors, many of whom are ex-military currently performing quasi-military roles. And, of course, both civilians and military must work with the people in the host country in which the conflict is taking place, including officials, security forces, and ordinary citizens. Civil-military relations – the focus of this book – have become increasingly blurred in the attempt to adapt to festering gray area conflict situations.

The security situation the United States and its allies have been facing continues to be fraught with multiple simultaneous conflicts.

Lieutenant General Joseph Votel, United States Army. Admiral McRaven retired from military service in September 2014, and General Votel was promoted and assumed command of USSOCOM in September 2014.

³ *Al-Aukaki v. Obama* 727 F.Supp2d 201 (D.D.C. 2010); Charlie Savage, "Judge Dismisses Suit against Administration Officials over Drone Strikes," *The New York Times*, April 4, 2014, <http://nyti.ms/1egGT9K> (accessed September 28, 2014). 727 F. Supp. 2d 1 (D.D.C. 2010).

⁴ Some observers in the United States and elsewhere regard intelligence officials as part of the military even when their agency is civilian.

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Some are ongoing disputes, others are reshuffled semi-wars, and some represent new outbreaks of violence. These conflicts are not usually traditional wars. Very few involve attempts at state-on-state conquest as typified by Saddam Hussein's invasion of Kuwait in 1990. More often, these wars fall within a spreading inkblot between war and peace. Some are internal conflicts that often destabilize historical boundaries. Some end up obliterating historical boundaries. Often combatants on one side of a conflict are not traditional soldiers in uniform, but are non-state actors – insurgents or terrorists – even though sometimes they serve as proxies for a state, as do militias in Iraq. It is the threat of widespread terrorism that has captured the continuing attention of western democracies. These gray area conflicts are the stage for this book.

Ironically, while in 2012 the number of large-scale killings in violent conflicts decreased, pervasive volatility has been growing.⁵ As Alex de Waal, Executive Director of the World Peace Foundation argues, stability is now more elusive than it was in the past: “More effort than ever is invested in peace, and peace agreements are larger and more complicated than ever before, but they seem not to bring peace.”⁶ But while many analysts and scholars focus on peace-building, little attention is being paid to the confused evolution of civil-military relations within the United States and its allies, and its impact on the very peace being sought. Significant and confusing changes impinge on classic democratic notions of civilian control of the military and on the behavior of both civilians and military. In response to the demands of the irregularity and pervasiveness of the gray area of conflict – not war/not peace – both civilians and military have been cast into unaccustomed roles. The classic notion of a civil-military dyad is no longer sufficient as a model: there are many actors who perform both civil and military functions,

⁵ Human Security Research Group, *Human Security Report 2013: The Decline in Global Violence: Evidence, Explanation, and Contestation* (Vancouver: Human Security Press, 2013), 12, http://www.hsrgroup.org/docs/Publications/HSR2013/HSRP_Report_2013_140226_Web.pdf (accessed October 2, 2014).

⁶ Alex de Waal, “Framework of the ‘Political Marketplace’” (lecture, World Peace Foundation seminar “The Political Marketplace: Analyzing Political Entrepreneurs and Political Bargaining with a Business Lens,” June 12–13, 2014), http://sites.tufts.edu/reinventingpeace/files/2014/10/Political-Marketplace_de-Waal.pdf (accessed March 24, 2015).

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including allies in a coalition, contractors, police, and host nation officials. It is not clear in the United States and Europe who the relevant civilians are or should be; and who, in addition to uniformed soldiers, is or should be performing military roles. Moreover, the U.S. military, at least, has undertaken perceived traditional civilian roles of reconstruction and rehabilitation of war-torn societies. Perhaps most important, military leadership has been induced into the realm of policy, and is now making strategic choices and practicing diplomacy at least as often as it fights battles. In this evolving context, the dialogue among civilians and military seems unplanned and ad hoc, with success often dependent on personal chemistry.

The blurred lines of authority, moreover, are further confused by the lack of adequate legal underpinnings, both domestic and international, to govern this new, fractured conflict environment. Existing law may not apply to evolving conditions, or it may fail to add clarity to role distribution. International rules – including customary law, treaty law and legal principles – are being stretched to fit new situations, but unfortunately, laws – particularly international treaties – are not infinitely elastic, nor are they easily rewritten. In other instances, there is a legal void. The current fit is awkward and not reassuring to the public. American domestic legislation, even laws written after 9/11, do not offer adequate guidance about what actions are permissible, or for those actions permitted by law, who should act. Executive powers have been increased, but oversight has not matched that expansion. The secrecy surrounding legal justification has magnified both confusion and public unease.

This book examines three different contemporary sets of issues within the gray area between war and peace: (1) counterinsurgency; (2) counterterrorism, in particular targeted killing; and (3) cyber attacks and cyber warfare. Each area presents some novel issues at both policy and operational levels that are not addressed adequately by the current legal frameworks. In each case, just as with nuclear weapons in the 1940s,⁷ legal change lags behind a rapidly evolving operational environment. Complex new rules are hard to adopt and slow to be widely accepted, if they are accepted at all. In

⁷ Nuclear weapons were first tested by the Soviet Union in 1949; the first arms control agreement was the Limited Test Ban Treaty of 1963.

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each area, the book addresses what may have aggravated difficult situations, and what measures might improve effectiveness.

This book does not explicitly address issues arising from the exponential development of the military industrial complex (“the iron triangle”⁸) over the past dozen years. That complex can better be described as an agglomeration of power among military, industrial producers, and Congress, rather than as a confusion of roles among the actors. Nor does it discuss lobbyists or political groupings trying to increase the military budget. Lobbyists and interest groups have become part of the “rough and tumble” of American politics, but their contribution to the current divisiveness now may be a distraction from congressional attention to novel and complex security issues.

How the United States and Its Allies Have Adapted to “Gray Area” Conflict

These three issue areas – counterinsurgency, counterterrorism, and cyber attacks – illustrate the attempt, especially by the United States, to adapt to the new gray area that lies between peace and war. Terrorism is by no means new. But its pervasiveness and geographic spread have not been seen before. Conventional wars ultimately do end, even if sporadic violence continues for a time. But in recent years, when one region seems to be stabilized for a while, another geographic gray area seems to emerge, often destabilizing its neighbors, just as the war in Syria has deepened the political-sectarian strife in Iraq.⁹ New crises confront a different set of decision makers, and their approaches are often as ahistorical as they are foolishly optimistic.

Although the history of warfare before the twenty-first century does offer important insights, the parallels are not fully examined, even when they might be useful as reference points for action

⁸ Hugh Heclo, “Issue Networks and the Executive Establishment,” in *The New American Political System*, ed. Anthony King (Lanham, MD: American Enterprise Institute Press, 1978).

⁹ Dexter Filkins, “What We Left Behind,” *The New Yorker*, April 28, 2014, <http://www.newyorker.com/magazine/2014/04/28/what-we-left-behind> (accessed September 27, 2014).

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against today's multiple and relentless outbreaks of violence. The United States has not developed enduring criteria to indicate when it may be useful for great powers to intervene in another country with or without force. The changing landscape of violent conflict may render static criteria unhelpful, but ongoing historic analysis of the motivations for intervention and nonintervention can be an important guide. Fear of a terrorist threat to the homeland has been the most powerful motivating factor since 9/11. Metastasizing insurgencies have also been a factor, even when they do not pose a direct threat to the homeland. American responses to the pervasive, spreading areas of violence also stem from altruistic impulses to assist suffering civilians or to grasp a perceived opportunity to help forge a democratic government. Many earlier decisions to intervene or exercise restraint were based on a simpler Cold War calculus about potential Soviet response in the twentieth century.

Recent interventions have raised both international and domestic legal issues with international political repercussions. They have also resulted in unforeseen and negative consequences. Unfortunately, the aftermaths of such interventions, as in Iraq, Afghanistan, and Libya, have demonstrated a continuation of the spreading violence with no end in sight.

The experience suffered during the UN operation in Somalia in October 1993 (UNISOM II), when television broadcasts showed the bodies of dead American soldiers being dragged through the streets of Mogadishu, inoculated America against intervention for a number of years. That event, it is argued, contributed to the decision to withhold support for a possible UN response to the genocide in Rwanda in 1994.¹⁰ It certainly shaped Presidential Decision Directive 25 that limited American participation in the UN's expanded peacekeeping operations to those that affected the vital interests of the United States. President Obama struck a similar note twenty years later at the West Point commencement in May 2014: "The United States will use military force, unilaterally if necessary, when our core interests demand it – when our people are threatened, when our livelihoods are at stake, when the security

¹⁰ Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Harper Collins, 2002), 374–375.

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of our allies is in danger.”¹¹ War fatigue, lack of success, and the stirring of public opinion by terrorist atrocities do not provide useful guidance for anything as crucial as a decision to intervene in a conflict or to offer or withhold military support. Even less rational are responses based on unrelated domestic political issues that at least in the United States include the time in an election cycle, the nature of congressional support for the executive branch at a given moment, and competing priorities.

Past Civil-Military Models Are Not Helpful

Perhaps in part because of this lack of a consistent rational methodology for deciding whether or when to intervene, and because of the variety of motivations that may drive such decisions, recent interventions and crisis responses have produced an improvised rearrangement of civil-military roles. The pervasive threat of terrorism has not been fully digested. And where forces have intervened, the importance of reconstruction efforts have also contributed to the blurring of civil-military roles.¹² No model has yet emerged that provides for the kind of deep cooperation and systematic planning among civilian and military leaders that the new characteristics of today's gray area conflicts require. Without such collaboration, role definition at the operational level, in turn, seems to develop reactively, or on a personal basis. In many cases, the relationships are not tailored to the situation, and are far less effective than had they been well thought through. The off-budget and widespread use of civilian contractors is a further problem. They affect command and control and skew the entire incentive system, even though they may be needed to fill unexpected demand.

The classic model of “objective” civilian control of a professional military insulated from politics was never realistic. Created by Samuel Huntington, the theory required that civilian leadership

¹¹ President Barack H. Obama (speech, United States Military Academy, West Point, NY, May 28, 2014), White House official website, <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony> (accessed October 2, 2014).

¹² Gabriella Blum, “The Fog of Victory,” *European Journal of International Law* 24, no. 1 (2013): 391–421.

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dominate policy, and operations be controlled by the military to effect the policy choices made. Operationally, the Huntington model would suggest a sequence of a policy decision to intervene, followed by combat operations managed by a professional military, ending with a peace agreement, after which civilians at the operational level would enter the scene to rebuild the society.¹³ Yet that neat separation did not even characterize the post-World War II narrative, in which the allied military forces were needed and employed to rebuild both Europe and Japan.¹⁴

Even combat operational choices may have crucial political consequences. The documented lessons from the Vietnam War made that clear.¹⁵ The ambiguity about new gray area warfare should have alerted policymakers to the need for deep and continuing collaboration and dialogue among civilians and military in both planning for intervention and execution thereafter. But any recognition on the part of policymakers that is revealed in after-the-fact reflections on current conflicts has not led to new systems or new models.

Counterinsurgency

Counterinsurgency (also known as COIN), the first area examined in this book, has as its central premise the protection of the civilian population. Its slogan – “clear, hold, build” – suggests a sequence, but further examination of the doctrine implies that the military might have to help rebuild a society while still fighting a war. Counterinsurgency thrusts the military into exposed positions among the population – a phenomenon widely illustrated in film and commentary. But reality on the ground has demanded that the tasks of reconstruction often be undertaken while fighting continues. Civilians are not adequately trained, nor, in most cases, are they willing to face such dangers. The military is therefore called upon to fill a critical void in the reconstruction efforts – a necessity that can often

¹³ Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, MA: Harvard University Press, 1957), 84.

¹⁴ Carl J. Friedrich, *American Experiences in Military Government in World War II* (New York: Rinehart & Co., 1948).

¹⁵ Robert Komer, *Bureaucracy Does Its Thing: Institutional Constraints on U.S.-GVN Performance in Vietnam*, RAND Institute, <http://www.rand.org/pubs/reports/R967.html> (accessed October 8, 2014).

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exacerbate the unequal budgets and authorities between military and civilian agencies. And when the military has stepped in to fill that void, resentment has developed among civilians about role usurpation. A parallel resentment has developed among military about being forced to assume roles they feel they are neither prepared nor equipped to fill on top of their often staggering combat duties.

No satisfactory model has been proposed to meet these demands. This book's extended discussion of counterinsurgency examines some of the highly exacting conditions for success that will be required if the doctrine is ever to be relied on in the future. Yet no policymaker has yet admitted failure, nor fully articulated the problems with the concept.

Counterinsurgency raises no serious issues of international or domestic law, so long as the laws of occupation are complied with in relevant situations. The doctrine may actually be more demanding than international humanitarian law rules on avoiding civilian casualties. But a lack of positive legal guidance perpetuates the confusion and resentment that have riddled attempts to implement the doctrine. No legal provision has been made that would create a process to tailor appropriate roles to a given situation. It is possible that no legal framework that created civil-military processes, such as planning, intensive training, and practice, would be sufficient to overcome bureaucratic inertia, turf hoarding, or failings of personal chemistry. However, as Chapter 3 discusses, the Goldwater-Nichols Act,¹⁶ which mandated inter-service cooperation among the military, actually reduced the wasteful rivalry that had existed earlier. Although legislation is suggested for the United States, this book acknowledges the difficulties of obtaining it and recommends a multifaceted "saturation approach" that might help, should counterinsurgency efforts be mounted again.

Counterterrorism

In the case of targeted killing, a major element in U.S. counterterrorism (CT) policy, the CIA performs military roles along with the

¹⁶ Goldwater-Nichols Department of Defense Reorganization Act of 1986, 10 U.S. Code 111, <http://www.govtrack.us/congress/bills/99/hr3622> (accessed October 15, 2014).

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military. The high level of secrecy makes it hard to tell whether cooperation or chaos best characterizes this civilian-military relationship. The current respective roles of the CIA and the military may be a sensible adaptation to emerging situations, but to the public it appears a bureaucratic cow path followed in different directions to deal with each situation as it arises – or perhaps even a way to avoid legal and public responsibility. Covert civilian action seems politically simpler and quicker, but the lack of transparency has frayed public confidence. If advanced planning for role allocation has occurred, it has not been articulated, nor has adequate oversight been made apparent. The question of “blowback” – whether widespread targeted killings encourage the spawning of new armies of terrorists while eliminating existing individuals – is also raised.

Targeted killing, as well as other aspects of counterterrorism, raise some of the most contentious issues of domestic and international legality, making the blurred civilian-military lines even more troublesome. The analysis in this book reviews, but does not enter into, the ongoing vigorous debate that has been raging in the press, blogs, scholarly journals, and reports by legal experts and policy analysts about the legality of this technique. The ambiguity of characterizing terrorism as “war” or “something less” – even within a single speech by President Obama – raises serious questions of fact and law. Different legal rules apply in wartime, both internationally and domestically. International law has a set of rules under both customary law, treaties and general principles for wartime behavior. The president has greater powers under the U.S. Constitution, Article II, during war than in other circumstances.

Challenges under international law have been made as to whether Article 51 of the UN Charter plausibly permits the United States to meld a collection of Islamic terrorist organizations into a single, worldwide actor that can be attacked in many different, seemingly unrelated sovereign states indefinitely. These issues are analyzed in Chapter 8, along with legal doctrines and interpretations that have been relied on by the U.S. government that a global, non-international armed conflict exists, which would permit the United States to strike the enemy wherever it presents a threat. This line of analysis also extends the right to attack without permission