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ETHICAL GUIDELINES FOR MILITARY COVERT OPERATIONS

BY

LIEUTENANT COLONEL ROBERT J. GARNER, USMC

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USAWC MILITARY STUDIES PROGRAM PAPER

ETHICAL GUIDELINES FOR MILITARY COVERT OPERATIONS.

AN INDIVIDUAL STUDY PROJECT

by

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ABSTRACT

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ETHICAL GUIDELINES FOR MILITARY COVERT OPERATIONS

CHAPTER I

INTRODUCTION

As I started this study, I anticipated exploring an interesting subject. I would study the military aspects of covert operations in detail and see where there have been ethical failures and where improved guidance could preclude those failures. I envisioned concluding with a recommendation for new guidance. Simple, right? Quite the contrary, I discovered that discussing both ethics and covert operations is like asking what time it is and ending up having to build a watch. However, in this case, building the watch is essential to answering the questions. Both issues are quite complex in their own right; combined, they require careful consideration indeed.

Unfortunately, the analysis must develop in general terms because of the highly secretive nature of covert operations. Only those persons with an absolutely essential need-to-know (a need much greater than for academic analysis) are given access to the details of such operations. Even operations that occurred many years ago and that have since become a matter of public record are not discussed in detail. Entry into the details of the "black

world" is tightly controlled, so do not expect any James Bond stories or other revelations about such activities.

Applying ethical standards to a study of covert operations further complicates the issue because there are no absolutes in ethics. Discussing right and wrong always raises the fundamental question of what is right and what is wrong. Therefore, I will not argue the pros and cons of various ethical theories. Rather, I will rely on generally accepted ethical standards for the foundation of my conclusions.

The bottom line is that improvements can be made, as always. I will recommend some, but there is little empirical evidence that the military has a significant problem.

BACKGROUND

The ethics of covert operations was of little concern to most Americans until the late 1960s, when public outcry over the war in Vietnam brought into question covert operations conducted in southeast Asia. Some information about these operations had been leaked to the press. Certainly, we had failures in covert operations prior to the late 1960s, such as the "Bay of Pigs" in Cuba and the "U-2" incident in the Soviet Union. But with these operations, the public was more concerned about the operational failures than the ethics involved in conducting the operations.

Later, however, disclosure of the covert operations in Chile and the plot to overthrow President Allende, in conjunction with "Watergate" and general mistrust of the government at that time, led to congressional action on covert operations. Until that time, Congress had not passed a single measure to restrain or monitor the Central Intelligence Agency (CIA) in the conduct of covert operations.1

In 1974 Congress passed the Hughes-Ryan Act, which states in part:

> No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the [CIA] for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of congress...2

The important aspects of this act are that it requires a written statement signed by the president acknowledging all proposed covert operations (known as special activities); it futher establishes congressional oversight of those activities. For many years presidential findings and congressional oversight seemed to offer a satisfactory monitoring of covert operations.

But in the early 1980s, our failed rescue of U.S. hostages in Iran led to attempts to improve U.S. special operations forces (SOF) capabilities. The military was assigned great operational

responsibilities for such actions. The budget for SOF was significantly increased. Then, because of the rapid build up of capabilities, there was a lack of proper control and supervision in some areas. This led to some abuses of government funds which were eventually investigated. These monetary abuses were associated with covert operations simply because SOF personnel were involved in highly secretive operations, the conduct of which negates much accountability for funds. But none of these cases deal with the actual conduct of covert operations. These cases certainly involve misuse of funds and the attempted cover-up of those misuses. Also, administrative and organizational practices have come under close scrutiny. However, there is nothing unique to covert operations about these cases, at least not from an operational aspect. So, in themselves, they do not require new and different guidance. The existing guidance and law have proven sufficient. General Meyer (Chief of Staff, United States Army, 1979-1983) observed that "in all but one case, the legal issue was funds. ...There are rules and regulations for handling funds within the 'white world' you know the regular ways. And there are rules and regulations for handling funds in the 'black world'. If you violate either of these rules or regulations then you did it for your own gain."3 He goes on to discuss the leadership responsibility to ensure proper supervision and also warns us to

put what was going on in perspective and not just look at what the individuals did wrong, but what they did right in a very stressful environment.

But one case did present complex problems. "The Longhoffer Case is different. In his case, that is the kind of thing that under the normal course of things, would not have gone to a court martial."4 Longhoffer was charged and convicted with dereliction of duty, conduct unbecoming an officer and disobeying a lawful order. These charges arose from his administration of a covert operation called "Yellow Fruit" and his attempts to cover financial wrong-doing on the part of one of its members.5

Next came the Iran Contra Affair, which is common knowledge and still in litigation, so I will not discuss it in detail. Here we have evidence that military officers and retired military officers engaged in unethical and illegal activities. Although they are military officers and a product of their environments in the military, they were not at that time performing their missions within the military; rather, they served as members of the National Security Council (NSC). They were not under the supervision of the Department of Defense. I make this point because no military guidance could have precluded their actions.

In the seventies, the CIA received heavy criticism. In the eighties, the criticism focused on the NSC. While a few military

figures were criticized for ethical failure, in none of my readings was I able to find any published ethical criticism of the military in the actual performance of covert operations.

ENDNOTES

1. Steven Emerson, Secret Warriors: Inside the Covert Military Operations of the Regan Era, p. 32.

2. Gregory F. Treverton, "Imposing a Standard: Covert Action and American Democracy, "Ethics & International Affairs, Vol. 3, 1989, pp. 34-35. Offically, Section 622 of the Foreign Assistance Act of 1974.

3. Edward C. Meyer, General, USA, "Senior Officer Oral History Program," draft copy, p. 257.

4. Ibid, p, 259.

5. Emerson, pp. 176, 179.

CHAPTER II

ETHICS

What is ethics? What are morals? What is the difference? These may seem like very simple questions, but they are not. Ethics is defined as (1) the discipline dealing with what is good and bad and with moral duty and obligation; (2) a set of moral principles or values; (3) a theory or system of moral values; (4) the principles of conduct governing an individual or a group.1 Moral is defined as (1) of or relating to principles of right and wrong in behavior; (2) expressing or teaching a conception of right behavior; (3) conforming to a standard of right behavior.2 We see then that ethics sets forth principles and morals applies to human behavior. However, in common usage they become synonymous in most applications. To quote Socrates, as reported by Plato in the Republic (cc. 390 B.C.) "We are discussing no small matter, but how we ought to live."3 But here agreement on the subject ends. There are numerous theories of ethics and morals, with pros and cons to all of them. Any discussion of the virtues of one theory over another has the capacity to become esoteric very quickly. However, the "Minimum Conception of Morality" can be defined as, "at the very least, the effort to guide one's

conduct by reason - that is to do what there are the best reasons for doing - while giving equal weight to the interests of each individual who will be affected by one's conduct."4 The key words are "conduct by reason". This requires that we make a decision by reasoning the difference between right and wrong. While specific rules are sufficient in most cases, there are exceptions. It is wrong to lie and wrong to kill, but is it right to lie to prevent a killing? Now, reason becomes essential. Ethics makes us aware of the moral options available as human beings grapple with real-life issues.5 Unfortunately, there are no absolutes in ethics. Because there are no absolutes, there can never be universal agreement. Bright, well- intentioned people, with the good of mankind clearly their top priority, will disagree strongly on the validity of various theories, as well as on the morality of individuals, groups, and societies. Let us not be too quick to judge the morality of another. And let us accept the merits of various theories as well as recognize their shortcomings.

Military Ethics

The nature and conduct of war requires ethical principles different from those applied to the general public. The foundation of the ethical justification for and the conduct of war have been articulated in the following principles:

Principles of Just War

Jus Ad Bellum (Just Recourse to War)

Just Cause

Legitimate Authority

Just Intentions

Public Declaration (Of Causes and Intents)

Proportionality (More Good than Evil Results)

Last Resort

Reasonable Hope of Success

Jus In Bello (Just Conduct in War)

Discrimination (Noncombatant Immunity)

Proportionality (Amount and Type of Force Used) 6

I will discuss the application of the Principles of Just War more in the next chapter, but let me quickly elaborate on the tension between the requirement for public declaration and the secrecy required in covert operations. This dilemma can be resolved by analyzing how the public would respond to the operation if it were to become public; then the only justification for proceeding with the operation would be confidence that it would be justifiable and acceptable to the public. Secrecy is not

unique to covert operations; generally the public must have faith in those to whom special authority has been entrusted.

The Principles of Just War are but one set of principles valuable to the military. Other ethical resources include the Law of War, Code of Conduct, UCMJ, and the various service leadership manuals; all of these set forth values and principles which seek to provide the foundation for moral conduct. These sources are all valuable and essential documents, yet no codified ethical guidance exists anywhere in the military, except in the most general terms, such as mottos in praise of duty, honor, country, loyalty etc. What is missing is the type of specific professional guidance that exists in medicine, law, engineering, and other professions. What the military needs is a professional code of ethics. "Codes of professional ethics serve at least three distinct purposes: (1) they protect other members of society against abuse of the professional monopoly of expertise, (2) they 'define the professional as a responsible and trustworthy expert in the service of his client,'7 and (3) in some professions they delineate the moral authority for actions necessary to the professional function but generally impermissible in moral terms."8 Such codes should also provide a foundation for ethical decision-making and provide an element of protection from criticism, or even prosecution, to those who adhere to the code.

Let us look deeper into the matter of delineating the moral authority for actions necessary to the professional function but generally impermissible in moral terms, which is known as a differentiated role. For example, a lawyer is required to hold information provided by a client as privileged even if that client admits guilt. The only time this may be violated is to preclude another crime. In fact, in a case in 1973, a murderer admitted to his lawyers that he had not only committed the murders he was charged with, but had committed two others. He even told them where the bodies were. When the lawyers were asked if they had information about missing persons in the vicinity of the crime of their client, they declined to comment; none the less, they knew the whereabouts of the other dead victims. Their reticence delayed finding and burying the other victims. When their decision became public knowledge, there was outrage. Yet they were required to protect the information provided by their client. This seemingly immoral act was required to protect one of the foundational principles of our adversary legal system. These attorneys' behavior is accounted for through their "differentiated role."[9] In the case of the military, death and destruction are an inherent part of the profession; likewise lying is an inherent part of covert operations. Defining differentiated roles could provide valuable guidance in these areas.

Codified ethical guidance is not a new idea. In researching this study, I have read several proposed codes. However, none has gained wide acceptance in the military. I feel this is partly due to problems in obtaining general agreement on what the guidance should be and partly on the fear that if the guidance doesn't cover all situations, someone will take advantage of the loopholes.

I do not share these reservations. The military should follow the lead of other professions and address the unique ethical aspects of the profession. The guidance provided to society in general is adequate in most areas and need not be repeated in the code. Only issues peculiar to the mililitary profession or those with special consideration need to be addressed Next, the military should address the concept of a differentiated role. Nowhere else are people ethically and legally allowed to cause death to noncriminals and destruction. And while lying is not unique to military covert operations, it requires special consideration. Finally, the fear of loopholes is not justified. The guidance would complement existing regulations not replace them. Ethics and law are not in competition. Most law has its foundation in ethical principles, but the principles cannot substitute for law. Guidance can only help not hurt.

Codified ethical guidance would also help provide focus on ethical decision-making. Kenneth H. Wenker makes the following observation:

> ... ethical failings in the armed services are not found primarily in people who do what they judge to be wrong. Nor is it found in people who make poor judgements about right and wrong. ...it is found in the fact that too many of us often fail to see that the problems we deal with on a daily basis are in fact ethical problems. We don't make bad ethical judgements, but all too often we make no ethical judgement at all - at least not consciously.10

Simply having a code would not increase consciousness, but it would provide a foundation in ethical decision-making for the profession. Thereafter, education and training would enhance both the focus and consciousness of the code. Such focus and consciousness are essential in covert operations where small- unit independent operations are routine and critical decisions with far-reaching implications must be made without the benefit of advice from the chain of command. The ability to make sound ethical decisions here is essential. Merely following rules, in a murky area where rules don't always apply, is not sufficient.

ENDNOTES

1. Webster's Ninth New Collegiate Dictionary, 1984, p. 426.
2. Ibid., p. 771.

3. James Rachels, The Elements of Moral Philosophy, p. 1.

4. Ibid., p. 11.

5. James T. O'kelley, Jr., Moral and Ethical Aspects of Military Leadership, p. 12.

6. James C. Corney, "Is it Ever Moral to Push the Button?" Parameters, March 1988, p. 76.

7. Anthony E Hartle, Moral Issues in Military Decision Making, p. 26. These concepts are discussed by Bengt Abrahamsson, Military Professionalism and Political Power, (Beverly Hills, Calif.: Sage, 1972), p. 69.

8. Ibid., p. 26.

9. Ibid., pp. 5-7.

10. Kenneth H. Wenker, "Military Necessity and Morality," Military Ethics Reflections on Principles-the Profession of Arms, Military Leadership, Ethical Practices,, War and Morality, Educating the Citizen-Soldier, p. 181.

CHAPTER III

COVERT OPERATIONS

Covert action, defined in Executive Order 12333 of December 4, 1981, is referred to as "Special Activities."

> Special activities means activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions.1

This definition clearly reflects concern over the abuses of the "Watergate Era". It tells more about what special activities are not than what they are. NSC 10/2, approved in 1948, described covert operations as:

> propaganda, economic warfare; preventive direct action, including sabotage, anti-sabotage, demolition and execution measures; subversion against hostile states, including assistance to underground resistance movements, guerrillas and refugee liberation groups, and support of indigenous anti-communist elements.2

NSC 10/2 provides a much clearer definition. It also addresses the issue of "plausible denial": "Operations were to be so planned and executed that any U.S. Government responsibility for them is not evident to unauthorized persons and that if uncovered

the U.S. Government can plausibly disclaim any responsibility for them."3 It is just as important to know who can conduct covert operations and under what circumstances they may be conducted as it is to define such operations. Executive Order 12333, in discussing the duties and responsibilities of the CIA, states:

> Conduct special activities approved by the President. No agency except the CIA (or the Armed Forces of the United States in time of War declared by Congress or during any period covered by a report from the President to the Congress under the War Powers Resolution) ...may conduct any special activity unless the president determines that another agency is more likely to achieve a particular objective...4

But what makes covert operations unique? Covert operations seek to conceal the sponsor of the action, unlike clandestine operations, which seek to conceal the operation itself. This requires a cover story which in turn requires lying in some form. It is as simple as that. However, should the operation be uncovered, the involvement of the U.S. government must be concealed to the extent that it can be plausibly denied. Plausible denial involves lying not only to foreign governments but also to the American public. Therefore, lying and the moral implications of lying are the source of considerable criticism of covert operations of any kind. Additionally, covert operations as well as espionage are illegal everywhere in the world.5 Therefore, in conducting covert operations, the U.S. government is

engaging in actions that interfere in the internal politics of a nation, that are illegal (by international law), and that are unethical and immoral in terms of individual standards.

Ideally, individual ethical standards and the standards of nations should be the same. However, a nation must take necessary actions to defend itself and the way of life established for its citizens. David Atlee Phillips states:

> Clandestine [and covert] operations have been condemned as immoral in principle and illegal in practice. This attitude naively side steps the problems of existing and indeed, surviving in a world whose history continues to be determined by nations promoting their own interests at the expense of others, the League of Nations, United Nations, and similar laudable endeavors notwithstanding. More to the point, it would have the United States compete in the international arena blindfolded and with one hand tied behind its back. The grim state of world affairs is neither likely to improve much in our time nor, for that matter, in our children's or grandchildren's. Until it does, the nations of the world will continue to insist on their sovereign right to defend and advance their interests through clandestine [and covert] operations, restricting any question of immorality or illegality to cases uncovered within their own national boundaries.6

One may respond that it still doesn't make such operations right even if they are necessary. Indeed covert operations are considered "dirty business" by many. However, the overriding consideration must be the good of mankind. If there is more good created than bad, then there is ethical validity to the action.

This is not a new idea. Abraham Lincoln in a speech to the Thirtieth Congress in 1848 said,

> The true role in determining to embrace or reject anything is not whether it have any evil in it, but whether it have more evil than good. Almost everything, especially of government policy, is an inseparable compound of the two; so that our best judgement of the preponderance between them is continually demanded. On this principle, the President, his friends, and the world generally, act on most subjects. Why not apply it then, upon this question? ...Why, as to this magnify the evil, and stoutly refuse to see any good in them?7

This moral precept and the Principles of Just War (presented in Chapter II) indeed offer a solid foundation for the proper authorization and conduct of covert operations.

Let us look now at some questionable U.S. covert operations that have received considerable criticism, applying the Principles of Just War to them. I will not draw conclusions in all cases, but merely pose questions in some. Was there just cause for U.S. involvement in Guatemala in the 1950s and in Chile in the 1960s? Or were we merely trying to protect U.S. business interests? Is protecting U.S. business interests just cause? Is U.S. involvement in Chile to preclude the free election of a pro-communist president just cause? Did President Nixon exercise legitimate authority in conducting what was known as "Tract II" of the activities to preclude the election of Allende in Chile which bypassed the State and Defense Departments as well as the U.S.

Ambassador to Chile? At that time no "finding" was required and no congressional oversight existed. But why bypass one's trusted advisors? It is hard to say exactly what would have happened had Allende remained in power, but the Pinochet presidency brought to Chile a harsh military dictatorship. I feel that helping facilitate the Pinochet presidency seriously violated the principle of proportionality (more good than evil should result). U.S. covert involvement in Nicaragua, which bypassed congressional authorization and oversight, clearly violates the principle of legitimate authority. It also violates the principle of public declaration. Neither the Congress nor public opinion was in support of lethal aid to the "Contras".

One of the problems with the Iran/Contra affair deals with the concept of plausible denial. Plausible denial is designed to hide the involvement of the U.S. government, not of the U.S. president. Once the operation is uncovered and U.S. involvement is known, continued denial is inappropriate. By continuing to deny knowledge, President Reagan put himself in a no-win situation. Either he did not know what he was responsible to know as a leader or he was refusing to be held accountable. Both explanations constitute immoral behavior for a leader.

Another problem dealing with "Iran/Contra" is that the U.S. government secretly violated its own foreign policy. Having a

secret policy contrary to a stated policy can and does create a "tangled web" far too complex to manage.

It is necessary to discuss questionable actions because there is considerable empirical evidence to indicate that improvement is necessary in designating what covert operations are authorized. Execution of these operations on the other hand, has received little criticism. But the operations of Lieutenant Colonel North provide an exception. Colonel North clearly over-stepped the authority of an National Security Council advisor when he assumed operational responsibilities. However, his actions should in no way impugn the record of professional covert operators.

John B. Clomeau (PHD, CIA) elaborates on the Principles of Just War and proposes ethical guidance specific to covert operations, including authorization and conduct. He suggests that:

-- they be supportive of our foreign policy (be it either the overtly stated aims of the government, or our secret objectives.)

-- they be for a just cause.

-- they not be in violation of U.S. law, executive order, or internal regulations.

-- there be a reasonable likelihood of success.

-- anticipated benefits outweigh the the risks anticipated in the operation. (There may be instances where extremely risky operations with little likelihood of success are undertaken because the potential payoff is great.)

-- the American people would approve if they knew and understood what was at stake. 8

If the differentiated role is applied to provide guidance on when lying is appropriate and to whom and when plausible denial is aporopriate, the guidance would be further enhanced. This I have already discussed in Chapter II. This guidance for following the rules is simple and clear and would have precluded many of the problems of "Iran/Contra."

The abuses of the last two decades have embarrassed the nation. Future covert operations must be legitimate, essential and clearly in the best interest of the nation and mankind. They must not harm national prestige. The prestige of the nation has suffered significant damage and the trust of our allies has been severely tested. This nation cannot continue to suffer such losses indefinitely without serious consequences. William H. Webster, Director of Central Intelligence, recently discussed management improvements at the CIA. Included in these management improvements were new guidelines for internal monitoring and

review of covert operations (no details were provided).[9] As the CIA has primary responsibility for covert operations, these guidelines should apply to the military as well.

ENDNOTES

1. Executive Order 12333, United States Intelligence Activities, December 4, 1981, p. XII-21.

2. Gregory F. Treverton, Covert Action the Limits of Intervention in the Postwar World, p. 36.

3. Ibid.

4. Executive Order 12333, pp. XII-8, 9.

5. David Atlee Phillips, Careers in Secret Operations: How to be a Federal Intelligence Officer, p. 36.

6. Ibid., pp. 37-38.

7. Ibid. pp. 79-80.

8. John B. Chomeau, Covert Action.

9. Remarks by William H. Webster, Director of Central Intelligence, May 23, 1988, p. 3.

CHAPTER IV

CHUYEN CASE STUDY

The following case study is a story of murder, conspiracy to murder, and conspiracy to murder (unfounded). I have selected the case because of the ethical dilemmas created for the accused individuals and because the incident has its genesis in what appears to be a covert operation. Although the term covert operation is not used, reference to a highly sensitive, illegal, unilateral U. S. intelligence activity is made. Discussion of the operation, acknowledges that significant damage would be done to the relationship between the United States and the Republic of Vietnam if the operation were made public. Also, the operation could damage public opinion of the U.S. effort in Vietnam. Further, the concept of "plausible denial" is applied to the killing. Whether the operation fits the strict interpretation of "special activity" cannot be determined from the documents, but the operation certainly is covert in nature. The fact that I am using a military example of wrong-doing should not be taken as a contradiction to my argument that there is little empirical

evidence to show that there are problems in the military's conduct of covert operations. The incident occured over twenty years ago and appears to be unique to the turbulent environment of the era. The value of this case is in the study of the ethical dilemmas created and the responses to them.

The information is gleaned from the initial investigation which is unsigned and undated. It has been sanitized to protect sensitive information and the names of the accused. Although the incident is more commonly referred to by use of the unit commander's name, I will refer to it as the "Chuyen Case" by using the victim's name as the identifier. I will not use the names of any of the accused known to me, since all charges were dropped even though many of the accused admitted to involvement in the killing and cover-up.

In 1969 a detachment of a Special Forces Group in Vietnam obtained an incriminating photograph which appeared to be of Thai Khac Chuyen. Chuyen was a Vietnamese national working for the detachment and the photo created suspicion that Chuyen may be a North Vietnamese Army/Vietcong (NVA/VC) penetration agent. Chuyen was involved in the unilateral U.S. intelligence activity previously mentioned. Thus public disclosure of his activities or sharing the suspicion with Vietnamese Intelligence was not

desirable. While further investigation was essential, it was also essential to hold knowledge of that investigation very closely.

It was decided to tell Chuyen that he was being considered for a highly sensitive position which required that he be polygraphed. Chuyen accepted the requirement for polygraphing him. He was subsequently flown to Saigon, where he was subjected to intensive interrogation. Included in this process was interrogation under sodium pentathol. This included extended periods of sleep privation to enhance the effectiveness of the sodium pentathol. While Chuyen never admitted that he was an NVA agent, there were very solid indicators that he was in fact a very highly trained NVA agent.

After approximately five days of interrogation, Chuyen was returned to the Special Forces Group. During this time there were discussions between the group and CAS (which I am told is an acronym for the CIA in Vietnam whose meaning has not been released) on what to do with Chuyen. Also, Military Assistance Command Vietnam (MACV) was aware of the case. Several options were considered: release him and attempt to double him as an agent; turn him over to Vietnamese Intelligence; take him out of the country; eliminate him. Trying to double him as a U.S. agent was discarded as an option, especially in view of Chuyen's treatment under interrogation. Turning him over to Vietnamese

Intelligence was discarded due to the certainty that they would learn of the covert activity. Removing him from the country was not considered feasible. Therefore, elimination seemed the only remaining option. In some manner CAS gave the impression that this was their favored option. Allegedly, the decision was made by the Special Forces Group commander to eliminate Chuyen. Several statements substantiate this, including one which claims the colonel had said words to the effect that he was taking responsibility and "riding his eagles" on it. Thus planning began for what was considered the assassination of Chuyen. A dry run was made on one evening. The next evening the mission was carried out and Chuyen was eliminated.

Chuyen was administered two syrettes of morphine, bound with rope, and transported by 3/4 ton truck to a boat launch site. From there he was taken by assault boat to a predesignated area in the South China Sea and shot twice in the head with a .22 caliber pistol equipped with a silencer and then dropped into the sea with approximately 130 lbs. of tire rims and chains attached to his body. The killing was done by three U.S. Army officers.

The next morning a staff sergeant, unwittingly posing as Chuyen, was flown to Tay Ninh, RVN on the beginning of a fictitious mission from which Chuyen would never return. This trip was to provide the cover story for Chuyen's disappearance.

The cover went to the extent of having radio operators standing by for Chuyen's radio transmissions from Cambodia.

The day following the killing, a message was received at group headquarters from CAS instructing the group to release Chuyen or turn him over to Vietnamese Intelligence. Also both the MACV commander and his J-2 called inquiring about Chuyen. They were both provided the cover story.

Very shortly after the incident, another sergeant first class who had knowledge of the operation, but did not participate, became very concerned for his own welfare. He reasoned that since he was the only one who knew the entire story but did not participate, then his life was in danger. His concern for his life was the foundation for the charge of conspiracy to murder (unfounded). He subsequently turned himself in to the Office of the Special Assistant (I infer this to mean an office of the CIA) for protection and told them his reason for concern. His information provided the grounds for initiating an investigation which was undertaken by the J-2 of MACV.

Soon the commander of the group was interviewed and offered the option of taking a polygraph test. If the test showed nothing to indicate his involvement, he would be allowed to conduct the investigation at his level. The commander declined and made comments to the effect that if the Army didn't trust his word,

then maybe it was time for him to seek other employment. During the interview, the commander stuck to the cover story. But during a subsequent interview, after the participants in the killing had admitted to it, he merely changed his story to say that perhaps he had been given the cover story by his subordinates to allow for plausible denial and not involve the group or MACV.

In September 1969 the Secretary of the Army announced that the charges had been dismissed due to witnesses receiving executive immunity from releasing their testimony. This action effectively closed the investigation.1

There is insufficient information to pass judgement on the individuals in this case. I caution the reader not to condemn anyone on the basis of this short summary, but to ponder the moral implications of the actions.

The analysis begins with the selection of Chuyen to participate in such a sensitive unilateral U.S. operation, given the nearly impossible task of performing an adequate background investigation on a Vietnamese national. There may have been justification. I hope such justification was overwhelming.

Chuyen's treatment while under interrogation was questionable as well. Statements were made which would cause one concern about the treatment of Chuyen. For all practical purposes, he was a prisoner. He was held in excess of the twenty-four hours

allowable for Vietnamese nationals; sodium pentathol may have been used without proper authorization; he may have been mistreated while under interrogation. A unit's moral behavior is frequently evident in its handling of prisoners.

The assassination of Chuyen brings up numerous questions. Why would a commander at group level or below make a decision to assassinate an individual without authorization from higher authority? I understand that authorized assassinations were occurring in the conduct of the war, but I cannot imagine those decisions being made at Special Forces Group level. And how could any officer interpret the assassination of a person in custody as legal? Chuyen was either a Vietnamese national wrongly perceived as an agent, a spy, or an NVA soldier. If he was an NVA soldier, then he should have been treated as a prisoner-of-war. If he was in fact an NVA agent, then he should have been tried as a spy or war criminal. As far back as the U.S. civil war, U.S. Army General Orders No. 100 (1863), paragraph 148, states on assassination:

> The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, as a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage ...2

The case provides many instances of individual reservations toward killing Chuyen; a great deal of soul searching. Yet we see no remorse was evident at the death. Participants didn't like what they were doing, but they tried not to let their feelings influence their performance.3 None of this indicates that they even posed objections anywhere during the decision-making process.

The interpretation of plausible denial by the Special Forces Group commander causes me great concern. The purpose of plausible denial is to hide the hand of the U.S. government from foreign governments, not from those with a legitimate requirement to know. Providing the cover story to the MACV commander and sticking to a claim that he did not know the truth of the matter, even after the killing was admitted to, certainly lends credibility to the claim that the group commander was simply lying to the MACV commander about wrong-doing. The abuses of the concept of plausible denial in this case as well as in the Iran/Contra affair leads one to believe that specific guidance is required on when and when not to attempt to deny and to whom.

There were rules and regulations to prevent the immoral behavior in the Chuyen case. But would specific ethical guidance or ethical training and education have precluded it? One will never know. But such guidance, education and training can help to sensitize, focus, and increase consciousness of the ethical

responsibilities for one's decisions. Increased emphasis on ethical conduct may have precluded the nihilistic (amoral) approach to decision-making used in this case, which seemed devoid of respect for human life, as we saw in the death of Chuyen. No institution will ever totally eliminate individual wrong-doing. The best the military can do is to protect the integrity of the institution. This protection should be founded on sound leadership reinforced by constant training and education. Certainly those individuals who fail, must be held accountable for their failings. To do less is to condone the worst in human behavior.

ENDNOTES

1. Criminal Investigation Division, Report of Investigation 69 -CID 548-38250, closed, 18 Sep 69.

2. W. Hays Parks, Memorandum of Law; Subject, Executive Order 12333 and Assasination, Department of the Army, Office of the Judge Advocate General, 2 Nov 1989, p. 4.

3. CID R01 09-CID 548-38250.

CHAPTER V

CONCLUSIONS

The decade of the 1980s was marked by intense media coverage of covert and clandestine military operations. This coverage had a significant impact on the public's perception of ethical misconduct. Certainly some of the criticism is valid, as in the case of Iran/Contra. But it is beyond the control of the military to correct the behavior of personnel outside its span of control. The failures of personnel operating within the military system were common ethical failures for which sufficient guidance and law already existed. There is evidence of lack of supervision and accountability, for which corrective procedural controls have been effected. But there is little evidence of ethical misconduct in the actual performance of covert operations.

This does not mean, however, that improvements are not warranted. Covert operators must conduct their missions with extraordinary secrecy and autonomy. The ability to supervise the actions of the operators is limited by the very nature of the mission. Covert operations also require behavior not morally acceptable for society in general. This autonomy, coupled with the requirement to operate outside generally accepted standards of behavior, place tremendous demands on the covert operator. He

must be capable of making decisions which impact on the reputation of the nation without the luxury of consultation; futher, he must know when deviation from generally accepted standards is appropriate and when it is not. That is a tremendous burden. Covert operators are forced to operate in a murky environment where often the rules do not apply and ethical dilemmas are common. Lying and deceiving are essential to the trade. Cover stories are essential to mission accomplishment-- and to their very survival. However, they must know when and when not to lie, when and when not to use their cover, and when to stop role playing.

Ethical guidance is essential. Covert operators require ethical guidance that expands on the professional guidance that applies to overt military operations. Yet no codified guidance exists on which to expand. Both covert and overt military operations have unique requirements that necessitate deviation from normal individual ethical standards. This "differentiated role" must be addressed.

Existing guidance can be found in several sources. Yet most tend to focus on general principles such as honor, selflessness, integrity, etc. And there are many rules! Rules tell what one can and cannot do, but they do not necessarily provide much foundation for ethical reasoning. Proper guidance would provide a

foundation for sound ethical decision making. Remember, at the very heart of ethics is reasoning -- reasoning about what is right and wrong.

Guidance alone is not the solution. A conscious awareness and focus on the ethical implications of decisions requires education and training. Ethics tend to come more from the heart than head. Often reaction to an ethical dilemma is more a gut feeling than a cogent thought. Education and training would do much to bring ethics to the forefront of one's thought process. This process must be continuous to be effective. Like any other skill, one's ability to reason ethically will deteriorate if not exercised. Ethical education and training requirements are not unique to covert operators. All military personnel could benefit from increased emphasis. However, I can think of very few situations where the requirement for autonomous decision making on ethical dilemmas of significant magnitude is greater than that of the covert operator -- certainly not in peace time where covert operators are still engaged in combat activities.

Enhanced guidance, education, and training would be beneficial, but no guidance or law can preclude the improper action of a person determined to act immorally. The best the military can hope for is to reduce these failures to an absolute

minimum. The key to success is, as always, sound leadership and accountability.

CHAPTER VI

RECOMMENDATIONS

-- That codified ethical guidance be provided which focuses on the unique aspects of covert operations and provides a foundation for ethical decision making.

-- That two codes be developed:

a. a differentiated role code for conventional warfighters

b. a differentiated role code for covert operators

-- That ethical education and training be enhanced and taught continuously.

-- That this ethical education and training be initiated during entry level training and be developed and reenforced on a regular basis.

The potential benefits of incorporating these recommendations are significant and well within the capabilities of the military services to implement quickly without overburdening existing training schedules. A solid foundation in the professional ethics of covert operations is absolutely essential and these recommendations will provide a basis for that foundation.

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