

DIFFERENT WORLDS: UNACKNOWLEDGED SPECIAL OPERATIONS AND COVERT ACTION

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**DIFFERENT WORLDS: UNACKNOWLEDGED SPECIAL OPERATIONS AND
COVERT ACTION**

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The ability for the United States to employ special operations forces in denied areas, on secret, unacknowledged missions, is critical to our success in the current war and in future conflict. In the area of covert operations, there is an ongoing debate about the blurred operational lines between DoD-led “Title 10 operations” versus CIA-led “Title 50 operations.” This paper will examine the statutory and doctrinal definitions of covert action, to include the “traditional military activities” exception to the law; the legal requirements for using covert action as defined in law; and the policy issues surrounding the use of covert action. Under the law, special operations forces conducting missions where the role of the U.S. is unacknowledged are not conducting “covert action” within the meaning of the law, as long as those missions are under the command and control of a military commander in support of ongoing or anticipated hostilities (“Title 10 operations”).

DIFFERENT WORLDS: UNACKNOWLEDGED SPECIAL OPERATIONS AND COVERT ACTION

... a joint force with improved capability to operate covertly and clandestinely will be a more flexible and effective instrument of policy.”

—Admiral Michael G. Mullen
Chairman, Joint Chiefs of Staff¹

Since September 11th, 2001 and the beginning of the Global War on Terrorism, the role of special operations has increased significantly. Special operations forces played critical roles in OPERATION ENDURING FREEDOM and the initial invasion of Afghanistan; OPERATION IRAQI FREEDOM and the liberation of Iraq; and in numerous operations, classified and unclassified, across the globe. They will continue to do so. The role of special operations will only increase with the new emphasis on irregular warfare in the Department of Defense (DoD).² As special operations forces continue to fight the global war on terror, reaching more and more into denied areas and politically sensitive areas, covert, clandestine, and low-visibility operations will become critical tools.³

During World War II, the newly-formed Office of Strategic Services (OSS) deployed 93 three-man “Jedburgh” teams into enemy-occupied France on secret missions. These teams, consisting of two officers and one enlisted radio operator, parachuted into enemy territory to link up with the partisan fighters of the French Resistance to conduct classic unconventional warfare against the German forces, to include sabotage and hit-and-run attacks.⁴ Assuming the United States wanted to conduct a similar operation today in support of the Global War on Terrorism, but intended to deny the role of the U.S. if the teams were captured or discovered, would this covert mission fall to the Central Intelligence Agency (CIA) or DoD? Prior to 9/11,

this might have been a largely academic argument; today, it is an important, ongoing debate about the blurred operational lines between the CIA on one hand and DoD special operations forces hunting terrorists worldwide on the other.⁵ The debate is sometimes couched in terms of DoD-led “Title 10 operations” versus CIA-led “Title 50 operations,” referring to the respective United States Code titles that give each agency its authority.

The debate is more than a question of roles and missions or funding. More importantly, given the important policy concerns surrounding the use of covert action, it matters significantly whether a CIA operative or a military special operator conducts the mission. This can be controversial. For example, a recent Congressional Research Service report suggests that DoD may have authorized special operations that, although falling within the statutory meaning of covert action, did not have the requisite Presidential finding and Congressional notification.⁶ Other critics echo that claim and accuse the Bush administration of bypassing the legal requirements on covert action by using special operations forces rather than the CIA.⁷

This paper will examine the statutory and doctrinal definitions of covert action, to include the “traditional military activities” exception to the law; the legal requirements for using covert action as defined in law; and the policy issues surrounding the use of covert action. As will be seen, special operations forces conducting missions where the role of the U.S. is unacknowledged are not conducting “covert action” within the meaning of the law, as long as those missions are under the command and control of a military commander in support of ongoing or anticipated hostilities (“Title 10 operations”). These operations would not rise to the statutory level of “covert action”

and thus would not require the Presidential finding and Congressional notification; however, due to underlying policy concerns, similar approval and notification is recommended.

Defining “Covert Action”

Under federal law, “covert action” is defined as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly....”⁸ Covert action is another means of exercising national power in pursuit of national interests; however, unlike “soft power” or overt military action, covert action is used in those situations where the United States does not wish its exercise of power to be known. Covert action is a third option when “soft” exercises of national power, such as diplomacy, economic sanctions, or informational power, are ineffective in influencing conditions abroad on one hand, while the use of overt military force is undesirable or not feasible on the other.⁹

Historically, covert action has been used by the United States since the Revolutionary War.¹⁰ With the creation of the CIA following World War II, its use has arguably increased. Under the Truman presidency, concern over the growing threat of Communism led to the new National Security Council (NSC) directing the CIA to begin peacetime covert operations. In 1948, the NSC defined covert action as:

propaganda; economic warfare; preventive direct action, including sabotage, demolition and evacuation measures; subversion against hostile states, including assistance to underground resistance movements, guerrillas and refugee liberations [sic] groups, and support of indigenous anti-Communist elements in threatened countries of the free world.¹¹

Covert action is traditionally divided into three categories: propaganda, paramilitary operations, and political action. Propaganda involves disseminating a specific messages or viewpoints to a target audience. As an example, in the late 1940's, the U.S. covertly used propaganda to assist anti-communist political parties in Italy and France during close elections. Paramilitary operations involve training, equipping, and supporting paramilitary groups in target countries. A successful example is our support of the Afghanistan guerrilla fighters during the Soviet invasion of the 1980's; an example of an unsuccessful paramilitary operation is the failed Bay of Pigs invasion of Cuba in the 1960's. Finally, political action involves influencing the political situation in a particular country, whether by influencing current government officials, election results, economic situations, or civic groups.¹² Political activities may also involve coups, such as the U.S. covert involvement in Chile in the late 1960's and early 1970's against the government of Salvador Allende.¹³

Covert action is sometimes referred to as the "third option" of American policy, allowing the government to influence other nations, whether friendly or enemy, in areas of national interest, without overtly revealing its hand or resorting to military action.¹⁴ The "plausible deniability" inherent in covert action allows the United States to pursue national interests in areas otherwise denied to a U.S. presence. Additionally, the use of covert action may allow the U.S. to influence a peer or near-peer competitor without the risk of escalation or military conflict. This was particularly important during the Cold War, as both the United States and the Soviet Union used covert action to avoid a larger conventional war between the two super-powers.¹⁵ Finally, although secret by definition, federal law requires Presidential approval and significant executive and

legislative oversight (by members of both political parties) of covert action, which reduces the risk of “rogue” programs.¹⁶

The first statutory definition of “covert action” was enacted in 1991 in an amendment to the National Security Act of 1947. Federal law defines covert action as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly....”¹⁷ The law also excludes the following categories from the statutory definition of covert:

- (1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;
- (2) traditional diplomatic or military activities or routine support to such activities;
- (3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or
- (4) activities to provide routine support to the overt activities (other than activities described in paragraph (1), (2), or (3)) of other United States Government agencies abroad.¹⁸

The critical exception to the definition of “covert action” for the special operations community is the “traditional military activities” exception, which will be covered in detail below.

Adding to the confusion, Executive Order 12333, which pre-dates the 1991 amendment to the National Security Act, uses the phrase “special activities” to describe covert action.¹⁹ The executive order defines “special activities” as:

...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.²⁰

There are some key distinctions between the statutory definition of “covert action” and the executive order definition of “special activities.” Whereas the scope of covert actions are limited to those seeking “to influence political, economic, or military conditions abroad,” the scope of special activities is much broader, including all activities “in support of national foreign policy objectives abroad.” The distinction is subtle, but nevertheless important. More importantly, the executive order definition of special activities does not have an exception for traditional military activities, a critical exception for special operations which will be examined in more detail later in this paper.

By its own terms, however, the executive order only applies to the intelligence community and intelligence activities.²¹ This would not include special operations forces on an operational mission under the command of a military commander. The DoD elements of the Intelligence Community (IC) only include the National Security Agency (NSA), the Defense Intelligence Agency (DIA), the “offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs,” and “the intelligence elements of the Army, Navy, Air Force, and Marine Corps.”²² The National Security Act definition of the IC is similar with respect to DoD.²³ Notably, neither definition presumes that special operations units, conducting special operations missions, would fall within the definition of the intelligence community.

The Exception That Swallows the Rule: "Traditional Military Activities"

As noted above, the statutory definition of "covert action" excludes traditional military activities. By the terms of the statute, if a military operation fell within the meaning of traditional military activities, then it would not be covert action and would not be subject to the Presidential findings and Congressional notification requirements of the statute.²⁴ In 1990, President Bush, in his statement to Congress regarding the proposed statutory definition of covert action, stated:

I believe that the Act's definition of "covert action" is unnecessary. In determining whether particular military activities constitute covert actions, I shall continue to bear in mind the historic missions of the Armed Forces to protect the United States and its interests, influence foreign capabilities and intentions, and conduct activities preparatory to the execution of operations.²⁵

The term "traditional military activities" is not further defined in the statute. It is, however, further explained in the legislative history accompanying the bill signed into law.²⁶ In the conference report accompanying the bill, the conferees indicated what constituted traditional military activities in the eyes of Congress. Essentially, the conferees drew a bright line at military operations under the control of a military commander in support of ongoing or anticipated hostilities:

It is the intent of the conferees that "traditional military activities" include activities by military personnel under the direction and control of a United States military commander (whether or not the U.S. sponsorship of such activities is apparent or later to be acknowledged) preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities for the activities and for operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving United States military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly. *In this regard, the conferees intend to draw a line between activities that are and are not under the direction and control of the military commander.* Activities that are not under the direction and control of a military commander should not be considered as "traditional military activities." [emphasis added]²⁷

This is an extremely expansive and broad definition, particularly in a “global” war on terrorism. One expert in this field notes that “covert operations conducted by special operations forces during wartime *clearly do not require* a presidential finding and congressional notification.”²⁸

The more difficult issue, however, is what is considered traditional military activities “in anticipation of hostilities;” that is, outside “ongoing hostilities” in an active combat zone such as Iraq or Afghanistan. The Department of Defense interprets that window of anticipated hostilities very broadly in the current conflict-- years in advance, as long as operational planning for an area is being conducted.²⁹

The Senate report on the bill, prior to the joint conference, had much more restrictive language regarding traditional military activities. Under the Senate version, the traditional military activities exception would not have included “an operation to achieve a military or political objective abroad where there is no intent to acknowledge the involvement or sponsorship of the United States” when carried out by “military elements who are not identifiable to the United States.”³⁰ The Senate language focused on the acknowledgement issue, whereas the final conference report focused on the command and control of the operation. The final conference report, adopted by the joint conference for the final version of the bill, is much broader.

In the face of increased special operations activity worldwide since 9/11, Congress revisited—but did not change--the definition of “traditional military activities” in 2003. In light of the issues of Congressional oversight and DoD’s stance on “anticipated hostilities,” the Senate Select Committee on Intelligence tried to clarify traditional military activities by explicitly declaring all unacknowledged special

operations activity in foreign countries where U.S. military forces were not already present to be “covert action” within the meaning of the statute. DoD and the Congressional armed services committees “strongly disagreed” with this proposed language,³¹ and DoD apparently won the argument; in November 2003, in the intelligence authorization act, the intelligence committees reaffirmed the “functional definition of covert action” without changing it.³²

Statutory Requirements for the Use of Covert Action

Determining whether an unacknowledged special operations mission meets the statutory definition of “covert action” is critical, because if it does, it must be preceded by a Presidential finding and Congressional notification. The National Security Act requires the president to make a finding in order to determine that the action “is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States....”³³ The Act requires that the President make the finding in writing in advance unless time does not permit; in that case, a written record of the oral finding must be made and reduced to a finding within 48 hours. The finding must specify all federal agencies participating in the action, as well as any third parties involved, and the finding cannot violate a US law or the Constitution. The statute identifies the Central Intelligence Agency (CIA) as the lead for covert action. Finally, the 1991 amendments specified that the President must keep the congressional intelligence committees informed, or, in extraordinary circumstances, certain limited members of those committees.³⁴

Policy Issues with Covert Operations

Covert action raises a number of important policy issues. First, many question the legitimacy of covert action. Some critics argue that covert action violates the principles of international law and the United Nations charter, as it involves “meddling” in the affairs of another sovereign nation-state without a legitimate mandate or resolution to do so.³⁵ In addition, covert action may be considered an act of war by the target nation.³⁶ There is some concern that the secrecy of covert action creates a lack of accountability and transparency, despite the oversight requirements. Covert propaganda raises the specter of “blowback,” which refers to the risk of a story planted in foreign media that then gets picked up by the U.S. media and reported in American media. Finally, particularly with larger paramilitary operations, there is a risk of discovery and public disclosure, which may have adverse consequences for the U.S. administration.³⁷ Public disclosure of a covert action could embarrass the U.S. government, as well as the government of the target country, and could effectively limit or even reverse the foreign policy gains sought from the covert action in the first place.

Beyond those policy concerns, the use of special operations forces in secret, denied operations, whether or not they rise to the statutory level of “covert action,” raises additional concerns. First, because the special operations forces would undoubtedly be out of uniform and posing as civilians, they might lose the international protections they enjoy under the Geneva Conventions. One commentator noted that even though the individual operators on the mission might be volunteers, their discovery or capture might presumably endanger other soldiers’ protections worldwide or adversely affect morale.³⁸ Unacknowledged special operations, while still raising the same policy concerns as CIA covert action, would arguably be subject to much less

oversight and review, since the operation would not have the Presidential finding and Congressional oversight. Such operations could conceivably be planned and approved wholly within DoD, lacking transparency and accountability.³⁹

“Covert Operations” in Joint Doctrine

Despite these policy issues, it is clear that DoD recognizes an expanded role for special operations forces to conduct clandestine and covert operations. In his recent *Capstone Concept for Joint Operations*, the Chairman of the Joint Chiefs of Staff (CJCS) recognized that the U.S. military needed to improve its ability to conduct covert and clandestine operations, in order to employ military power while minimizing political repercussions—a task difficult to do with the overt employment of forces. He also recognized, without elaboration, that some developing situations might require secret preemptive action in order to prevent a crisis that would require the large, overt employment of forces. He indicated some countries might welcome U.S. military assistance but be unable politically to acknowledge it, and in other cases, it might be in the U.S. interest to act in covertly or clandestinely when overt military action was “politically unacceptable.”⁴⁰

Presumably, when the CJCS refers to covert operations in joint documents, he is referring to the doctrinal definition of covert which, unfortunately, is completely different from the statutory definition. For the military practitioner, determining whether an unacknowledged special operation legally constitutes “covert action” can be somewhat frustrating. The statutory definition of “covert action” differs distinctly from the definition of “covert operations” found in joint doctrine.

In joint doctrine, a covert operation is defined as:

an operation that is so planned and executed as to conceal the identity of or permit plausible denial by the sponsor. A covert operation differs from a clandestine operation in that emphasis is placed on concealment of the identity of the sponsor rather than on concealment of the operation.⁴¹

This definition focuses solely on concealment of the sponsor, and does not address the strategic level foreign policy element of the statutory definition (“to influence political, economic, or military conditions abroad”) or include the critical “traditional military activities” exception found in the statute. It is conceivable that an unacknowledged special operation could be considered “covert” under the DoD definition yet not rise to the threshold of the statutory definition of covert action. This is a critical distinction, because any operation deemed to be covert action under the statute will require Presidential findings and notice to Congress.

Joint doctrine contrasts covert operations with “clandestine operations,” which are defined in joint doctrine as:

an operation sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment. A clandestine operation differs from a covert operation in that emphasis is placed on concealment of the operation rather than on concealment of the identity of the sponsor. In special operations, an activity may be both covert and clandestine and may focus equally on operational considerations and intelligence-related activities.⁴²

Adding to the confusion, joint doctrine adds a third category called “low visibility operations:”

Sensitive operations wherein the political-military restrictions inherent in covert and clandestine operations are either not necessary or not feasible; actions are taken as required to limit exposure of those involved and/or their activities. Execution of these operations is undertaken with the knowledge that the action and/or sponsorship of the operation may preclude plausible denial by the initiating power.⁴³

Other than this definition, found in the DoD Dictionary of Military and Associated Terms, the term “low visibility operations” is not further explained or defined in the joint

publication on special operations. The term “low visibility operations” does appear in the new DoD policy on irregular warfare, discussed below.

Frankly, these doctrinal distinctions are somewhat unclear. If “covert” means the sponsor is secret, while “clandestine” means the operation itself is secret, does this distinction include the results of the operation? For example, if a special operations team successfully conducts a secret operation to sabotage a bridge, making it collapse in a way that appears to be accidental structural failure, is this a clandestine operation? The operation is secret, but the results are clearly not—the locals would know the bridge was damaged. On the other hand, is it covert just because the special operations team was successful enough to remain undetected throughout? The difficulty with the DoD definitions is that, if an operation remains completely secret (i.e., is successful), then the sponsor almost certainly remains secret as well, unless the U.S. intends to later acknowledge the operation.

Adding to the uncertainty, the Under Secretary of Defense for Intelligence, General James R. Clapper, Jr., addressed this issue in his written answers to the Senate Armed Services Committee’s advance policy questions before his confirmation hearing. When asked whether military counterterrorism activities constituted covert actions within the meaning of the law, he responded in the negative, but added this:

Clandestine activities—a term that is not statutorily defined—are those activities conducted in secret, but which are, in an intelligence context, passive in nature. For me, the crucial distinction lies in whether an activity is “passive” (which is the case with intelligence activities) or “active” (which is the case with covert action). It is my understanding that military forces are not conducting “covert action.”⁴⁴

Although he added the caveat “in an intelligence context” and “which is the case with intelligence activities,” his response fails to address special operations which go beyond

intelligence gathering, such as sabotage or the use of paramilitary forces in unconventional warfare. Those missions, while “active” in a very real sense, do not rise to the statutory level of covert action even if the U.S. role is publicly denied. Nor do they fit neatly within the doctrinal definitions of clandestine or low visibility. It is clear the doctrinal definitions need to be revised to reflect the current law.

Irregular Warfare and Paramilitary Operations

Nowhere is the need for clarity more important than in the area of paramilitary operations, a subset of irregular warfare. Irregular warfare is gaining prominence within the Department of Defense (DoD); in fact, new DoD policy makes irregular warfare “as strategically important as traditional warfare.”⁴⁵ Irregular warfare is defined as:

A violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s). Irregular warfare favors indirect and asymmetric approaches, though it may employ the full range of military and other capacities, in order to erode an adversary's power, influence, and will.⁴⁶

In order to be successful in irregular warfare, DoD intends to “extend U.S. reach into denied areas and uncertain environments by operating with and through indigenous foreign forces.”⁴⁷ Such warfare is a separate mission from training and advising a country's own military forces in order for that country to protect its own sovereignty. Operating through indigenous forces to extend U.S. reach essentially involves the use of surrogate or paramilitary forces to achieve U.S. national interests in areas where U.S. military cannot go easily (or at all). In order to accomplish this, US Special Operations Command (USSOCOM) must “develop [special operations forces] capabilities for extending U.S. reach into denied areas and uncertain environments by operating with and through indigenous foreign forces or by conducting low visibility operations.”

For example, unconventional warfare, a subset of irregular warfare, involves the use of indigenous or surrogate forces, to include paramilitary forces, to conduct guerrilla warfare, subversion, sabotage, intelligence activities, and unconventional assisted recovery.⁴⁸ The Army field manual on UW states that the “conceptual core” of unconventional warfare is “working by, with, or through irregular surrogates in a clandestine and/or covert manner against opposing actors.”⁴⁹ These unconventional warfare operations, if conducted by the CIA, would be considered special activities and/or covert action. However, if conducted by a combatant command using special operations forces, under the command of a military commander, these operations would not rise to the level of covert action as defined in statute, even if the role of the U.S. was unacknowledged.

Unfortunately, paramilitary operations are one area where some commentators have accused the military in general, and special operations in particular, of encroaching on the CIA’s traditional turf. Both DoD and the CIA have conducted paramilitary operations since World War II, dating back to their common history in the Office of Strategic Services.⁵⁰ The CIA has conducted paramilitary operations since its creation in 1947, to include the failed Bay of Pigs operation in Cuba in 1961, efforts in Laos during the Vietnam War, and recent operations in Afghanistan in 2001.⁵¹

Despite this history, the 9/11 Commission recommended shifting the responsibility of directing and executing *all* paramilitary operations, *to include clandestine or covert operations*, from the CIA to the Defense Department under USSOCOM. The report concluded that while USSOCOM had developed paramilitary capabilities, the CIA had failed to do so and was relying on improperly trained foreign

personnel under contract. The Commission felt the military was better suited to run paramilitary operations in the current environment.⁵²

In fact, Congress has recently increased the capability of DoD to conduct paramilitary operations by creating a new paramilitary funding mechanism for USSOCOM. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Section 1208, permitted U.S. special operations forces to pay and equip foreign forces or groups supporting the U.S. in combating terrorism. Previously, DoD forces had to go to the CIA for this funding.⁵³ Referring to Section 1208 funds in his 2008 USSOCOM Posture Statement before the Senate Armed Services Committee, Admiral Eric Olson, commander of USSOCOM, stated that “a most important tool in our ability to build the capacity of partner nations to conduct counterterrorism or stability operations is our continued authority to train and equip foreign military forces.”⁵⁴ Admiral Olson added that these authorities “have made a big difference in developing carefully selected counterpart forces.”⁵⁵

Paramilitary operations are a critical tool in the war on terrorism, and the role of special operations forces will continue to grow in this area. It is likely that as it does, USSOCOM will find it necessary to deny the role of U.S. forces in sensitive or denied areas, particularly in the case of UW. In those cases, as long as the special operations forces remain under a military commander, these paramilitary operations will not be “covert” within the legal meaning of the phrase.

Recommendations

Success in irregular warfare requires the capability for special operations forces to conduct secret and unacknowledged operations in countries where hostilities are

ongoing or anticipated. In order to clarify some of the underlying authorities, and address the policy concerns with covert and clandestine operations, DoD should consider the following recommendations:

1. Revise the joint doctrinal definition of “covert operations” to make it consistent with the statutory definition, as follows:

A covert operation is an operation under the command and control of an intelligence agency, to include DoD intelligence agencies, 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. Covert operations are so planned and executed as to conceal the identity of or permit plausible denial by the sponsor. Operations under the command and control of a military commander, in support of ongoing or anticipated hostilities, are not covert operations even though the role of the United States will not be apparent or acknowledged publicly.

2. Re-define “clandestine operations” in joint doctrine as follows to encompass all secret military operations:

Within DoD, a clandestine operation is a special operations mission conducted under the command and control of a military commander, in support of ongoing or anticipated hostilities, in such a way as to assure secrecy or concealment of the operation itself. The role of the United States may or may not be acknowledged in clandestine military operations.

3. In order to increase accountability, require Presidential approval for all clandestine special operations conducted in countries where hostilities are anticipated (rather than ongoing hostilities), a military commander will be in command, and it is intended that the role of the United States will be unacknowledged. If special operations forces participate in a true covert action (i.e., not a traditional military activities but under the control and direction of an intelligence agency), then the statutory requirements for a finding and Congressional notification would apply.

4. In order to increase accountability with Congress, the President should notify select members of the Senate and House armed services committees when special operations forces will conduct clandestine or low-visibility operations in countries where hostilities are anticipated (rather than ongoing hostilities), a military commander will be in command, and it is intended that the role of the United States will be unacknowledged. This will be particularly important if the operation is later discovered or acknowledged. Because special operations under a military commander are not intelligence activities under the law, these operations would not and should not fall within the jurisdiction of the Senate and House intelligence committees. Special operations should remain within the jurisdiction of the armed services committees.

5. Ensure that any special operations forces participating in clandestine or covert operations fully understand the legal implications of their actions and their status if captured or detained in a foreign country. Once the commander ensures all participants are fully informed of the risks and implications, he must ensure that all participants are volunteers.

Conclusion

The ability for the United States to employ special operations forces in denied areas, on secret, unacknowledged missions, is critical to our success in the current war and in future conflict. Covert and clandestine special operations are an important tool for the President to employ in safeguarding our national interests when neither overt military force nor soft power is feasible. Unless and until Congress modifies the law, unacknowledged special operations under the command of a military commander

should not be considered “covert action” but should be undertaken with similar safeguards.

Endnotes

¹ U.S. Department of Defense, *Capstone Concept for Joint Operations*, Version 3.0 (Washington, DC: U.S. Department of Defense, January 15, 2009), 32, http://www.jfcom.mil/newslink/storyarchive/2009/CCJO_2009.pdf (accessed February 10, 2009).

² Department of Defense, *Irregular Warfare*, DoD Directive 3000.07 (Washington, DC: U.S. Department of Defense, December 1, 2008), 2, <http://www.dtic.mil/whs/directives/corres/pdf/300007p.pdf> (accessed February 12, 2009), declaring irregular warfare to be as strategically important as traditional warfare.

³ U.S. Joint Chiefs of Staff, *Doctrine for Joint Special Operations*, Joint Publication 3-05 (Washington, DC: U.S. Joint Chiefs of Staff, December 17, 2003), I-1, http://www.dtic.mil/doctrine/jel/new_pubs/jp3_05.pdf (accessed February 2, 2009).

⁴ Central Intelligence Agency, *The Office of Strategic Services: America's First Intelligence Agency* (Washington, DC: Central Intelligence Agency, March 15, 2007), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/oss/art05.htm> (accessed February 4, 2009).

⁵ See, for example, Eric Schmitt, “Clash Foreseen between CIA and Pentagon,” *New York Times*, May 10, 2006, <http://www.nytimes.com/2006/05/10/washington/10cambone.html> (accessed February 12, 2009).

⁶ Alan Cumming, *Covert Action: Legislative Background and Possible Policy Questions* (Washington, DC: Library of Congress, Congressional Research Service, December 1, 2008), 1, http://assets.opencrs.com/rpts/RL33715_20081201.pdf (accessed February 6, 2009).

⁷ Jennifer D. Kibbe, “Covert Action and the Pentagon,” *Intelligence and National Security* 22, no. 1 (February 2007): 63, <http://dx.doi.org/10.1080/02684520701200806> (accessed December 19, 2008).

⁸ *National Security Act of 1947*, Public Law No. 235, 80th Cong. (July 26, 1947), as amended by Public Law 102-88 (August 14, 1991), sect. 503.

⁹ William J. Daugherty, *Executive Secrets: Covert Action and the Presidency* (Lexington, KY: The University Press of Kentucky, 2004), 19-20.

¹⁰ Daugherty, *Executive Secrets*, 2.

¹¹ U.S. Department of State, “Note on U.S. Covert Actions,” *Foreign Relations 1964-1968, Western Europe, Volume XII* (Washington, DC: U.S. Department of State, May 2001), <http://www.state.gov/r/pa/ho/frus/johnsonlb/xii/2961.htm> (accessed October 30, 2008).

¹² Daugherty, *Executive Secrets*, 71-84.

¹³ Mark M. Lowenthal, *Intelligence: From Secrets to Policy*, 3rd ed. (Washington, DC: CQ Press, 2006), 162-163.

¹⁴ Daugherty, *Executive Secrets*, 19-20.

¹⁵ Lowenthal, *Intelligence*, 165-166.

¹⁶ Daugherty, *Executive Secrets*, 24-25.

¹⁷ *National Security Act of 1947*, Public Law No. 235, 80th Cong. (July 26, 1947), as amended by Public Law 102-88 (August 14, 1991), sect. 503 (codified at Title 50, United States Code, Section 413b).

¹⁸ Ibid.

¹⁹ Executive Order (EO) 12333, December 4, 1981, 46 Federal Register 59941, 3 CFR, 1981 Comp., <http://www.archives.gov/federal-register/codification/executive-order/12333.html> (accessed February 12, 2009), cited in Daugherty, *Executive Secrets*, 3.

²⁰ EO 12333, para 3-4(h).

²¹ EO 12333, para. 3-4(e).

²² EO 12333 para. 3-4(f).

²³ *National Security Act of 1947*, sect. 503.

²⁴ The author is not suggesting that a military operation outside the definition of covert action" would not require Presidential approval at all; just that the findings and notification requirements of the National Security Act would not be implicated.

²⁵ George Bush, "Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991," August 14, 1991, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/index.php?pid=19899> (accessed February 4, 2009).

²⁶ "Legislative history is a term that refers to the documents that are produced by Congress as a bill is introduced, studied and debated. These legislative documents are often used by attorneys and courts in an attempt to determine Congressional intent or to clarify vague or ambiguous statutory language." Georgetown Law Library, "Legislative History Research," July 2005, http://www.ll.georgetown.edu/guides/legislative_history.cfm (accessed February 4, 2009).

²⁷ U.S. Congress, House of Representatives, Committee of Conference, *Conference Report on H.R. 1455 ("Intelligence Authorization Act, Fiscal Year 1991)*, 102nd Cong., 1st sess., July 25, 1991, 5905-5906.

²⁸ Kibbe, "Covert Action and the Pentagon," 63.

²⁹ Ibid.

³⁰ U.S. Congress, Senate, Select Committee on Intelligence, *Conference Report to Accompany S. 1325*, 102nd Cong., 1st sess., June 19, 1991, 39.

³¹ Jennifer D. Kibbe, "The Rise of the Shadow Warriors," *Foreign Affairs* 82, no. 2 (March/April 2004): 107.

³² Ibid.

³³ *National Security Act of 1947*, sect. 503.

³⁴ Ibid.

³⁵ Daugherty, *Executive Secrets*, 24-25.

³⁶ Ibid., 18-19.

³⁷ Lowenthal, *Intelligence*, 165-167.

³⁸ Kibbe, "The Rise of the Shadow Warriors," 113.

³⁹ Ibid.

⁴⁰ *Capstone Concept for Joint Operations*, 32.

⁴¹ U.S. Joint Chiefs of Staff, *DoD Dictionary of Military and Associated Terms*, Joint Publication 1-02, (Washington, DC: U.S. Joint Chiefs of Staff, October 17, 2008), 134, http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf (accessed February 12, 2009).

⁴² Ibid., 91.

⁴³ Ibid., 321.

⁴⁴ U.S. Congress, Senate, Armed Services Committee, "Advanced Questions for Lieutenant General James Clapper USAF (Ret.), Nominee for the Position of Under Secretary of Defense for Intelligence," March 27, 2007, 14, <http://armed-services.senate.gov/statemnt/2007/March/Clapper%2003-27-07.pdf> (accessed February 6, 2009).

⁴⁵ U.S. Department of Defense, *Irregular Warfare*, 2.

⁴⁶ Ibid., 11.

⁴⁷ Ibid., 2.

⁴⁸ Ibid., 11-12. DoD defines paramilitary forces as "[f]orces or groups distinct from the regular armed forces of any country, but resembling them in organization, equipment, training, or mission." See *DoD Dictionary of Military and Associated Terms*, 410.

⁴⁹ U.S. Department of the Army, *Army Special Operations Forces: Unconventional Warfare*, Army Field Manual 3-05.130, (Washington, DC: U.S. Department of the Army, September 30, 2008), 1-2, <http://www.fas.org/irp/doddir/army/fm3-05-130.pdf> (accessed February 10, 2009).

⁵⁰ The Office of Strategic Services (OSS) was arguably "America's first" strategic-level intelligence agency, created by President Roosevelt during WWII under the jurisdiction of the Joint Chiefs of Staff. It was disbanded after the war. While the CIA looks to the OSS as its

predecessor, the OSS in fact was run by a general officer, employed thousands of Army officers and soldiers, and can also be seen to be the predecessor of modern SOF. For more information, see Central Intelligence Agency, *The Office of Strategic Services: America's First Intelligence Agency*.

⁵¹ Richard A. Best Jr. and Andrew Feickert, *Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress*, (Washington, DC: Library of Congress, Congressional Research Service, January 4, 2005), 3, <http://www.fas.org/man/crs/RS22017.pdf> (accessed February 9, 2009).

⁵² *9/11 Commission Report* (Washington, DC: Government Printing Office, 2004), 415-416, <http://www.9-11commission.gov/report/911Report.pdf> (accessed February 23, 2009), cited in Best and Feickert, *Special Operations Forces (SOF) and CIA Paramilitary Operations*, 3.

⁵³ Best and Feickert, *Special Operations Forces (SOF) and CIA Paramilitary Operations*, 5. Section 1208 funds are now referred to as Section 1202 funds.

⁵⁴ Admiral Eric T. Olson, "Statement of Admiral Eric T. Olson, U.S. Navy, Commander, United States Special Operations Command, before the Senate Armed Services Committee on the Posture of Special Operations Forces, March 4, 2008", 9, http://www.socom.mil/Docs/2008_Posture_Statement.doc (accessed February 9, 2009).

⁵⁵ Ibid.