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MASTER OF MILITARY STUDIES

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**TITLE:**  
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**EXTRATERRITORIAL COUNTERTERRORISM OPERATIONS**

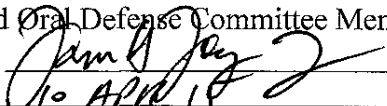
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## Executive Summary

**Title:** Handcuffs or Hand Grenades; The False Dichotomy of Extraterritorial Counterterrorism Operations.

**Author:** Supervisory Special Agent Jeffrey D. Burgess, Federal Bureau of Investigation.

**Thesis:** U.S. extraterritorial counterterrorism operations must be conducted through a partnership of law enforcement and military capabilities requiring updated authorities in order to counter current and future terrorism threats.

**Discussion:** Prior to the terrorist attacks on 9/11/2001, the U.S.'s efforts to exact justice upon extraterritorial terrorist targets were either military or law enforcement actions. Both options included inherent limitations. Military strikes, typically in the form of air or missile strikes, did little to dismantle the targeted terrorist organizations and were more likely fodder for the propaganda efforts of the enemy and other U.S. detractors. The law enforcement response often depended upon diplomatic efforts to have the government of the asylum nation arrest, detain and extradite the terrorist subject. This option presumed a functioning government existed in the asylum nation. Otherwise, U.S. law enforcement had to lure the subject to a U.S.-friendly location for arrest. Following the 9/11 attacks, law enforcement and the military were thrust together in the combat theaters of Afghanistan and Iraq where they learned each other's value and liability. The benefits of law enforcement's information sharing and evidence collection capabilities, coupled with the military's mobility and power projection, significantly enhanced intelligence collection and targeting against terrorist networks. However, the relationship suffered setbacks when the culture of civilian law enforcement collided with the culture of the war fighting military. The dilemma over interrogation techniques and detainee abuse were compounded by questions over the efficacy of military commissions versus civilian courts, all of which created a firestorm of criticism, negative publicity and an erosion of trust in the U.S. Changes to U.S. policy designed to eliminate torture and abuse by the military, coupled with the success of civilian terrorism trials in the U.S., supported the concept of employing a joint military and law enforcement solution to the extraterritorial terrorism threat. However, implementation of this joint solution will be hampered by the elimination or degradation of authorities for the use of military force against designated terrorists and terrorist networks. Additionally, Department of State bureaucratic requirements governing the movement of FBI personnel embedded with USSOCOM units overseas will continue to hamper the FBI's responsiveness on counterterrorism operations.

**Conclusion:** In order to apply a combined law enforcement and military solution to extraterritorial counterterrorism threats, Congress must authorize the President to use military force against specified terrorists and terrorist networks and the Department of State must permit the FBI to operate with USSOCOM without unnecessary bureaucratic obstacles.

## DISCLAIMER

THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MARINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

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## Preface

The mid-point of my career with the Federal Bureau of Investigation (FBI) happened to roughly coincide with 9/11/2001. In the years following, I witnessed the lumbering transformation of the FBI from a largely criminal investigation centric organization to a counterterrorism and intelligence collection focused agency. During the post-9/11 years, I witnessed friends and colleagues deploy to Afghanistan and Iraq drawn by varying degrees of adventure, financial gain, and duty. It wasn't until an Agent I supervised volunteered for an assignment in Afghanistan that I paused to reflect on the dichotomy of the FBI I had known and the FBI he was deploying to support. He was embedded with a Special Operations Force in the mountains of Afghanistan to conduct sensitive site exploitations and collect intelligence on terrorist networks. He was operating at or near the tip of the spear. When he returned, I pressed him for details of his deployment and could only sense vicariously what he had experienced.

Five years later, as a student at Command and Staff, I remembered the conversation we had and the glaring disparity I felt between his FBI experience and my own. Consequently, I chose to research the authorities that permit the FBI to operate in non-permissive environments with members of the Special Operations community, which then morphed into a broader examination of the evolution of the FBI's partnership with the United States Special Operations Command.

I appreciate the support and guidance given by Lt. Col. Carolyn Bird, my Military Faculty Advisor, and Professor Michael Lewis, my Civilian Faculty Advisor, who encouraged me to use my investigative mindset to challenge new concepts. I also appreciate the guidance provided by my MMS mentor, Dr. James Joyner. Dr. Joyner challenged me to make an argument in my MMS dissertation before the last few pages and provided vital organizational guidance.

Additionally, the information and insight provided by LTC Carl Morris and the guest speakers in his Special Operations elective helped steer my research.

## **Introduction**

The United States government's counterterrorism apparatus to mitigate the threat from extraterritorial terrorists and their networks experienced a transformation following the attacks on 9/11. The crisis brought together the Federal Bureau of Investigation (FBI), the country's lead federal law enforcement counterterrorism agency, and the United States Special Operations Command (USSOCOM), the country's lead military counterterrorism command, in a unified effort. Prior to 9/11, these components only worked together on an ad hoc basis because international terrorism was largely viewed as requiring either a law enforcement or military solution as opposed to a cohesive approach.

The 9/11 attacks created the urgency to reform the U.S.'s counterterrorism strategy. As a result of their integration in the combat theaters of Afghanistan and Iraq, the FBI and USSOCOM gradually built a partnership, capitalizing on the FBI's evidence collection and analysis capabilities and USSOCOM's ability to exploit the collected information through kinetic operations. Eventually however, the FBI's law enforcement culture clashed with USSOCOM's war fighting culture, causing friction and hampering the partnership. The conflicts were resolved through changes to U.S. policy emphasizing the capture of targets and the legal and moral treatment of detainees. The ongoing partnership between the FBI and USSOCOM was shaped by the lessons learned in Afghanistan and Iraq and is now being applied in other regions of the world. However, the authority granted in 2001, to use military force against al-Qaeda and its associates must be supplanted with new authorities focused on mitigating current and emerging terrorism threats through a combined law enforcement and military strategy. Additionally, Department of State (DoS) bureaucratic requirements governing the movement of

FBI personnel embedded with USSOCOM units overseas will continue to hamper the FBI's responsiveness on counterterrorism operations. According to an FBI Fly Team member, the DoS requirement underscores the fact that: "USSOCOM operates at the speed of war whereas the FBI operates at the speed of government."<sup>1</sup>

## **U.S. Counterterrorism Components**

### **The Federal Bureau of Investigation**

Within the FBI, the counterterrorism mission is conducted pursuant to guidelines established by the Counterterrorism Program within the Counterterrorism Division (CTD) of the National Security Branch. Numerous other FBI programs and divisions support the Counterterrorism Program, including the International Operations Division (IOD), the Critical Incident Response Group (CIRG), the Laboratory Division (LAB), and the 56 FBI field offices throughout the U.S.

The FBI's Counterterrorism Program, managed by the CTD at FBI Headquarters (FBIHQ), oversees the management of FBI counterterrorism investigations worldwide and consists of operational and supporting units to include the CTD Fly Team and the High Value Detainee Interrogation Group (HIG). The Fly Team was established in 2002 and is a rapidly deployable investigative and analytical unit with multi-discipline expertise in terrorism investigations. They often support the FBI's overseas Legal Attaché offices (Legats) during terrorism events or investigations. Fly Team personnel undergo a rigorous selection process and once selected, receive additional counterterrorism, survival, language, medical, and cultural awareness training. During terrorism related events, the Fly Team's mission is to assist field office or Legat personnel in assessing the nature and scope of the crisis to determine what additional resources are needed and to conduct a preliminary investigation and begin the

evidence collection process. The subsequent investigation is then assigned to one of four FBI field offices that have geographic responsibility for extraterritorial (ET) investigations.

Four FBI field offices have been designated to man, train and equip investigative squads dedicated to conducting ET investigations involving U.S. citizens or interests. These ET squads regularly work closely with CTD Fly Team and Legat personnel. The Washington, DC Field Office is responsible for conducting investigations originating from, or involving, Europe, Eurasia, the Middle East and Canada. The Los Angeles Field Office conducts investigations involving the United Kingdom, Afghanistan, Pakistan, and Southeast Asia. The New York Field Office handles the African continent, and the Miami Division conducts investigations in the Caribbean, and Central and South America. ET squad Special Agents and analysts are typically deployed to their areas of responsibility (AOR) on a rotational basis to work with the Department of Defense (DoD), the interagency and host nation agencies. When the investigations warrant the filing of criminal charges, the cases are typically referred to the U.S. Attorney's Office where the ET squad's office is located

The HIG is overseen by the National Security Council and led by an FBI CTD executive. It is comprised of interrogators, linguists, analysts and other subject matter experts from the U.S. government and military components. The HIG is responsible for conducting interrogations of high value terrorism subjects anywhere in the world. Executive Order (EO) 13941, issued by President Obama in January 2009, established a presidential task force, which recommended the creation of the HIG, in addition to revoking previous presidential directives regarding the detention and interrogation of certain individuals. EO 13941 also set forth standards for interrogations and directed the closure of Central Intelligence Agency (CIA) detention centers,

also known as “black sites.” The Directors of the FBI, CIA and Defense Intelligence Agency must authorize operational HIG deployments.

The Counterterrorism Division also includes the Combatant Command Liaison Unit (CLU). CLU personnel are deployed to DoD Geographic Combatant Commands (GCCs) and Theater Special Operations Commands (TSOCs) to ensure timely exchange of information and coordination of training and operations. CLU personnel consist of Special Agents or Supervisory Special Agents and Intelligence Analysts who are co-located with their military counterparts. The CLU also coordinates the assignment of military liaison officers from various military branches and USSOCOM to a number of FBI components, namely the Counterterrorism Division, the International Operations Division, and the Critical Incident Response Group.

The FBI’s International Operations Division (IOD) is responsible for program management of the Legat Program. The FBI currently has 64 Legat offices in U.S. Embassies around the world. A typical Legat office consists of a Senior Executive Service or GS-15 Legal Attaché, one or more Assistant Legats, and Legat Operations Assistants. In coordination with the U.S. Ambassador and embassy country team, Legats work with the law enforcement and security agencies in their host nation to coordinate investigations of interest to both countries. Legats typically do not have investigative staffs and rely on augmentations from FBIHQ or field offices to handle large or complex investigations and crises. The FBI must obtain the Department of State’s Chief of Mission (COM) concurrence for all FBI personnel travelling to and through their AOR. The COM governs how many U.S. government personnel are allowed in their AOR at any given time.

The FBI’s Critical Incident Response Group (CIRG) contains national level assets for crisis response. CIRG’s key components include the Tactical Section, the Counter Improvised

Electronic Device (IED) Section, and the Strategic Information and Operations Section. The Tactical Section includes the Hostage Rescue Team (HRT) and its supporting elements. The HRT is the federal government's premier full-time tactical unit specializing in high risk warrants, intelligence gathering, hostage rescue and counterterrorism operations. Members of the HRT often work closely with USSOCOM components during extraterritorial sensitive site exploitations, arrest and intelligence gathering operations and training missions. The Counter IED Section manages the Special Agent Bomb Technician (SABT) Program and the Render Safe Program. FBI SABTs were assigned to the DoD Combined Explosives Exploitation Cells (CEXC) in Iraq and Afghanistan. Additionally, the SABTs work closely with the multi-national, multi-agency Terrorist Explosives Device Analytical Center (TEDAC) in the FBI Laboratory. The Strategic Information and Operations Section manages the FBI's 24/7/365 operations center at FBIHQ, which is activated during significant operations and crises. During activation, the command post is staffed by representatives of the essential FBI components, members of the interagency and DoD.

### **United States Special Operations Command**

The Department of Defense first began developing a dedicated counterterrorism force in the 1970s in response to increasing incidents of international terrorism, specifically aircraft hijackings. From the U.S. Army's Special Forces community, DoD created the 1<sup>st</sup> Special Operations Detachment-Delta, popularly known as Delta Force, to conduct operations other than war, including counterterrorism. Regrettably, its first operational assignment was the ill-fated 1980 Operation Eagle Claw to rescue the American hostages in Iran. The Goldwater-Nichols Act of 1986, amended by the 1987 Defense Authorization Act (also known as the Nunn-Cohen Act) began the reformation of U.S. special operations forces including the creation of the

Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD-SO/LIC) position. The legislation also resulted in the establishment of the USSOCOM and its subordinate command the Joint Special Operations Command (JSOC).

USSOCOM is comprised of the Army, Marine Corps and Air Force Special Operations Commands, the Navy Special Warfare Group, and the JSOC. The unified command includes ground, aviation and maritime units, and their supporting elements. The Army's Special Operations Command consists of the Army Rangers, Special Forces, the 160<sup>th</sup> Special Operations Aviation Regiment and supporting civil affairs and military information groups. The Marine Corps Special Operations Command (MARSOC) consists of the MARSOC Regiment, a support group and an intelligence battalion. The Air Force Special Operations Command (AFSOC) includes four Special Operations Wings and two Special Operations Groups. AFSOC specialties include para-rescue, combat air control, and special operations weathermen. The Naval Special Warfare Group consists of SEAL teams, SEAL delivery vehicle teams, and special boat units.<sup>2</sup> According to the JSOC public website, the command is "charged to study special operations requirements and techniques, ensure interoperability and equipment standardization, plan and conduct special operations exercises and training, and develop joint special operations tactics."<sup>3</sup> A September 2011 *Washington Post* article describes JSOC as a well funded, highly trained collection of elite warriors tasked to carry out some of the nations most dangerous counterterrorism operations.<sup>4</sup>

Around the globe, USSOCOM forces are aggregated in regional Theater Special Operations Commands (TSOC). TSOCs are located with the Geographic Combatant Commands (GCCs) and are responsible for special operations forces in their AOR. Historically, the TSOCs

were placed under the command of the individual GCCs. As a result, each GCC adapted the TSOC to their specific needs, creating dissimilar “organizations in size, structure, capability and capacity.”<sup>5</sup> In February 2013, the Secretary of Defense authorized the reassignment of the TSOCs to USSOCOM to ensure uniformity among all the commands.

### **The Evolution of Extraterritorial Counterterrorism Operations**

The FBI has a well-established history with the DoD as a result of their shared responsibility to protect the national security of the nation. The relationship began as early as 1917 when the Bureau’s forerunner, the Bureau of Investigation, was tasked by Congress to investigate espionage and subversion by enemy aliens during World War I. In 1944, the Bureau aided the United States Marine Corps by training “legions of American Commandos,”<sup>6</sup> for operations during World War II, and collaborated with the military throughout the Cold War as they tracked and arrested communist spies and saboteurs. The U.S.’s war on drugs began in earnest in the 1970s and in the 1980s the DoD was authorized to provide counterdrug support to civilian law enforcement, including the FBI and the Drug Enforcement Administration (DEA). At that time DoD was named as the lead agency for the detection and monitoring of international aerial and maritime drug trafficking routes.<sup>7</sup> Anti-hostage taking and anti-terrorism legislation in the 1980s and 1990s enabled law enforcement to reach beyond the borders of the United States to investigate, arrest, extradite, and prosecute international criminals and terrorists.<sup>8</sup> Also in the 1980s, the U.S. military created JSOC, its first dedicated counterterrorism unit.<sup>9</sup> Terrorist organizations grew in sophistication and lethality during the 1980s and 1990s; yet, law enforcement and the military pursued their own stove piped counterterrorism strategies. The amalgamation of law enforcement and military counterterrorism capabilities would not be fully realized until after the terrorist attacks of 9/11.

## **Pre-9/11 Era - Operation Goldenrod**

The U.S.'s criminal terrorism laws were first tested in the late 1980s as a result of an aircraft hijacking in Lebanon. In June 1985 Fawaz Younis and four other members of the Lebanese Shi'a Amal militia hijacked a Royal Jordanian Airlines flight before its departure from Beirut, Lebanon. Onboard were seventy passengers and crew including two American passengers. After attempting to find safe haven in Tunisia or Syria, the aircraft eventually returned to Lebanon where the terrorists held a press conference, released the hostages, blew up the empty aircraft, and escaped.

An investigation by the FBI, CIA, DEA and DoD identified Younis as one of the leaders of the hijacking. In September 1987 the FBI secured an arrest warrant for Younis in the United States District Court for the District of Columbia, and initiated Operation Goldenrod to locate and arrest him. The operation included an undercover scenario, which lured Younis onto a yacht in international waters off Cyprus, Greece where members of the FBI's newly formed Hostage Rescue Team arrested him. Younis was transferred to the *USS Butte* then to the aircraft carrier *USS Saratoga* where he was interrogated and admitted his involvement in the hijacking. Subsequent interrogation produced high value terrorism intelligence regarding operations in Beirut.<sup>10</sup> Thereafter, Younis was flown from the *Saratoga* to Washington, D.C. where he was arraigned for conspiracy, hostage taking, and damaging an aircraft. A superseding indictment added additional aircraft damage counts and air piracy charges.

Younis's trial began in September 1987 and resulted in his conviction and a thirty-year federal prison sentence. Then-Attorney General Richard Thornburgh called Younis' trial the most important test of using the U.S. judicial system to combat international terrorism.<sup>11</sup> The

Younis case was the first test of the U.S.'s new counterterrorism laws and foreshadowed the critical need for cooperation between law enforcement and the military. As stated, the Younis case was the first successful use of the U.S.'s new "long arm" counterterrorism laws; however, its success depended on a number of factors. First, the FBI's ability to make the arrest was based solely on the success of luring Younis to a yacht in international waters. Had the ruse not worked, the Bureau was neither authorized nor organized to make an incursion into an uncooperative country to secure his arrest. Second, without the support of the U.S. military, the FBI would have been incapable of transporting Younis to the U.S. without risking potential interference from third party countries. Hence, merely having the legal authority to arrest Younis did not establish the primacy of U.S. law enforcement in the fight against extraterritorial terrorism. At the time, terrorism was viewed by then-U.S. Attorney General Edwin Meese as "criminal acts, pure and simple. The world must deal with them as criminal acts, and utilize the rule of law in order to combat this very serious threat."<sup>12</sup>

Extraterritorial terrorist attacks against U.S. citizens and interests increased significantly in the years following the Younis case, including the 1986 bombing of the La Belle Discotheque in West Berlin, Germany; the 1988 bombing of Pan Am flight 103; the 1996 bombing of the Khobar Towers in Saudi Arabia; the 1998 bombings of the U.S. Embassies in Kenya and Tanzania; and the 2000 bombing of the *USS Cole* in Yemen. The FBI responded by deploying hundreds of personnel overseas to collect evidence and conduct criminal investigations. The investigations led to federal indictments and arrest warrants issued by U.S. civilian courts. However, obtaining custody of those charged largely depended on the existence of extradition treaties with their host nation or their willingness to deport subjects if they were not citizens of the host nation. The concept of "rendition to justice," defined by the human rights organization

*The Rendition Project* as “The extra-judicial transfer of persons from one jurisdiction or state to another, for the purposes of standing trial,”<sup>13</sup> was not a widely practiced counterterrorism tactic by the U.S. government at the time.

During this era, the U.S. military’s counterterrorism response was limited to conducting air and missile strikes such as those conducted against Libya following the 1986 La Belle bombing, and Afghanistan and Sudan following the 1998 embassy bombings. Neither action eliminated or seriously degraded the terrorist organizations in those targeted countries. During the 1990s, the conventional U.S. military was focused on Operations Desert Shield and Desert Storm, operations in Haiti, and the splinter republics of the former Yugoslavia. USSOCOM personnel were focused on counternarcotics operations in South America and providing support to the above listed operations, not terrorism in the Middle East.

The millennium concluded with law enforcement and the military executing their counterterrorism strategies in the familiarity of their own operational silos of either investigate and indict, or fix and finish. The Executive Summary of *The 9/11 Commission Report* suggested the U.S. government’s inability to stop the attacks was due to outdated strategies. “Before 9/11, the United States tried to solve the al-Qaeda problem with the capabilities it had used in the last stages of the Cold War and its immediate aftermath. These capabilities were insufficient. Little was done to expand or reform them.”<sup>14</sup> However, the criticism does not account for the sense of urgency and political will generated by the attacks, which enabled the development of new counterterrorism capabilities through unprecedented legislation, executive orders and interdepartmental cooperation.

## **9/11 Era - Afghanistan, Iraq and GTMO**

At the request of the U.S. military's Central Command, the FBI deployed personnel to Afghanistan in late 2001 to pursue counterterrorism investigations against al-Qaeda and to support the U.S. military's ongoing counterterrorism efforts. The Bureau's primary mission in theater was to collect intelligence to support operations to prevent further attacks on the U.S. homeland and to support ongoing counterterrorism investigations in the U.S. Gradually, the Bureau's mission expanded to support the forensic exploitation of recovered improvised explosive devices, the collection and exploitation of biometric data and training Afghan law enforcement to conduct criminal investigations. Similarly, the FBI deployed agents and analysts to Iraq. Early in the Afghanistan and Iraq wars, the FBI instituted the Embed Program wherein FBI Agents were embedded with USSOCOM elements to deploy in theater to conduct sensitive site exploitations (SSE) and collect information on-site from terrorism subjects and witnesses. The inclusion of FBI Agents provided capabilities focused on the forensic collection of physical evidence for eventual use in criminal proceedings which allowed USSOCOM personnel to focus on their mission and avoid being in the evidentiary chain of custody requiring their potential appearance in U.S. courts.

In January 2002, as part of the counterterrorism intelligence collection effort, the FBI deployed personnel to the U.S. Naval Base at Guantanamo Bay, Cuba (GTMO) to assist in gathering and exploiting intelligence from detainees brought to GTMO. In 2003 the FBI personnel deployed to Iraq provided the same type of support, including detainee interviews at the Abu Ghraib prison and other detention facilities in Iraq. As the law enforcement/military relationship began to coalesce meaningfully, a wrench was thrown into the works when the

FBI's law enforcement culture collided with the military culture over interrogation techniques and the treatment of detainees.

### **Torture and Abuse**

In 2004 after numerous incidents of friction between FBI and other government interrogators over the use of enhanced interrogation techniques (EITs), the FBI's Office of General Counsel issued the "Interrogation Memo,"<sup>15</sup> which provided guidance to FBI personnel regarding their involvement in interrogations with or by other U.S. government agencies. FBI personnel were prohibited from participating in interrogations with the military or other government agencies when interrogation techniques that were inconsistent with FBI policy were used. Although Executive Order 13491, issued by the Obama administration in January 2009 banned the use of EITs, the military retained authority to use techniques listed in the Army's Field Manual *FM 2-22.3, Human Intelligence Collector Operations*, which are considered coercive by law enforcement standards and would likely render statements made pursuant to those techniques inadmissible in U.S. courts.

The 2003 public disclosure of detainee abuse and torture by the U.S. government in relation to the wars in Afghanistan and Iraq and the global war on terror generated intense negative publicity against the U.S. military and other agencies, its national security strategies and weakened the human rights standing of the U.S. The revelations also caused the American public to question the righteousness of the U.S.'s methods. However, the most damaging effect of the disclosures was the propaganda value for the opposition. Jeannie Johnson from the Naval Postgraduate School's Center for Contemporary Conflict noted: "Not only will torture create a dedicated core of anti-American jihadists, their stories will lose us the "hearts and minds"

campaign with the larger Muslim population.”<sup>16</sup> Within the U.S. government, debate raged over the effectiveness of EITs versus traditional law enforcement interrogation techniques. A task force commissioned at the outset of the Obama administration settled the argument by releasing interrogation guidance and creating the multi-agency High Value Detainee Interrogation Group (HIG).

The creation and employment of the HIG brought law enforcement, military, intelligence and academic professionals together to research and propose the most effective interrogation techniques. The techniques identified not only satisfied the national security needs of the U.S., but also withstood judicial scrutiny of U.S. courts. HIG interrogations focused on eliciting as much critical public safety focused information as possible from a subject prior to advising the subject of their Fifth Amendment right against self-incrimination. The technique of non-Mirandized questioning is permitted under the “Public Safety Exception” to the Fifth Amendment.<sup>17</sup>

### **Military Commissions**

In response to the looming question of what to do with the terrorists who were caught during the war on terror, in November 2001 President Bush signed an Executive Order titled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” authorizing the use of military commissions to adjudicate cases against terrorism subjects. In 2006 the U.S. Supreme Court invalidated the order as a result of its findings in *Hamdan v. Rumsfeld*, ruling that the military commission violated elements of the Geneva Convention. Later that year, the U.S. Congress passed the Military Commissions Act (MCA), which was further amended in the MCA of 2009. The Bush administration argued military commissions

were appropriate since terrorism subjects were considered unlawful enemy combatants and not entitled to protection under the U.S. Constitution. Despite campaign promises prior to President Obama's first term in office to close the Guantanamo Bay detention center and transfer detainee cases to civilian courts in the U.S., his administration backed the continued use of military commissions with additional legal protections for the detainees.

The effectiveness of the military commission process must be judged in comparison to terrorism cases heard in U.S. civilian courts. According to a 2011 article in *Lawfare* by human rights attorney Raha Wala, "Three of the eight military commission convictions have already been overturned, while civilian courts have completed over 500 international terrorism-related cases since 9/11, many of which involved suspects apprehended overseas who were involved in major terrorist attacks."<sup>18</sup> Additionally, significant procedural delays have been reported in the commission's centerpiece trial of 9/11 mastermind Khalid Sheikh Mohammed and his four co-conspirators, which likely could have been handled much more expeditiously by a civilian court. Apart from the judicial differences between the civilian and military justice processes, the financial difference is substantial. No figures are readily available comparing civilian trials and military commissions; however, the DoD has spent \$12 million to build an "Expeditionary Legal Complex" in Guantanamo Bay. Moreover, according to Senator Patrick Leahy's testimony before the Senate Judiciary Committee, the annual operating cost at GTMO equals \$2.7 million per prisoner versus \$78,000 in a U.S. supermax prison.<sup>19</sup> Given the preparation and expense incurred thus far, it would be counterproductive to transfer the pending GTMO commission cases to civilian courts; however use of military commissions in the future should be the rare exception instead of the norm.

## **Post 9/11 Era - Benghazi**

On September 11 and 12, 2012, members of “Obaidah Ibn Al Jarrah, an extremist brigade that was absorbed into Ansar Al Sharia (“AAS”) after the recent Libyan revolution,”<sup>20</sup> attacked the U.S. Mission and Annex in Benghazi, Libya. Abu Khatallah was later identified as a senior leader of AAS who participated in the attack against the U.S. Mission. The attackers used small arms, rocket propelled grenades and mortar fire. During the attack on the U.S. Mission, the buildings were set on fire. U.S. Ambassador J. Christopher Stevens and Department of State (DoS) Information Management Officer Sean Patrick Smith were killed during the attack on the U.S. Mission. DoS Security Officers Tyrone Woods and Glen Doherty were killed during a mortar attack on the Annex.

In June 2013, following an extensive investigation by the FBI in Libya, the U.S. Attorney’s Office for the District of Columbia charged Khatallah, in a sealed criminal complaint with numerous terrorism related charges. An arrest warrant based on that complaint was issued for Khatallah the same day. In June 2014 Khatallah was arrested in Libya by a team of USSCOM operators and FBI Agents and was subsequently taken by boat to the *USS New York*, where members of the interagency HIG interrogated him. On October 20, 2014, Khatallah pled not guilty in U.S. District Court in Washington, DC; a trial date has not been set.

The Khatallah operation demonstrated the growth and potential of the partnership between law enforcement and the military since 9/11 to address counterterrorism threats emanating from areas of the world that lack effective governance. The FBI led criminal investigation resulted in Khatallah’s indictment on terrorism charges in the civilian U.S. court system. His arrest in, and rendition from, Libya was executed by USSOCOM, augmented by the FBI’s HRT. He was interrogated aboard a U.S. naval vessel by the interagency HIG to elicit

threat information followed by a Mirandized interrogation for use in the ensuing criminal proceedings in U.S. federal court.

Khatallah's arrest was conducted using civilian and military authorities. The arrest warrant for Khatallah was issued in the District of Columbia and included terrorism related violations of Title 18 of the United States Code, which were delegated to the FBI to enforce. Conversely, the USSOCOM personnel were operating under Title 10 authority, and according to a letter to the United Nations (U.N.) Security Council President from Samantha Power, U.S. Ambassador to the U.N., the U.S. was operating within its inherent right of self-defense pursuant to Article 51 of the U.N. Charter.<sup>21</sup> In the Khatallah case, the U.S. did not assert its authority to use military force under the 2001 authorization because Ansar Al Sharia was not linked to the 9/11 attacks, a requirement of the 2001 law and limiting factor for future use of the authority.

## **COUNTERTERRORISM AUTHORITIES**

### **FBI Counterterrorism Authorities**

The FBI's jurisdiction over extraterritorial terrorism investigations is based primarily on Title 28, Code of Federal Regulations, Section 0.85(l), establishing the FBI as the lead counterterrorism agency in the U.S., as delegated from the U.S. Attorney General pursuant to Title 28, United States Code, Section 533. In 1986 the Reagan administration released its classified National Program for Combating Terrorism under National Security Decision Directive 207, which included naming the FBI as the lead domestic counterterrorism agency. President Reagan's actions followed a series of international terrorist incidents in the early 1980s including multiple bombings in Lebanon, killing hundreds of Americans.

Title 18, United States Code, Sections 2332b and 2332 provided the Attorney General (delegated to the Director of the FBI) with extraterritorial jurisdiction to investigate acts of

terrorism that transcend national boundaries and provided criminal penalties for the extraterritorial murder of U.S. nationals. In 1980 the FBI sought Attorney General authority to execute arrest warrants in foreign countries without the consent of those countries. President Jimmy Carter's Justice Department denied the request citing sovereignty concerns. However in 1989, Assistant Attorney General William Barr issued a legal opinion confirming the FBI's existing statutory authority, under Section 533, to conduct non-consensual extraterritorial arrests. Department of State officials were very concerned about the impact Barr's opinion and subsequent operations would have on international relations. Despite having legal authority to conduct such arrests, the U.S. must weigh the political consequences of such unilateral action, especially when dealing with friendly or neutral nations. Fragile and fractured nation-states present a different challenge. Violating sovereignty is less a concern than is the safety risk to those executing the arrest warrant. The FBI cannot conduct these types of operations without the support of USSOCOM.

### **USSOCOM Counterterrorism Authorities**

USSOCOM'S counterterrorism authorities primarily derive from Title 10 USC Section 167 and were expanded upon by the 2004 Unified Command Plan that made USSOCOM responsible for the synchronization of DoD's planning for counterterrorism operations. The command is also authorized to operate under Title 50 of the United States Code when engaged in intelligence activities and covert action. In specific instances the military was tasked with conducting arrests of extraterritorial criminals. In 1989 members of USSOCOM arrested Panamanian dictator Manuel Noriega on drug charges following the invasion of Panama. Noriega's defense counsel alleged such operations are violations of the Posse Comitatus Act; however courts have held that the Act does not apply to extraterritorial arrests. Nonetheless,

Special Operations Forces prefer not to be tasked with law enforcement functions, so as not to dilute their primary war fighting responsibilities.<sup>22</sup>

Shortly after 9/11, Congress passed Public Law 107-40, Section 2, widely known as the 2001 Authority to Use Military Force (AUMF). The 2001 AUMF permitted the President to authorize the use of military force against those responsible for the 9/11 attacks in order to prevent future terrorist attacks. The Bush administration initially requested broader authority to use the military to “deter and preempt *any* future acts of terrorism or aggression against the U.S;”<sup>23</sup> however; Congress changed the language of the bill to restrict the AUMF to al-Qaeda and its associates. In 2002 Congress passed a separate AUMF for combat operations in Iraq.

The FBI and USSOCOM’s principle counterterrorism authorities derive from Title 18 and Title 10 respectively and govern distinctly different institutions which share responsibility for mitigating extraterritorial terrorist threats. Over the last fourteen years, law enforcement and the military have leveraged their individual authorities in a cohesive effort to adapt to the U.S.’s current counterterrorism strategy, which favors the capture and civilian prosecution of extraterritorial terrorism subjects. However, the success of the FBI in fulfilling its extraterritorial counterterrorism mission is largely dependent upon the counterterrorism authorities granted to USSOCOM.

## **IDENTIFIED DEFICIENCIES**

### **United States Special Operations Command**

The 2001 AUMF is a critical piece of counterterrorism legislation, which enables the President to apply U.S. hard power against this significant threat to national security. However, in their 2014 article “After AUMF,” national security lawyers Jennifer Daskal and Stephen Vladeck examined the limits of the 2001 AUMF and suggested alternatives to using the 14-year-

old legislation as the primary means to authorize the continuing war on terror. They noted that the AUMF was not an open-ended authorization for the counterterrorism campaign, and that past presidential administrations had not been candid on who and/or what qualified as an al-Qaeda associated force or co-belligerent.<sup>24</sup> In their assessment of the 2001 AUMF, they argue that given the “evolving sophistication of our law enforcement and intelligence-gathering tools over the past decade”<sup>25</sup> and the U.S.’s internationally recognized right of self-defense, that a robust justification must be made why additional legal authorities are necessary to combat international terrorism.

The legal duo’s analysis failed to acknowledge that law enforcement’s successes against extraterritorial terrorism were largely due to the authorities granted to the military under the 2001 AUMF. The FBI capitalized on USSOCOM’s counterterrorism authority by embedding with Special Operations Forces during missions targeting al-Qaeda and its associates in order to collect information and arrest subjects in locations otherwise inaccessible to FBI personnel.

In addition to Daskal and Vladeck’s contention that criminal anti-terrorism laws or the internationally recognized right of self defense should be sufficient authority to deal with the terrorism threat, they suggested that Congress would be responsive enough to approve a “group specific AUMF”<sup>26</sup> if needed. Reliance on the responsiveness of Congress to pass time sensitive legislation permitting the use of military force against a specific terrorist group assumes a political consensus could be achieved in a timely manner. It also assumes that the legislative and executive branches will forgo political gamesmanship over authorization of the bill.

For the U.S. to effectively invoke its inherent right to self-defense authorized under Article 51 of the United Nations Charter, it must demonstrate the terrorist target is an imminent threat. Such determinations are dependent upon timely, high quality intelligence, or the

definition of an imminent threat must be applied liberally. The peril of waiting until the threat is imminent jeopardizes our ability to mobilize the appropriate forces to avert an attack. Whereas broadening the definition of an imminent threat creates consternation and criticism from the international community and media about the U.S. conducting “assassinations.”

### **Federal Bureau of Investigation**

When FBI personnel are deployed internationally, the FBI’s International Operations Division (IOD) oversees the administrative aspects of their deployment, regardless of whether the personnel are assigned to the Counterterrorism Division, an FBI field office, or some other FBI entity. In coordination with the appropriate Legal Attaché office, IOD ensures that FBI personnel have obtained the Department of State’s Chief of Mission (COM) authority to travel to their AOR and conduct whatever investigation is required. The COM’s Regional Security Officer assumes responsibility for the security of those internationally deployed FBI personnel. This procedure works well in the majority of the FBI’s non-operational deployments, however when FBI personnel are embedded with USSOCOM units for international counterterrorism operations in non-permissive locations, these procedures amount to a bureaucratic obstacle.

The authorities bestowed on the COM and other DoS personnel are codified in Title 22 of the United States Code and the DoS Foreign Affairs Manual (FAM). Pursuant to Volume 2 of the FAM, the COM has authority over all Executive Branch personnel in the COM’s host country with the exception of personnel under the command of a U.S. area military commander.<sup>27</sup> However, the DoS does not extend this exception to FBI personnel embedded with USSOCOM personnel. This position is unreasoned since FBI personnel embedded with USSOCOM forces become the security responsibility of the USSOCOM Commander. USSOCOM also provides billeting, food, lift and logistics for the embedded personnel.

During Operations Enduring Freedom and Iraqi Freedom, the DoS authorized an exemption for FBI personnel embedded with the DoD in Iraq and Afghanistan. However, since the conclusion of combat operations in those theaters, the DoS reverted to the standard procedures for FBI personnel traveling internationally. Hence, embedded FBI personnel must request COM concurrence for travel to and between extraterritorial AORs. This requirement creates bureaucratic delays that can limit operational opportunities and disrupts USSOCOM's operational tempo.

## **RECOMMENDED SOLUTIONS**

### **United States Special Operations Command**

The U.S. military needs comprehensive authority for the use of military force against expressly identified terrorist organizations and their members. The conventional model of military operations and military adversaries do not apply to these organizations. Their tactics allow them to blend in with the indigenous population, strike targets when and where they choose, and retreat back into the cover afforded by ungoverned society. The last AUMF directed at terrorists is now fourteen years old and must be replaced with one that reflects the current threat.

Legal scholars at Stanford University's Hoover Institute proposed a variation of Daskal and Vladeck's "group specific AUMF" plan, by broadening the proposed pool of terrorist targets. The plan envisions Congressional authorization of an AUMF tied to a list of terrorist organizations created and managed by the Executive Branch. This plan incorporates timely authorization of the use of force against identified and validated targets and the ability to add or remove targets as necessary.

Daskal and Vladeck also favored elimination of the AUMF to make “clear to our allies and the pool of would-be terrorist recruits that...the United States is not engaged in, or seeking to engage in a state of perpetual war.”<sup>28</sup> This perspective fails to acknowledge that terrorism in the 21<sup>st</sup> century has changed the threat environment and that the war against terrorism will not have a finite ending. Providing the President with the authority to use military force pursuant to an updated and periodically reviewed AUMF does not equate to a declaration of war. During the negotiations for a new AUMF, Congress can place limits or conditions within the legislation. Additionally, Executive Orders can be issued to refine the execution of an AUMF. President Obama issued Presidential Policy Directive 14 and a Presidential Policy Guidance document, which refined the 2001 AUMF by creating standards for the handling of military detainees and set limits on the use of targeted killing operations against terrorism subjects.

### **Federal Bureau of Investigation**

The FBI also requires updated authorities to ensure its personnel have timely access to locations and personnel of investigative interest, regardless where they are located. Embedding FBI personnel with USSOCOM elements provides that access. Conducting sensitive site exploitations and questioning sources and subjects enables the FBI to build solid cases against those responsible for supporting or conducting terrorist attacks against the U.S., its citizens, or its interests. DoS policy has limited embedded FBI personnel’s ability to operate with USSOCOM, thereby restricting employment of the U.S.’s full counterterrorism capabilities.

A Memorandum of Understanding (MOU) must be created between the headquarters of the FBI and USSOCOM outlining the roles, responsibilities and command relationship for FBI personnel embedded with USSOCOM units. Executive level dialogue must begin between the FBI and DoS to resolve departmental policy obstructions to the efficient use of FBI/USSOCOM

components in various regions of the world. Any agreement must be codified in an MOU and disseminated to the appropriate COMs, Geographic Combatant Commanders, Theater Special Operations Commanders and Legal Attaché.

## **CONCLUSION**

The counterterrorism relationship between the FBI and USSOCOM has transformed over the last three and a half decades from an ad hoc association to an ongoing partnership. Prior to the events of 9/11, U.S. law enforcement and the military shared similar goals of disrupting and dismantling terrorist organizations but followed separate strategies to those ends. The attacks on 9/11 provided the sense of urgency for a combined counterterrorism effort and provided essential authorities that facilitated the war on terror. Following the U.S. invasions of Afghanistan and Iraq, FBI personnel were embedded with USSOCOM elements to help collect and exploit information obtained from the battlefield. USSOCOM's intelligence and direct action capabilities were paired with the FBI's collection and exploitation capabilities in a cohesive effort to identify, disrupt, and dismantle terrorist cells and their leadership. Valuable lessons were learned when the two cultures clashed over the treatment and prosecution of terrorism subjects. Fortunately those conflicts led to improved processes and better coordination between law enforcement and the military.

The improved synchronization between the FBI and USSOCOM enhanced the government's ability to identify and pursue terrorism networks in other parts of the world, sustained by relationships that USSOCOM developed with partner nations over the years, the network of FBI Legats around the world and the continuous support of the U.S. interagency. The U.S.'s counterterrorism mission faces new challenges as it transitions from the battlefields of Afghanistan and Iraq to failing or failed nation-states unwilling to address terrorist threats

within their own borders. For this reason, the U.S. government must adapt its counterterrorism authorities and policies to enable its counterterrorism components to apply their capabilities wherever and whenever necessary to mitigate the threat. National Security author, James Kitfield, aptly characterized the U.S.'s post 9/11 counterterrorism apparatus in his May 2014 article in the *National Journal* when he wrote:

Indeed, even after the last U.S. combat troops leave Afghanistan this year, the shadow war against jihadi terrorists that began on Sept. 11, 2001, will rage on, executed by comingled military, intelligence, and law-enforcement capabilities using legal authorities that blur distinctions between uncommon criminals and enemy combatants. Terrorism suspects caught in the hard stare of the U.S. counterterrorism network will still be arrested by U.S. law-enforcement agents overseas; snatched off the streets of lawless cities by U.S. special operations forces; eviscerated by CIA drone strikes in remote areas far from any declared war zone; and interrogated under the rules of warfare before being read their *Miranda* rights and prosecuted in federal courts. And that life-and-death struggle will continue to play out largely in secret.<sup>29</sup>

The decade of combat operations in Afghanistan and Iraq provided an opportunity and environment to experiment with the theory and practice of combining law enforcement and military capabilities to counter the global terrorism threat. The lessons learned identified limitations, which if not remedied, would hinder the execution of future extraterritorial counterterrorism operations. However, the experience shaped the current partnership and validated the concept of employing both handcuffs and hand grenades in the U.S.'s counterterrorism arsenal.

## APPENDIX A: ACRONOYMS

Acronym	Name
AAS	Ansar Al Sharia
AFSOC	Air Force Special Operations Command
AOR	Area of Responsibility
ASD-SO/LIC	Assistant Secretary of Defense for Special Operations and Low Intensity Conflict
AUMF	Authority to Use Military Force
CEXC	Combined Explosives Exploitation Cells
CIA	Central Intelligence Agency
CIRG	Critical Incident response Group
CLU	Command Liaison Unit
COM	Chief of Mission
CTD	Counterterrorism Division
DEA	Drug Enforcement Administration
DoD	Department of Defense
DoS	Department of State
EO	Executive Order
ET	Extraterritorial
FBI	Federal Bureau of Investigations
FBIHQ	Federal Bureau of Investigations Headquarters
GCC	Geographic Combatant Commands
GTMO	U.S. Naval Base at Guantanamo Bay
HIG	High Value Detainee Interrogation Group
HRT	Hostage Rescue Team
IED	Improvised Electronic Device
IOD	International Operations Division
IOD	International Operations Division
JSOC	Joint Special Operations Command
LAB	Laboratory Division
Legats	Legal Attaché Offices
MARSOC	Marine Corps Special Operations Command
MCA	Military Commissions Act
MOU	Memorandum of Understanding
SABT	Special Agent Bomb Technician
TEDAC	Terrorist Explosives Device Analytical Center
TSOC	Theater Special Operations Commands
U.S.	United States
USC	United States Code
USSOCOM	United States Special Operations Command

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## Endnotes

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<sup>3</sup> Ibid.

<sup>4</sup> Dana Priest and William M. Arkin, "Top Secret America: A Look at the Military's Joint Special Operations Command," *The Washington Post*, August 30, 2011, [http://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ\\_story.html](http://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ_story.html).

<sup>5</sup> United States Special Operations Command, *Optimizing the TSOCs*.

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<sup>6</sup> Frederick L. Collins, *The FBI in Peace and War* (New York: G.P. Putnam's Sons, 1943).32.

<sup>7</sup> *Armed Forces*, Title 10 United States Code, Sections 371-378 and 124.

<sup>8</sup> *Hostage Taking and Terrorism*, Title 18 United States Code, Sections 1203 and 2332b

<sup>9</sup> Priest and Arkin, "Top Secret America."

<sup>10</sup> Garrett M. Graff, *The Threat Matrix: The FBI at War*, 1st Back Bay pbk. ed (New York: Back Bay Books, 2012).217.

<sup>11</sup> Robin Wright and Ronald J. Ostrow, "Arab Hijacker's Trial to Pose Test of U.S. Terrorism Policy," *Los Angeles Times*, February 20, 1989, [http://articles.latimes.com/1989-02-20/news/mn-23\\_1\\_international-terrorism](http://articles.latimes.com/1989-02-20/news/mn-23_1_international-terrorism).

<sup>12</sup> Kenneth B. Noble, "Lebanese Suspect in '85 Hijacking Arrested by the F.B.I. While at Sea," *The New York Times*, September 18, 1987, sec. World, <http://www.nytimes.com/1987/09/18/world/lebanese-suspect-in-85-hijacking-arrested-by-the-fbi-while-at-sea.html>.

<sup>13</sup> "Rendition," *The Rendition Project*, accessed March 21, 2015, <http://www.therenditionproject.org.uk/the-issues/rendition.html>.

<sup>14</sup> National Commission on the Terrorist Attacks Upon the United States, *The 9/11 Commission Report, Executive Summary* (Washington, DC). <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

<sup>15</sup> U.S. Department of Justice, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq*. (Washington, DC, 2008)

<sup>16</sup> Jeannie L. Johnson, "Exploiting Weakness in the Far Enemy Ideology Strategic Insights, Volume IV, Issue 6 (June 2005)," accessed March 27, 2015, [http://www.au.af.mil/au/awc/awcgate/nps/johnson\\_jun05.pdf](http://www.au.af.mil/au/awc/awcgate/nps/johnson_jun05.pdf). 8.

<sup>17</sup> Steven Andrew Drizin, "Fifth Amendment. Will the Public Safety Exception Swallow the 'Miranda' Exclusionary Rule?," *Journal of Criminal Law and Criminology*, 1984, 692–715.

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<sup>19</sup> *Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications: Hearing before the Senate Judiciary Committee*. 113<sup>th</sup> Cong. (2013).

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<sup>20</sup> U.S. v. Abu Ahmed Khatallah, "*Government's Motion for Pretrial Detention.pdf*," accessed January 3, 2015, <http://s3.documentcloud.org/documents/1211904/khatallah-ahmed-abu-govt-motion-for-pretrial.pdf>.

<sup>21</sup> Samantha Power, U.S. Ambassador to the U.N., to President, U.N. Security Council, June 17, 2014.

<sup>22</sup> Author's interview with Major Ty Flint, U.S. Army Special Forces on 4/8/2015.

<sup>23</sup> David Abramowitz, "President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force against International Terrorism," *Harv. Int'l LJ* 43 (2002): 71.

<sup>24</sup> Jennifer Daskal and Stephen I. Vladeck, "After the AUMF," *Harv. Nat'l Sec. J.* 5 (2014): 115–305. 120.

<sup>25</sup> *Ibid.* 118

<sup>26</sup> *Ibid.* 138.

<sup>27</sup> U.S. Department of State, *Foreign Affairs Manual, Volume 2, Handbook 2*. Washington, D.C. Accessed February 2, 2015, <http://www.state.gov/documents/organization/89604.pdf>. Emphasis added by author.

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