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JWFC Lessons Learned Points of Contact

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- What was supposed to happen?
- What happened?
- What went right?
- What went wrong?

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Message From the Commander

MajGen Gordon C. Nash, USMC
Commander, JFCOM JWFC



This edition of the Joint Center for Lessons Learned (JCLL) Bulletin is dedicated to examining the complex question of “Authorities” in homeland security. The articles presented here examine topics dealing with the relationship between the use of forces in both Title 10 and Title 32 United States Code (USC) status, particularly in reference to national special security events (NSSE) such as the Winter Olympics in Salt Lake City, Utah. Some of the issues include the use of these forces in conjunction with law enforcement activities, the restrictions of the Posse Comitatus Act of 1878, intelligence gathering and sharing, interagency coordination, command and control, and funding. This Bulletin is intended to serve as a reference for commanders and staffs who may be called upon to execute missions in support of homeland defense.

In the article, **Understanding Authorities in National Special Security Events**, Mr. Al Preisser gives an overview of the topics being discussed in the subsequent papers. He provides a definition and background for an NSSE, and then provides a short discussion of the key points from each of the areas presented by the other authors.

The second article, **Joint Task Force-Olympics 2002**, continues the discussion of the topics begun in the overview article. Ms. Charlene (Charley) Eastman goes into great depth on the issues of Title 10/Title 32 USC military forces and their use in various roles, command and control difficulties, funding impacts, and the Posse Comitatus Act restrictions.

Mr. Rich Handford presents an interesting study of the intelligence coordination issues in his article, **Intelligence Authorities in Support of Homeland Security**. His paper looks at the difficulty of sharing information between the Department of Defense and the other federal and non-federal agencies that need the information to provide our security. Mr. Handford also looks at the liaison manning requirements between the DOD and the agencies that are needed to ensure information is utilized effectively.

The final article is a reprint of a paper from the Journal of Homeland Security, and provides a detailed historical perspective and modern application of the Posse Comitatus Act. In **The Myth of Posse Comitatus**, Major Craig Trebilcock, US Army Reserve Judge Advocate General’s Corps, discusses the erosion of the act over time and how to view it today in the context of the homeland defense perspective in combating terrorism.

GORDON C. NASH
Major General, U.S. Marine Corps
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JCLL UPDATE

Mr. Mike Barker

Director, JCLL

Prior to 11 September 2001 (9/11), the training exercises that focused on military support to various types of disasters, both natural and man-made, within the continental United States highlighted the need for Department of Defense (DOD) and non-DOD agencies, both federal and State, to figure out how to operate better together. Examples of some areas identified as needing improvement include command and control (C²), information/intelligence sharing, coordination, funding, and utilization of the active, reserve, and National Guard (Title 10/32 US Code) component forces. Post 9/11 events accelerated the requirement to identify the necessary fixes to these and other issues. In the middle of all this, throw in a national special security event (NSSE) – the 2002 Winter Olympics in Salt Lake City. The “who” didn’t change appreciably from the 1996 Summer Olympics held in Atlanta, GA. What did change was the level of coordination that took place during the 2002 event, as compared to the 1996 event. Both Olympics included US Joint Forces Command (USJFCOM) as the higher headquarters (known as US Atlantic Command in 1996), Joint Task Force-Olympics (JTF-O), Federal Bureau of Investigation (FBI),

and US Secret Service as the major proponents. While on an assistance visit to JTF-O in January, I had the opportunity to meet and talk with BG Johnson (Commander JTF-O), and the senior agents from both the FBI and Secret Service. What was readily apparent was the level of cooperation among all proponents, especially the three located in Salt Lake City. If a problem was identified that crossed the seams between the military and the other agencies, a work-around was found. Many of these work-arounds were captured and annotated in the respective after action reports (AAR). The JTF-O Joint After Action Report and the USJFCOM Joint After Action Report can be viewed on both the unclassified and classified web pages for the JCLL.

The articles in this Bulletin reflect some of the findings from these AAR reports. This isn’t to say, however, that all issues between the military and non-DOD agencies have been resolved. What it does say is that senior leaders are working harder as a result of this new threat to find those “fixes” required to make this great country safe once again.

“In no other profession are the penalties for employing untrained personnel so appalling or so irrevocable as in the military.”

General Douglas MacArthur, 1933

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Understanding Authorities In National Special Security Events

Alan D. Preisser
Editor, JCLL Bulletin

The purpose of this paper is to give the reader an overview of the key points extracted from past National Special Security Events (NSSE) in order to highlight some key trends and lessons learned, and to guide in the planning and execution of future national events. The articles that follow in this Bulletin provide expanded information on the trends from the 2002 Winter Olympics held in Utah, with additional information from other sources.

I. Terms of Reference: The following terms are provided for common reference and understanding.

A. Consequence Management (CM). Consequence management is defined as measures to protect public health and safety, restore essential government services, and provide emergency relief to governments, businesses, and individuals affected by the consequences of a [chemical, biological, radiological, nuclear, or explosives] CBRNE situation. The primary authority rests with the states to respond, and the Federal Government to provide assistance as required.

B. Crisis Management. The Department Of Defense (DOD) dictionary defines crisis management as “measures to resolve a hostile situation and investigate and prepare a criminal case for prosecution under federal law. Crisis management will include a response to an incident involving a weapon of mass destruction, special improvised explosive device, or a hostage crisis that is beyond the capability of the lead federal agency.” The Federal Response Plan (FRP) provides a broader definition and refers to crisis management as primarily a law enforcement response. The FRP states, crisis management is “measures to identify, acquire, and plan the use of resources needed to anticipate, prevent, and/or resolve a threat or act of terrorism.”¹

C. Director of Military Support (DOMS). The Army, as the executive agent for the Department of Defense, operates DOMS, whose area of responsibility covers the United States and its territories. The mission of DOMS is to plan for and commit DOD resources in

response to requests from civil authorities — often in the form of emergency requests for assistance in responding to natural or manmade disasters or civil disturbances. Other functions include special event support and assisting in domestic preparedness implementation in response to weapons of mass destruction.

D. Lead Federal Agency (LFA). The federal agency that leads and coordinates the overall federal response is referred to as the LFA and is determined by the type of emergency. Specific responsibilities of an LFA vary according to the agency’s unique statutory authorities.

E. National Special Security Events (NSSE). NSSE are defined as “events designated upon the approval of the Attorney General and the Secretary of the Treasury which DOD and other government agencies may be requested to preposition forces. The forces requested may be units with CM capabilities in anticipation of a CBRNE situation.”²

F. Request for Federal Assistance (RFA). An RFA is a form used to request military resource support following the activation of the FRP. The FRP applies to any major emergency or disaster response under the Stafford Act, or any other occasion or instance for which the President determines that Federal assistance is needed to supplement State and local efforts or capabilities. It is also applicable to reducing vulnerability to future disasters (i.e. an NSSE). National level requests for support are made through the DOMS.³

II. Background on National Special Security Events:

Current support to an NSSE has its basis in the Presidential Decision Directives (PDD) 39 and 62. PDD 62 was the latest, issued in May 1998 by then President Clinton. A portion of these PDDs deal with the roles and responsibilities assigned to various federal, state, and local agencies, and the DOD support in providing a secure environment for designated events of national interest. The recent winter Olympics in Salt Lake City (SLC), Utah, was the first Olympics officially designated as an NSSE. Other events designated by the Attorney General of the United States as NSSE include the Presidential Inauguration of George W. Bush and the football SuperBowl. The previous summer Olympics, held in Atlanta, Georgia, in 1996, or any event that draws large numbers of United States or foreign visitors to an area are examples of potential NSSEs, if

the President of the United States or Attorney General, with agreement of the Secretary of the Treasury, chooses to designate them as such. Much can be learned from these historical events in preparing for future NSSEs.

PDD 62 reaffirms the Department of Justice (DOJ) as the overall LFA in NSSE, with the Federal Bureau of Investigation (FBI) as the LFA for crisis management, the US Secret Service (USSS) as the LFA for security planning and execution, and the Federal Emergency Management Agency (FEMA) as the LFA for CM. DOD is tasked to support the appropriate LFA and is governed under Title 10 United States Code (USC), Section 2564, Support to International Sporting Competitions (SISC), and under Title 32 USC, Section 508, DOD logistical and security support to the Paralympics.⁴

III. Title 10/32 issues:

Issues of authority and command and control of DOD troops supporting the LFAs were central to the lessons learned during the Olympics in SLC and in other NSSE activities. The Joint Task Force-Olympics (JTF-O) was established to provide assistance to the LFAs as required by the PDD 32/62 tasking. However, due to the restrictions inherent in the Posse Comitatus Act of 1878, federalized military forces (Title 10 USC) cannot directly support law enforcement activities. On the other hand, National Guard forces in a non-federalized status (Title 32 USC) are under command and control of the Governor/The Adjutant General (TAG) of their respective state government and may be utilized in traditional law enforcement activities. The issues here center on who has command and control of the forces. If there is an active duty (Title 10) commander of the JTF, there is no command relationship with the non-active duty (Title 32) forces since they are still assigned and commanded by TAG in their respective home state. During the 2001 Olympics the question arose as to how the Commander, JTF-O (CJTF-O) could exercise control over the Title 32 forces from other states supporting the Olympics. In the 1996 Summer Olympics in Atlanta, Georgia, there was a dual chain of command to coordinate the use of forces. In the case of the SLC Olympics, such coordination was handled through a series of memorandums of agreement (MOA) between the various TAGs from supporting states and the CJTF-O, USJFCOM, and the National Guard Bureau (NGB). These MOAs gave the CJTF-O tasking authority but not command authority

over the Title 32 forces in his area of operations. In this case, the CJTF-O was a federalized (Title 10 status) National Guard general officer designated by USJFCOM. Assigned Title 10 forces were utilized strictly in a passive coordination and planning function in support of law enforcement agencies, while Title 32 forces were used to actively assist in the law enforcement function with the LFAs.

Future NSSE operations may not have the luxury of long lead-time planning in preparation for execution. Strawman agreements should be established and coordinated between the state TAGs, NGB, and USJFCOM that can be modified and executed as required to support the short notice NSSE.

For more in-depth analysis see the article by Ms. Charlene Eastman in this Bulletin.

IV. Posse Comitatus Issues:

The Posse Comitatus Act (PCA) of 1878 was established to remove federal troops from participating in civilian law enforcement activities within the United States. During and immediately after the reconstruction period following the Civil War, US Marshals often used local militia and federal troops as a posse comitatus to maintain peace and to enforce the law. The PCA was designed to restrict these activities and prevent abuses of the main function of the federal troops, which is securing the borders of the United States against foreign enemies. In its present iteration, the PCA applies, by its text and supporting service instructions, to all Title 10 USC military personnel, including the reserve forces. It does not apply to the US Coast Guard (Title 14) or the National Guard forces (Title 32 USC) in the US.

What this means is that Title 10 forces cannot normally be used to directly support law enforcement. However, they can routinely be used in passive law enforcement like planning and preparation of law enforcement activities to assist the local and federal law enforcement agencies. Therefore, in an event where both Title 10 and Title 32 forces are utilized (such as the SLC Olympics or anti-drug activities), much care must be exercised and stringent controls need to be established to prevent violating the intent of the PCA. However, the PCA is not a blanket prohibition. As expressed by Colonel Brinkerhoff, USA (Ret), a former acting Associate Director for National Preparedness at FEMA and former Deputy Executive Secretary of the Emergency Mobili-

zation Preparedness Board, “The Posse Comitatus Act is not a general and universal proscription of the use of federal military forces to enforce or execute the law. The military services may do so and have done so when *ordered by the president and pursuant to the authorization of Congress*. [emphasis added]...The Posse Comitatus Act does not prevent the military services from supporting the police, nor does it preclude them from enforcing the law when so ordered by the president. It does preclude them from being the police in normal times.”⁵

That being said, our challenge then is to quantify the process and procedures required to ensure the optimum use of our Title 10 and Title 32 forces in a JTF, without broaching the letter and intent of the law. An excellent article by Major Trebilcock, USAR, is also included in this Bulletin on the history and background of the PCA. His article, “The Myth of Posse Comitatus,” will assist the reader in better understanding this critical issue.

V. Interagency Issues:

Interagency issues have been at the core of many of the JTF and NSSE events in the recent past. Trying to integrate the coordination processes of multiple federal, state, and local agencies, as well as the DOD in order to ensure a seamless channel for processing and using intelligence information is critical to a successful operation. Guidance is found in the Federal Response Plan. “The Federal Response Plan (FRP) is the basic framework used to manage and coordinate a Federal response in support of State and local governments to a full range of emergencies, including response to terrorist threats or terrorist incidents involving weapons of mass destruction (WMD). The FRP organizes 26 Federal departments and agencies and the American Red Cross into interagency response functions and recovery and hazard mitigation program areas to mesh with counterpart agencies in an affected State.”⁶ Without an effective, well thought-out plan, too much information is lost or fails to reach the appropriate level to be of use.

The development of a common operating picture (COP) among the multitude of agencies involved in an NSSE is extremely difficult, but also extremely necessary for an effective working relationship. In several recent JTF operations, the use of liaison officers (LNO) at various levels within and between agencies helped to mitigate the lack of a COP. In the recent SLC JTF-O, an ad-

equated COP was never attained and the LNO structure had to fill the gap to ensure mission success. This failure to achieve a useful COP was partly due to the late identification and establishment of the JTF-O, well after the various civilian and federal agencies had begun their planning efforts. In addition, funding issues were largely responsible for the failure of sufficient JTF-O participation in the interagency planning and training phases of the SLC Olympics. A more thorough examination of these funding issues is presented below and in the Bulletin articles that follow.

In the future when a JTF is established in support of an NSSE, early and regular participation of the DOD members is essential to creating an environment where a relevant COP can be established. Additionally, the LNO structure between agencies and the DOD should be examined to ensure proper coordination and dissemination of critical information. Finally, as identified in several previous multi-agency operations, there needs to be a central DOD point of contact with the LFA to prevent the problem of too many, and often contradictory, messages.

VI. Intelligence Support Issues:

There are many restrictions to DOD collection efforts relative to the type of intelligence information and how it is gathered. Much of the information obtained on US persons must be delivered to law enforcement agencies without any analysis conducted on the information. These restrictions are designed to prevent intelligence oversight abuses by military intelligence. However, intelligence gathering and the sharing of intelligence information are critical components to the effective execution of NSSE. This requires a robust intelligence structure of both personnel and systems. Also, in recent events, the sharing of intelligence information has been stifled due to the lack of interface between agencies that would allow an effective exchange of information. This is especially true between the DOD intelligence functions and other agencies (federal, state, and local) because of the classification of DOD intelligence data. While it is essential to safeguard intelligence information and sources, in many cases the data is useless for security in an NSSE unless it can be openly utilized by the law enforcement agencies charged with that mission. Generally speaking, military intelligence organizations will receive intelligence information from law enforcement agencies, not gather it.

Another issue is the manning of intelligence functions within the NSSE by DOD personnel. The establishment of a formal intelligence section (IS) early in the process has proven to be beneficial. This was not done in the SLC JTF-O until after the attacks on 11 September. The tasking of the IS was to look at foreign threat intelligence. Once established, the section was very effective and provided a daily intelligence summary on the current threat assessment to the CJTF-O, USJFCOM, TAG Utah, and subordinate JTF commanders. In addition, the IS developed a list of priority intelligence requirements (PIR), which assisted greatly in the intelligence efforts during the Olympics. Other recent NSSE type events and exercises such as TOPOFF 2000 have continued to emphasize in their after-action reports the need for a robust LNO structure between the DOD and the various federal, state, and local agencies to coordinate and disseminate critical intelligence information. These reports should be studied and a detailed LNO support structure developed to ensure adequate preparation and training of tasked personnel.

For a complete review of the intelligence authorities, see the article by Mr. Rich Handford in this Bulletin. His article discusses the aspects of intelligence authorities in detail.

VII. Funding Issues:

Funding issues were at the heart of the problems encountered by DOD support during the JTF-O in SLC. In this case, the budget restrictions and partial funding by Title 10, Section 2564, SISC budget authorities, prevented full participation of the USJFCOM, JTF-O, and subordinate JTF personnel in the planning and training exercises prior to JTF-O execution. This budgetary shortfall was partially mitigated following the 11 September attacks when additional funding became available for safety and security at the Olympics through the Defense Emergency Relief Fund (DERF).⁷ However, the funding process was entirely too slow, with multiple layers of staffing and approval required. These multiple reviews caused undo delays in the funding of required items and the letting of support contracts, some of which were eventually cancelled due to the delays.

Future events need to have a streamlined staffing process for efficiently vetting RFAs to ensure timely approval and funding. There should also be a means to set up contingency contracts for JTF support. In the Atlanta summer Olympics after-action report, it was rec-

ommended that members of the Staff Judge Advocate, Army Audit Agency, and the J8 (financial management personnel) be included in the review of all funding actions, to ensure their compliance with Federal law and the avoidance of inappropriate or unauthorized funding commitments. These funding issues and the reports from NSSE type events should be analyzed and steps taken to codify a more efficient system for approval and oversight that can be used in future events of this magnitude.

Summary:

This article has presented a broad-brush synopsis of some of the many areas being critically examined as a result of the increased efforts in homeland security following 11 September. Exercises like the TOPOFF series and NSSE activities like the SLC Olympics are forcing us to focus more closely on how the joint and Service communities can support these efforts within the legal, budgetary, and security constraints currently in place.

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*“The Posse Comitatus Act
is not a
general and universal
proscription
of the use of
federal military forces
to enforce and execute the law.”*

Joint Task Force – Olympics 2002 An Overview of Various Funding, Command and Control, Titles 10/32 and Posse Comita- tus Lessons Learned from the XIX Winter Olympic and VII Paralympic Games, Salt Lake City

*Charlene (Charley) Eastman
Military Analyst*

“Time and distance from the events of Sept. 11 will not make us safer unless we act on its lessons. America is no longer protected by vast oceans. We are protected from attack only by vigorous action abroad and increased vigilance at home.”

President George W. Bush,
State of the Union Address,
January 29, 2002

The following selected observations and lessons learned will provide insights on how various challenges in funding, command and control (C2), Titles 10/32, and Posse Comitatus issues were resolved by the Joint Task Force-Olympics (JTF-O) 2002.

Background

One of the major issues is whether the National Guard should perform its civil support duties on federal active duty, or in state status. This issue affects funding, command, control, and law enforcement. The real problem is not with who issues the orders but with who pays the bills.

The Presidential Decision Directive (PDD)-39, “US Policy on Counterterrorism (U),” validates and reaffirms the Department of Justice (DOJ), acting through the FBI, as the overall Lead Federal Agency (LFA) and lead agency for crisis management and the Federal Emergency Management Agency (FEMA) is responsible for coordinating the federal response to any unexpected incident.

The JTF-O mission, for the DOJ, was to plan, coordinate, and execute approved Department of Defense (DOD) support. The mission also called for the JTF-O to provide C2, coordination, and integration of all DOD units, resources, and assets specifically engaged in routine support of the Games and to be pre-

pared to support contingency operations.¹

The JTF-O target activation date was set for 1 August 2000, based on feedback from the 1996 Atlanta Games emphasizing the need for the JTF to be activated at least eighteen months prior to opening ceremonies. This was recommended as the minimum amount of time to deploy personnel, set up communications, and prepare facilities for the arrival of DOD forces.²

Authority

The governing authority for DOD support for the essential security and safety needs of the Olympics is found in Title 10 United States Code (USC), Section 2564, Support to International Sporting Competitions (SISC). Under separate authority, Title 32 USC, Section 508, DOD provided logistical and security support to the Paralympics. Representatives from the United States Army Forces Command (FORSCOM), United States Joint Forces Command (USJFCOM), 52nd Explosive Ordnance Disposal (EOD), and Utah National Guard (UTNG) met in 1999 to discuss the draft concept of operations (CONOPS). It became apparent that DOD support to the Salt Lake games would be much smaller in scope than support to the 1996 Atlanta Games. There were two primary reasons for this: Winter Games traditionally have fewer athletes and countries participating, and the geographical area for the Winter Games was confined to the Salt Lake City area (1996 Summer Games were spread over several states). Further, DOD, for the JTF-O, unlike the JTF Atlanta Olympics in 1996, was legislatively limited to only five categories of support (Aviation, Communications, EOD, Physical Security, and Temporary Facilities).³

Within the USJFCOM staff, the National Guard Bureau (NGB), and the Director of Military Support (DOMS), there was confusion as to the C2 authority that could be exercised by the Commander, Joint Task Force-Olympics (CJTF-O), over National Guard military personnel in a Title 32 non-Federal status. From June 2000 through June 2001, several action officers from the USJFCOM staff, NGB, and DOMS voiced the position that the CJTF-O could exercise tactical control (TACON) or operational control (OPCON) over those National Guard military personnel assigned to Salt Lake City. This was not actually possible under the authorities. Eventually, these National Guard personnel were brought to Utah within a Title 32 non-Federal status to support the Olympics and Paralympics.⁴

Part of the problem involved confusion over joint terminology and part involved a lack of understanding of C2 for a joint operation. When one states that CJTF-O has TACON or OPCON of the National Guard military personnel, there are two important C2 implications. First, for CJTF-O to have OPCON, Commander, USJFCOM (CUSJFCOM) must have combatant command (COCOM) (command authority) over the National Guard military personnel. Secondly, for the CUSJFCOM to have COCOM (and for CJTF-O to have OPCON), the National Guard military personnel must be in a Title 10 Federal status, vice a Title 32 non-Federal status.⁵

Since CJTF-O could not exercise C2 over National Guard forces in a Title 32 non-federal status, a memorandum of agreement (MOA) between the Governor of Utah [The Adjutant General (TAG) of Utah], CUSJFCOM, and the Chief, National Guard Bureau (CNGB) was developed. The MOA established working relationships, policies, procedures, and coordinating responsibilities of organizations/agencies supporting the Olympics. Ten similar MOAs were executed with TAGs of other states, providing substantial support for the enhanced security requirements stemming from the 11 September 2001 terrorist attacks. The decision to use Active, Reserve, and National Guard forces resulted in two parallel chains of command. TAG Utah had authority over the enhanced security personnel and most of the force protection personnel, while CJTF-O only had responsibility for those personnel providing routine support. This brought the Posse Comitatus Act into play.⁶

Another lesson learned was that the late identification of a C2 structure for the JTF-O put DOD support to the 2002 Winter Olympics behind the timeline and did not incorporate lessons learned from the 1996 Olympics. Requests for Federal Assistance (RFAs) started to be delivered from the Utah Olympic Public Safety Command (UOPSC) in the summer of 2000. Since a JTF-O was not established, however, little action could be taken on the RFAs, other than developing background information and cost data. Once the JTF-O was established, action was taken on the earlier RFAs but items such as radar augmentation; command, control, communications, and computers architecture; billeting, and hiring of support personnel were all put in jeopardy by the late C2 decision.

The Posse Comitatus Act (codified at Title 18 Section

1385) states: “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise execute the laws shall be fined under this title or imprisoned not more than two years, or both.” The Posse Comitatus Act applies by statute to the military members of the Army and Air Force in active Federal service, and it was made applicable to Navy and Marine Corps personnel, active and reserve, as a matter of DOD policy through DOD Directive 5525.5.⁸

In light of the fact there was no command relationship between the Title 10 Federal active duty military forces and the Title 32 non-Federal status National Guard military forces supporting the 2002 Winter Olympics and Paralympic games, there was a recognized need to formalize the coordination relationship between CJTF-O and the various state TAGs of the Title 32 non-Federal status National Guard military forces that would be participating. In addition, it was decided that in an effort to enhance security, there was a need to allow CJTF-O to submit voluntary operational type taskings to certain identified Utah National Guard forces in a Title 32 non-Federal status and to other identified non-Utah National Guard military forces in a Title 32 non-Federal status following the 11 Sept ’02 terrorist attacks. Under this voluntary tasking process, each state TAG of the National Guard military forces in a Title 32 non-Federal status had to decide whether or not to perform the task requested by CJTF-O. If the state TAG of the Title 32 non-Federal status National Guard military forces voluntarily decided to perform the task, the task became an adopted mission of that Title 32 non-Federal status National Guard military force.⁹

Hypothetically, if CJTF-O, in a Title 10 use status, had TACON or OPCON of National Guard military personnel and if CJTF-O directed these National Guard military personnel to conduct roving patrols, magnetometer and x-ray operations, vehicle screenings, or other law enforcement type activities during the 2002 Winter Olympics or Paralympic games, these actions would be in direct violation of the Posse Comitatus Act.

Normally, National Guard military personnel in a Title 32 non-Federal state status may lawfully conduct these active law enforcement type activities to include: roving patrols, magnetometer and x-ray operations, and vehicle screening operations without fear of violating the Posse Comitatus Act. National Guard military per-

sonnel in a Title 32 non-federal state status would be under the C2 of “The Adjutant General” of the home state, vice CJTF-O.¹⁰

The Posse Comitatus Act prohibits direct support by Title 10 Federal military personnel in active law enforcement activities. [Note: Court interpretations have held that military support of passive law enforcement activities short of actual search, seizure, arrest, or similar confrontations with civilians (i.e., traditional law enforcement functions) are not violations of the Act.]

In summary, each task that CJTF-O asked to be performed by a Title 32 non-Federal status National Guard military force was either explicitly or implicitly adopted by the respective state TAG as that TAG’s own mission. The mechanism chosen to formalize the coordination process and to allow CJTF-O to submit voluntary operational taskings was the MOA.¹¹

An official command relationship between the Title 10 Federal active duty military forces and the Title 32 non-Federal status National Guard military forces for the 2002 Winter Olympics and Paralympic games is non-existent by definition. The work-around took tremendous time and effort as there was a need to develop and execute MOA’s to establish the working relationship, policies, procedures, and coordinating responsibilities among the Governor/TAG of each respective state providing significant National Guard military personnel in a Title 32 non-federal status; the CNGB; and CUSJFCOM/CJTF-O.

As a result of these MOAs, a unique working arrangement developed that permitted National Guard military personnel in a Title 32 non-federal status to handle missions that would have posed a Posse Comitatus Act problem for Title 10 Federal active duty military.¹²

JTF-O Funding

No single issue caused greater friction and cost more time than inadequate and delinquent funding. Throughout the JTF-O mission, various funding restrictions constrained operational requirements, effectively resulting in “the budget driving the mission.” Budget policy formulation and execution were too late in coming to provide adequate time for the JTF-O Contracting Officers to negotiate favorable contract terms for food service, lodging, and transportation requirements prior to the Olympics, an area where other organizations had been on the ground for the previous two years.

From the beginning, the piecemeal approach to funding caused delays, increased costs, and expended valuable time. Over the course of the JTF-O mission, the financial issues and concerns created major challenges and threatened to impact mission success; however, the professionalism and personal sacrifice of a few dedicated individuals within each organization contributed to the great success of the Olympic operation.

It was determined that a reliable DOD financial infrastructure should be operational at the JTF level, no later than one year prior to execution. A JTF Support Team consisting of legal, contracting, logistics, financial, information management, and personnel specialists should be deployed 18 to 24 months prior to the event. This team would initially standup the JTF and prepare MOAs, memorandums of understanding (MOUs), Inter-Service Support Agreements (ISSAs), Joint Manning Documents (JMD), and Initial Operating Budgets. After adequate personnel arrived to fill key positions as identified on the JMD, the JTF Support Team would return to their permanent duty station to prepare for another JTF Support assignment.¹³

While all organizations must operate under budgetary constraints, major logistical operations should employ sufficiently skilled financial personnel to ensure the appropriate processing of their financial transactions. A financial manager, or comptroller, should determine the number of financial personnel and the need for specific skill sets. Skilled accountants consulting with action officers as they make financial decisions, offer greater value to an internal control system, as opposed to organizational oversight after the fact.¹⁴

The Support for International Sporting Competitions (SISC) budget was the driving force for operations before 11 September 2001, resulting in numerous budgetary briefings at Salt Lake City, the Pentagon, and USJFCOM. Budget management became a point of friction. USJFCOM was designated the Supported Unified Commander; however, partial SISC funding was officially transferred to USJFCOM less than two months before Opening Ceremonies. Operationally, JTF-O was subordinate to USJFCOM, but for most of the operation they were financially directly responsible to DOMS. (DOMS is operated by the Army. The mission of DOMS is to plan for and commit DOD resources in response to requests from civil authorities.)

JTF-O frequently received decisions regarding funding either through phone discussions with DOMS or through the DOMS LNOs in Salt Lake City. As the Supported Commander, all tasking to JTF-O should have been directed by USJFCOM. Funding delays resulted in contractual issues, specifically contracts not being awarded on agreed upon dates. This caused several source providers to either withdraw from potential support, or to increase prices of provided service.¹⁵

A joint funding compatibility issue was identified that should be improved for future joint events. The Army Budget Office provided funds to USJFCOM's Comptroller's Office. These funds were converted to a Navy Subhead and line of accounting. The vast majority (over 90%) of the units and organizations providing support to the Olympics were Army and Air Force. The Navy operates from a different financial system (STARS) than the Army and Air Force (STANFINS), which created challenges for those organizations accepting funds for support reimbursement. Extensive coordination was necessary between the USJFCOM Comptroller's Office and those activities accepting the Military Interdepartmental Purchase Requests (MIPR) due to the Navy line of accounting. The Army Budget Office also experienced challenges with retrieving the obligation data from their financial system due to incompatible systems.¹⁶

National Special Security Event

A National Special Security Event (NSSE) Working Group was established in Salt Lake City to review all RFAs to support the Winter Olympics. The NSSE Working Group was made up of representatives of DOD, State and Federal Agencies, UOPSC, Salt Lake Olympic Committee (SLOC), Federal Bureau of Investigation (FBI), United States Secret Service (USSS), and Dept of Justice (DOJ). This working group was given the responsibility of determining whether or not an RFA met one of the five approved categories of support, and if that RFA was supportable by other than DOD resources. It was a requirement that all efforts to resource an RFA be exhausted before requesting DOD assistance. When an RFA could not be supported by any means other than DOD, then the RFA was submitted to the NGB Liaison Officer in Salt Lake City. He then began the process of mission analysis. At the same time a copy of the request was forwarded to DOMS for staffing.¹⁷

This situation was cumbersome to productive C2.

Many early UOPSC/committee training exercises suf-

ferred from not involving the units/personnel expected to execute the mission. This systemic problem resulted from either a lack of funding for bringing appropriate personnel to the joint operations area (JOA) in a temporary duty (TDY) status, or the fact that the execution units/personnel had yet to be identified. For example, in Apr '01 the FBI initiated a series of exercises designed to validate security response policies and procedures and included the use of DOD helicopters. However, since the Olympic DOD aviation units had yet to be tasked, the training was conducted using aircraft and aircrews not supporting/participating in the Olympic Games. Similarly, a lack of funding precluded bringing JTF-O's subordinate task force commanders/staff to selective UOPSC exercises. This not only robbed them of training opportunities, but also precluded their input into critical planning and SOP development.¹⁸

In the fall of 2000, in coordination with USJFCOM, DOMS, and JTF-O, a database tracking system was developed to accommodate the increasing number of RFAs being submitted by the NSSE Working Group. A flow chart depicting how RFAs would be processed was developed and distributed to all agencies involved with the Olympics. RFAs would be submitted from the originating agency to the NSSE Working Group. The working group would determine the validity of the request, the category of support, and whether or not the RFA could be sourced from other than DOD resources. If the NSSE Working Group determined that DOD support was required, the RFA would be submitted to JTF-O for mission analysis. JTF-O action officers would determine feasibility and necessary requirements, and then forward them to USJFCOM for action. USJFCOM would staff, resource, and consolidate mission analysis and, if supportable with its COCOM resources, would approve, forward to DOMS for financial and legal review (as required), then issue tasking. If not able to support, USJFCOM would forward the requirement to DOMS, with concurrence or non-concurrence for staffing and resourcing at the Service level (or other appropriate manner). All RFAs were submitted to DOMS for staffing through legal, policy, and finance before approval to support was granted. If an RFA was submitted that had an associated cost of \$50K or less, USJFCOM could approve. RFA's that exceeded the \$50K ceiling required DOMS approval, even though USJFCOM had SISC funds available that had been previously requested by DOMS. DOMS maintained oversight of all funds disbursed to USJFCOM.¹⁹

This process worked, however, it could have been streamlined and clarified. Future NSSE events should have a clearly articulated process for efficient processing of RFAs from the originating agency, through the chain of command. The information to be tracked needs to be tailored to the specific mission or event. As a minimum, the system should include the following information: RFA number, category of support, date received, current RFA status, person responsible for the request, the cost of the request, and each command's concurrence or non-concurrence of the request. As appropriate, an implementing message or disapproval letter should follow the RFA vetting process.²⁰

Summation

The 2002 Winter Olympics was a benchmark event for future NSSEs. It will, and should serve as the standard for future planning in the new national security environment. Significant challenges were met head-on and solved with assertive staffing coordination and MOAs. Significant takeaways from USJFCOM support to the Olympics are:

- A need for mutual understanding of the differences between the C2 of Title 10 and Title 32 forces
- Early designation of the five legislated categories of DOD support (Aviation, Communications, EOD, Physical Security, and Temporary Facilities)
- Funding decisions restricted the decision making process of the JTF-O Commander
- A need to streamline the lengthy MOA staffing process between the NGB, USJFCOM, and state TAGs
- Recognition of the lengthy RFA staffing and approval process prior to 11 September
- Development of formal JTF-O battle staff training
- Early identification of players to allow participation in rehearsals

The overwhelming success achieved by United States military personnel in Salt Lake City is a testament to the preparedness, dedication, and excellence of the men and women of all the United States Armed Forces.²¹

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Intelligence Authorities in Support of Homeland Security

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Background

Homeland security operations are new to a substantial portion of active duty military personnel. Few operations and exercises have used homeland scenarios, since our focus has been applied to foreign, actual or potential enemies. This has changed dramatically since the terrorist threat to the homeland has been demonstrated. In the future, many joint force exercises will take place with homeland security scenarios. Many of the participants will be new to the special requirements associated with these operations.

The major threat from a terrorist attack is an incident involving Chemical, Biological, Radiological, Nuclear, or High Yield Explosives (CBRNE). It produces catastrophic loss of life or property, requiring joint forces support. Other events that would require such support include natural disasters and National Special Security Events (NSSE), such as the 2002 Winter Olympics in Utah.

The intelligence section of a joint force staff (J-2) is tasked to collect, analyze, and store information, and to prepare, disseminate, and maintain an up-to-date relevant threat assessment for the force and other organizations that need the information. This tasking within the United States is subject to intelligence oversight guidance contained in Executive Order 12333. The military community has extensive experience with allowable foreign intelligence activities. However, neither the military nor the civilian community has extensive experience with allowed and specifically disallowed domestic intelligence.

This article addresses what is and is not allowed. It begins first with the guidelines from the executive order, then provides examples from past events, and finally summarizes how to work within the guidelines in the future.

The Executive Order

Selected excerpts from Executive Order 12333 are pro-

vided below for information:

“The Secretary of Defense is authorized to utilize. . . the foreign intelligence and counterintelligence elements of the Army, Navy, Air Force, and Marine Corps, whose responsibilities shall include:

(1) Collection, production, and dissemination of military and military-related foreign intelligence and counterintelligence, and information on the foreign aspects of narcotics production and trafficking. When collection is conducted in response to national foreign intelligence requirements, it will be conducted in accordance with guidance from the Director of Central Intelligence. Collection of national foreign intelligence, not otherwise obtainable, outside the United States shall be coordinated with the Central Intelligence Agency (CIA), and such collection within the United States shall be coordinated with the Federal Bureau of Investigation (FBI); and

(2) Conduct of counterintelligence activities outside the United States in coordination with the CIA, and within the United States in coordination with the FBI.”

“*Collection of Information.* Agencies within the Intelligence Community are authorized to collect, retain, or disseminate information concerning United States persons only in accordance with procedures established by the head of the agency concerned and approved by the Attorney General, consistent with the authorities provided by Part 1 of this Order. Those procedures shall permit collection, retention, and dissemination of the following types of information:

(1) Information that is publicly available or collected with the consent of the person concerned;

(2) Information constituting foreign intelligence, including such information concerning corporations or other commercial organizations. Collection within the United States of foreign intelligence not otherwise obtainable shall be undertaken by the FBI or, when significant foreign intelligence is sought, by other authorized agencies of the Intelligence Community, provided that no foreign intelligence collection by such agencies may be undertaken for the purpose of acquiring information concerning the domestic activities of United States persons;

(3) Information obtained in the course of a lawful for-

eign intelligence, counterintelligence, international narcotics, or international terrorism investigation;

(4) Information needed to protect the safety of any persons or organizations, including those who are targets, victims, or hostages of international terrorist organizations;

(5) Information needed to protect foreign intelligence or counterintelligence sources or methods from unauthorized disclosure. Collection within the United States shall be undertaken by the FBI except that other agencies of the Intelligence Community may also collect such information concerning present or former employees, present or former intelligence agency contractors or their present or former employees, or applicants for any such employment or contracting;

(6) Information concerning persons who are reasonably believed to be potential sources or contacts for the purpose of determining their suitability or credibility;

(7) Information arising out of a lawful personnel, physical, or communications security investigation;

(8) Information acquired by overhead reconnaissance not directed at specific United States persons;

(9) Incidentally obtained information that may indicate involvement in activities that may violate federal, state, local, or foreign laws; and

(10) Information necessary for administrative purposes.

In addition, agencies within the Intelligence Community may disseminate information, other than information derived from signals intelligence, to each appropriate agency within the Intelligence Community for purposes of allowing the recipient agency to determine whether the information is relevant to its responsibilities and can be retained by it.”

Examples in Amplification of Executive Order 12333

Example One: The intelligence section of a joint task force (JTF) was preparing to support another JTF on a real-world operation. The operation was preceded by a training exercise. In the training exercise, military intelligence personnel conducted analysis and prepared reports regarding domestic criminal activities of notional US persons in the context of notional terrorist

acts by international terrorists in the US. In a real-world environment, the manner in which these activities were handled would have violated intelligence oversight directives. Intelligence components may collect information on a US person when the intelligence component has the mission (or “function”) to do so. An intelligence component will only have a mission to collect information on US persons when that intelligence component’s mission can be shown to be in direct support of the primary mission assigned to the command by the Secretary of Defense (SECDEF). The exercise mission in this case did not meet the required criteria. Directives that implement Executive Order 12333 are (1) Department of Defense (DOD) Directive 5240.1, DOD Intelligence Activities (25 April 1988), and (2) DOD Regulation 5240.1R, Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons (7 December 1982).

Example Two: The lead federal agency (LFA) for a real-world domestic civil support operation published priority intelligence requirements (PIR). These PIR addressed domestic and international terrorism, including information regarding purchases of items from retail electronics stores that could be used by terrorists to construct improvised explosive devices. Subsequently, DOD counterintelligence personnel reported interviewing the manager of a retail electronics store within the JTF area of operations in response to the international terrorism PIR. A report was submitted, detailing the purchase of various electronics by an unidentified male, who reportedly spoke “unaccented English in low tones.” The counterintelligence report offered no details discounting the presumption that the individual was a US person, nor linking the individual with any terrorist organization or activity. This domestic collection activity appeared not to be consistent with homeland missions assigned to DOD counterintelligence elements. Guidance included in DOD Regulation 5240.1R indicates that within the US, DOD counterintelligence elements must avoid misinterpretation of LFA PIRs, as foreign intelligence requirements. Collection capabilities do not equate to assigned collection missions.

Example Three: In a recent real-world civil support operation, the JTF was initially staffed without a J-2 section because of a perceived impropriety regarding DOD intelligence operations in the continental US. Later, an intelligence section was created using antiterrorism/force protection (AT/FP) personnel and moved under the J-3 [operations] to separate foreign and do-

mestic intelligence missions. The next change was to stand up the J-2 section, using one of three AT/FP personnel with an intelligence military operational skill (MOS). The two personnel retained in AT/FP had not attended the military school for that MOS. The FBI, as LFA, made routine intelligence reports that mixed foreign and domestic intelligence. Therefore, to preclude possible perceptions of intelligence oversight impropriety, all intelligence gathering, storage, reports, and dissemination became the responsibility of the J-3 AT/FP cell. Thus, intelligence responsibilities were given to untrained AT/FP personnel, while the analytical skill sets to perform this function were in the J-2. In addition, J-2 personnel were directed by the JTF J-3 to stop attending the joint terrorism task force (JTTF) and criminal intelligence collection and dissemination (CICAD) meetings for intelligence, because they included domestic intelligence information. The Assistant SECDEF for Intelligence Oversight (ATSD/IO) reviewed the JTF intelligence operations plans shortly before the operation commenced. He stated there was no reason to exclude J-2 personnel from meetings where domestic threat information was discussed. There is no information oversight problem with the J-2 staff having awareness of the details of domestic threat information.

Example Four: If a military intelligence component receives information that indicates that a US person plans to commit a criminal act (such as an attack against a military installation), this information may be delivered to proper law enforcement authorities and/or command FP representatives. It must be delivered to these organizations in the same format received, with no analysis conducted of the information by the intelligence component. This example illustrates that merely receiving information does not constitute “collection;” collection entails receiving “for use.” Intelligence components may always receive information, if only to determine its intelligence value and whether it can be collected, retained, or disseminated in accordance with governing policy. However, if that US person’s information is included in a report or used in some other manner which constitutes an affirmative intent to use or retain that information, it is deemed collected, and therefore a violation.

Intelligence Coordination with Other Agencies

The most obvious agency to coordinate with is the LFA for a specific civil support operation. The United States

Secret Service (USSS), the FBI, and the Federal Emergency Management Agency (FEMA) are all potential LFAs in domestic operations. The Federal Response Plan designates who will be the LFA for each Emergency Support Function (ESF). FEMA is always the LFA for consequence management (CM) events. Local authorities or the LFA can provide the common operational picture (COP) needed to support deployment missions.

The DOD Military Criminal Investigative Organizations (MCIOs) can legally collect and provide to the commander, information on threats to the command posed by any civilians regardless of where those threats exist (DOD Directive 5200.27). DOD MCIOs can support force protection missions by the provision of indigenous threat information. This capability is derived from Executive Order 12333, item four of the Collection of Information section, that allows information needed to protect the safety of any persons or organizations.

In a recent exercise, DOD liaison officers (LNOs) from various commands were sent to the FBI's Strategic Information Operations Center (SIOC). These DOD LNOs supported the Joint Interagency Intelligence Support Element (JIISE). The FBI, as well as other law enforcement organizations, shares with other intelligence organizations only information that relates to an immediate threat. Such information is within that allowed to protect the safety of any persons or organizations. The LNOs were able to provide critical FP information from these two fusion centers back to DOD decision makers. In addition, the presence of these LNOs stimulated interagency cooperation and coordination.

In a recent domestic real-world operation, intelligence and communications support was provided by the National Intelligence Support Team (NIST). This was a significant advantage to assigned LNOs. The LNOs were tasked with answering requests for information. The dissemination of existing intelligence information within the Intelligence Community is authorized for the purpose of allowing the recipient agency to determine whether the information is relevant to its responsibilities and can be retained by it. Most requests to the LNOs for information sought database checks against individuals, a task for which the LNOs were not equipped to complete effectively in a timely manner. NIST members had immediate access to National Agency databases, message traffic, imagery, and other

intelligence products. As a result, most National Agency inputs were received within one hour of submission. Also, NIST members were able to establish secure connectivity to both the Joint Worldwide Intelligence Communications System (JWICS) and the SECRET Internet Protocol Router Network (SIPRNET) for the J-2 LNOs. This simplified the process of sharing classified information between DOD commands and interagencies.

The National Guard is an important intelligence resource in most domestic civil support operations. Local units may participate in law enforcement (LE) operations. Intelligence from such operations may be critical, especially in support of FP operations. Military units are severely restricted from LE functions in many domestic operations. Command relationships, roles, and responsibilities between the JTF and the National Guard should be clearly identified and disseminated to all relevant organizations.

There are numerous other agencies, such as local LE officers or the Center for Disease Control (CDC), that might provide useful intelligence information in a specific operation. In addition, organizations are created frequently to support the operation on a one-time basis. Intelligence sections should identify available organizations that may be helpful, and take steps to coordinate efforts with them. Such organizations should be contacted, and coordination begun, as soon as practical.

In a civil support operation, many interagency organizations do not have access to classified communications equipment. Many lack any established classified information handlers. Information sent via classified means within DOD may be further disseminated via unsecure means throughout an interagency, leading to security violations. Appropriate processing must be arranged early on. Consideration should be given to declassifying information, if practical, and then separating the unclassified information from classified communications.

Additional Actions

Military intelligence personnel should be cognizant of, and trained in, the appropriate directives, instructions, and intelligence oversight procedures regarding collection, retention, and dissemination of information about US persons. They should have intelligence oversight refresher training when slated for an assignment to in-

teragency intelligence/coordination centers supporting NSSEs.

Rules for civil support operations are works in progress. They may be changed from one operation or exercise to another. Also, some operations may have unique situations for which guidance is ambiguous. If in any doubt, the JTF J-2 should work with the JTF Staff Judge Advocate (SJA) to prepare a "Proper Use Statement" for signature by the JTF commander. This statement requests legal authority to take measures which address the ambiguous situation, in the event intelligence collection assets are used in a domestic situation. The statement is forwarded to the combatant command SJA representative for staffing and ultimate combatant commander action.

When assistance is to be rendered to a civil authority, a legal interpretation by a competent source should be obtained to determine compliance with federal law.

The J-2 should build a list of PIR for the Commander, JTF. Once the list is developed, the J-2 should coordinate with the LFA, FBI, and state and local law enforcement agencies to further develop usable PIR.

Summary

Military operations and exercises are likely to include an increasing focus on domestic civil support functions. The execution of intelligence tasks in this environment is substantially different from that in the more familiar setting of operations against foreign enemies, which are remote from the US homeland. Intelligence operations are restricted in order to protect the privacy of US persons. Because of these restrictions, military intelligence must increase coordination with civilian intelligence organizations.

An important aspect of restricted operations is the need to know and understand the details of the restrictions. Although the documents relevant to such restrictions are available, some of the details are, or at least appear to be, ambiguous. Also, directives are changed from time-to-time, and it is necessary to remain up-to-date. Therefore, prior to an operation or exercise, as practical, relevant directives should be researched, and legal assistance should be used.

Coordination with the LFA and all other relevant organizations should be conducted as early as possible. Use

of LNOs (when available) at critical intelligence sites is an effective tool. Remember that in the intelligence field there is no such thing as a stupid question.

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The Myth of Posse Comitatus

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The Posse Comitatus Act has traditionally been viewed as a major barrier to the use of U.S. military forces in planning for homeland defense.¹ In fact, many in uniform believe that the act precludes the use of U.S. military assets in domestic security operations in any but the most extraordinary situations. As is often the case, reality bears little resemblance to the myth for homeland defense planners. Through a gradual erosion of the act's prohibitions over the past 20 years, posse comitatus today is more of a procedural formality than an actual impediment to the use of U.S. military forces in homeland defense.

History

The original 1878 Posse Comitatus Act was indeed passed with the intent of removing the Army from domestic law enforcement. *Posse comitatus* means "the power of the county," reflecting the inherent power of the old West county sheriff to call upon a posse of able-bodied men to supplement law enforcement assets and thereby maintain the peace. Following the Civil War, the Army had been used extensively throughout the South to maintain civil order, to enforce the policies of the Reconstruction era, and to ensure that any lingering sentiments of rebellion were crushed. However, in reaching those goals, the Army necessarily became involved in traditional police roles and in enforcing politically volatile Reconstruction-era policies. The stationing of federal troops at political events and polling places under the justification of maintaining domestic order became of increasing concern to Congress, which felt that the Army was becoming politicized and straying from its original national defense mission. The Posse Comitatus Act was passed to remove the Army from civilian law enforcement and to return it to its role of

defending the borders of the United States.

Application of the Act

To understand the extent to which the act has relevance today, it is important to understand to whom the act applies and under what circumstances. The statutory language of the act does not apply to all U.S. military forces.² While the act applies to the Army, Air Force, Navy, and Marines, including their Reserve components, it does not apply to the Coast Guard or to the huge military manpower resources of the National Guard.³ The National Guard, when it is operating in its state status pursuant to Title 32 of the U.S. Code, is not subject to the prohibitions on civilian law enforcement. (Federal military forces operate pursuant to Title 10 of the U.S. Code.) In fact, one of the express missions of the Guard is to preserve the laws of the state during times of emergency when regular law enforcement assets prove inadequate. It is only when federalized pursuant to an exercise of presidential authority that the Guard becomes subject to the limitations of the Posse Comitatus Act.

The intent of the act is to prevent the military forces of the United States from becoming a national police force or *guardia civil*. Accordingly, the act prohibits the use of the military to "execute the laws."^{4,5} Execution of the laws is perceived to be a civilian police function, which includes the arrest and detention of criminal suspects, search and seizure activities, restriction of civilian movement through the use of blockades or checkpoints, gathering evidence for use in court, and the use of undercover personnel in civilian drug enforcement activities.⁶

The federal courts have had several opportunities to define what behavior by military personnel in support of civilian law enforcement is permissible under the act. The test applied by the courts has been to determine whether the role of military personnel in the law enforcement operation was "passive" or "active." Active participation in civilian law enforcement, such as making arrests, is deemed a violation of the act, while taking a passive supporting role is not.⁷ Passive support has often taken the form of logistical support to civilian police agencies. Recognizing that the military possesses unique equipment and uniquely trained personnel, the courts have held that providing supplies, equipment, training, facilities, and certain types of intelligence information does not violate the act. Military personnel may also be involved in planning law enforcement op-

erations, as long as the actual arrest of suspects and seizure of evidence is carried out by civilian law enforcement personnel.⁸

The Posse Comitatus Act was passed in the 19th century, when the distinction between criminal law enforcement and defense of the national borders was clearer. Today, with the advent of technology that permits weapons of mass destruction—chemical, biological, or nuclear weapons—to be transported by a single person, the line between police functions and national security concerns has blurred. As a matter of policy, Western nations have labeled terrorists “criminals” to be prosecuted under domestic criminal laws. Consistent with this, the Department of Justice has been charged as the lead U.S. agency for combating terrorism. However, not all terrorist acts are planned and executed by non-state actors. Terrorism refers to illegal attacks on civilians and other nonmilitary targets by either state or non-state actors. This new type of threat requires a reassessment of traditional military roles and missions along with an examination of the relevance and benefits of the Posse Comitatus Act.

Erosion of the Act

While the act appears to prohibit active participation in law enforcement by the military, the reality in application has become quite different. The act is a statutory creation, not a constitutional prohibition. Accordingly, the act can and has been repeatedly circumvented by subsequent legislation. Since 1980, Congress and the president have significantly eroded the prohibitions of the act in order to meet a variety of law enforcement challenges.

One of the most controversial uses of the military during the past 20 years has been to involve the Navy and Air Force in the “war on drugs.” Recognizing the inability of civilian law enforcement agencies to interdict the smuggling of drugs into the United States by air and sea, the Reagan Administration directed the Department of Defense to use naval and air assets to reach out beyond the borders of the United States to preempt drug smuggling. This use of the military in antidrug law enforcement was approved by Congress in 10 U.S.C., sections 371–381. This same legislation permitted the use of military forces in other traditionally civilian areas—immigration control and tariff enforcement.

The use of the military in opposing drug smuggling and

illegal immigration was a significant step away from the act’s central tenet that there was no proper role for the military in the direct enforcement of the laws. The legislative history explains that this new policy is consistent with the Posse Comitatus Act, as the military involvement still amounted to an indirect and logistical support of civilian law enforcement and not direct enforcement.⁹

The weakness of the analysis of passive versus direct involvement in law enforcement was most graphically demonstrated in the tragic 1999 shooting of a shepherd by marines who had been assigned a mission to interdict smuggling and illegal immigration in the remote Southwest. An investigation revealed that for some inexplicable reason the 16-year-old shepherd fired his weapon in the direction of the marines. Return fire killed the boy. This tragedy demonstrates that when armed troops are placed in a position where they are being asked to counter potential criminal activity, it is a mere semantic exercise to argue that the military is being used in a passive support role. The fact that armed military troops were placed in a position with the mere possibility that they would have to use force to subdue civilian criminal activity reflects a significant policy shift by the executive branch away from the posse comitatus doctrine.

Congress has also approved the use of the military in civilian law enforcement through the Civil Disturbance Statutes: 10 U.S.C., sections 331–334. These provisions permit the president to use military personnel to enforce civilian laws where the state has requested assistance or is unable to protect civil rights and property. In case of civil disturbance, the president must first give an order for the offenders to disperse. If the order is not obeyed, the president may then authorize military forces to make arrests and restore order. The scope of the Civil Disturbance Statutes is sufficiently broad to encompass civil disturbance resulting from terrorist or other criminal activity. It was these provisions that were relied upon to restore order using active-duty Army personnel following the Los Angeles “race riots” of the early 1990s.

Federal military personnel may also be used pursuant to the Stafford Act, 42 U.S.C., section 5121, in times of natural disaster upon request from a state governor. In such an instance, the Stafford Act permits the president to declare a major disaster and send in military forces on an emergency basis for up to ten days to pre-

serve life and property. While the Stafford Act authority is still subject to the criteria of active versus passive, it represents a significant exception to the Posse Comitatus Act's underlying principle that the military is not a domestic police force auxiliary.

An infrequently cited constitutional power of the president provides an even broader basis for the president to use military forces in the context of homeland defense. This is the president's inherent right and duty to preserve federal functions. In the past this has been recognized to authorize the president to preserve the freedom of navigable waterways and to put down armed insurrection. However, with the expansion of federal authority during this century into many areas formerly reserved to the states (transportation, commerce, education, civil rights) there is likewise an argument that the president's power to preserve these "federal" functions has expanded as well. The use of federal troops in the South during the 1960s to preserve access to educational institutions for blacks was an exercise of this constitutional presidential authority.

In the past five years, the erosion of the Posse Comitatus Act has continued with the increasingly common use of military forces as security for essentially civilian events. During the 1996 Olympics in Atlanta, over ten thousand U.S. troops were deployed under the partial rationale that they were present to deter terrorism. The use of active-duty military forces in a traditional police security role did not raise any serious questions under the act, even though these troops would clearly have been in the middle of a massive law enforcement emergency had a large-scale terrorist incident occurred. The only questions of propriety arose when many of these troops were then employed as bus drivers or to maintain playing fields. This led to a momentary but passing expression of displeasure from Congress.¹⁰

Homeland Defense

The Posse Comitatus Act was passed in an era when the threat to national security came primarily from the standing armies and navies of foreign powers. Today the equation for national defense and security has changed significantly. With the fall of the Soviet Union our attention has been diverted—from the threat of aggression by massed armies crossing the plains of Europe to the security of our own soil against biological or chemical terrorism. Rather than focusing on massed Russian intercontinental ballistic missiles as our most

imminent threat, we are increasingly more aware of the destructive potential of new forms of asymmetric warfare. For instance, the U.S. Office of Technology Assessment states that 100 kilograms of dry powdered anthrax released under ideal meteorological conditions could kill up to three million people in a city the size of Washington, DC.¹¹ The chemical warfare attacks carried out by Japanese terrorists in the subways of Tokyo during the 1990s heightened our sense of vulnerability. The Oklahoma City bombing and the unsuccessful attempt to topple the World Trade Center have our domestic security planners looking inward for threats against the soil of the United States from small but technologically advanced threats of highly motivated terrorists. What legal bar does the Posse Comitatus Act present today to using the military to prevent or respond to a biological or chemical attack on the soil of the United States? In view of the erosion of the Posse Comitatus Act in the past 20 years, the answer is "not much."

The erosion of the Posse Comitatus Act through Congressional legislation and executive policy has left a hollow shell in place of a law that formerly was a real limitation on the military's role in civilian law enforcement and security issues. The plethora of constitutional and statutory exceptions to the act provides the executive branch with a menu of options under which it can justify the use of military forces to combat domestic terrorism. Whether an act of terrorism is classified as a civil disturbance under 10 U.S.C., 331–334, or whether the president relies upon constitutional power to preserve federal functions, it is difficult to think of a domestic terrorism scenario of sizable scale under which the use of the military could not be lawfully justified in view of the act's erosion. The act is no longer a realistic bar to direct military involvement in counterterrorism planning and operations. It is a low legal hurdle that can be easily cleared through invocation of the appropriate legal justification, either before or after the fact.¹²

Conclusion

Is the Posse Comitatus Act totally without meaning today? No, it remains a deterrent to prevent the unauthorized deployment of troops at the local level in response to what is purely a civilian law enforcement matter. Although no person has ever been successfully prosecuted under the act, it is available in criminal or administrative proceedings to punish a lower-level commander who uses military forces to pursue a common

felon or to conduct sobriety checkpoints off of a federal military post. Officers have had their careers abruptly brought to a close by misusing federal military assets to support a purely civilian criminal matter.

But does the act present a major barrier at the National Command Authority level to use of military forces in the battle against terrorism? The numerous exceptions and policy shifts carried out over the past 20 years strongly indicate that it does not. Could anyone seriously suggest that it is appropriate to use the military to interdict drugs and illegal aliens but preclude the military from countering terrorist threats that employ weapons of mass destruction? For two decades the military has been increasingly used as an auxiliary to civilian law enforcement when the capabilities of the police have been exceeded. Under both the statutory and constitutional exceptions that have permitted the use of the military in law enforcement since 1980, the president has ample authority to employ the military in homeland defense against the threat of weapons of mass destruction in terrorist hands.

[Editor's note: The term National Command Authority (NCA) refers to the President and the Secretary of Defense. The term NCA is no longer used and is replaced by using either the President or Secretary of Defense or both as appropriate. Per Memorandum for Joint Directors, LTG John P. Abizaid, Director, Joint Staff, MCM-0003-02, 11 January 2002.]

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Bibliography

- 1 "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both"—18 U.S.C. 1385.
- 2 The act as originally passed referenced only limitations upon the Army. After World War II, it was amended to include the Air Force. By DoD Directive 5525.5, the limitations of the act have been administratively adopted to apply to the Navy and Marine Corps as well.
- 3 The peacetime law enforcement mission of the Coast Guard has been well recognized since the founding of its parent agency, the Revenue Marine, in 1790.
- 4 For the sake of brevity, the term *military* as employed in this article refers to the Army, Air Force, Navy, and Marines, their Reserve components, and the National Guard when in federalized status pursuant to Title 10. It does not include the Coast Guard or the National Guard operating in state-controlled Title 13 status.
- 5 The Uniform Code of Military Justice is an exception to the Posse Comitatus Act. The code gives the military the inherent right to maintain good order and discipline over its personnel through law enforcement activity, prosecution, and punishment. As such, the code gives the military jurisdiction to enforce both military and civilian laws against its own military personnel.
- 6 *State v. Nelson*, 298 NC 573, 260 SE 2d 629, *cert den*; 446 U.S. 929, 100 S. Ct. 1867, 64 L. Ed. 2d 282 (1980).
- 7 *Ibid*.
- 8 *United States v. Red Feather*, 392 F. Supp. 916 (DC SD 1975).
- 9 Pursuant to this mission, the USS *Kidd* intercepted a drug-smuggling boat in 1983. When the smugglers refused to yield without force, the problem of passive versus active law enforcement was handled by lowering the Navy ensign on the ship and raising the Coast Guard ensign. The Coast Guard asset USS *Kidd* then fired on the smugglers' ship, rendering it immobile and leading to its seizure, along with 900 bales of marijuana.
- 10 "Business, Capitol Hill Question Military's Role in Olympics," *Defense Week*, 22 July 1996.
- 11 U.S. Congress, Office of Technology Assessment, *Proliferation of Weapons of Mass Destruction: Assessing the Risks* (Washington, DC: Government Printing Office, 1993), OTA-ISC-559, p. 54.
- 12 The enforcement of a prosecution under the Posse Comitatus Act would necessarily be brought by the Department of Justice, the lead agency charged with combating domestic terrorism. This further suggests that as long as coordination of the use of military forces was part of a coordinated interagency effort that the likelihood of prosecution under the Posse Comitatus Act of any executive branch official would seem remote at best.

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