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Civil Military Cooperation for Counterterrorism Operations within the United States

by

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Civil Military Cooperation for Counterterrorism Operations within the United States

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Abstract

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The threat to the United States remains complex, ambiguous and real. Ever since the United States' military response in the aftermath to the 9/11 attacks, the U.S. Military has become the subject matter expert in counterterrorism operations while engaging in Afghanistan, Iraq, the Horn of Africa and other places around the globe. While major advances in preparation, planning, funding and training in support of counterterrorism operations have been achieved by the U.S. Law Enforcement Community over the last decade, there remains a necessity and opportunity for greater synergy between the U.S. Military and U.S. Law Enforcement for counterterrorism operations within homeland. The recommendation in this paper will be to design a model where military representatives have greater involvement with U.S. civilian law enforcement in counterterrorism operations within the United States. The U.S. military, specifically Special Operations Forces, possesses a pool of talent in advanced counterterrorism operations that is not being utilized by civilian law enforcement because of the current law enforcement models and the traditional interpretation by the U.S. military of their role in continental United States operations.

Civil Military Cooperation for Counterterrorism Operations within the United States

> Let us not forget, the Nation remains at war abroad to defend against and defeat threats to our homeland. Our foremost priority is the security of the American people, our territory, and our way of life. In the current operational environment, this means each component of our Joint Force will remain aligned to achieve success in our ongoing campaign in Afghanistan and security efforts with Pakistan, and against violent extremism worldwide. We must continue to prevent attacks against the United States and its allies, strengthen international and regional security, and be prepared to deter and defeat aggression that would undermine international stability as we fight these campaigns.
>
> —The National Military Strategy of the United States of America 2011[1]

The Department of Defense, the Department of Homeland Security and the U.S. Law Enforcement Community continue to improve their planning, preparing and training for counterterrorism operations within the United States. "The attacks of September 11, 2001, as well as the subsequent attempts to contaminate Americans with anthrax, dramatically exposed the nation's vulnerabilities to domestic terrorism and prompted numerous legislative proposals to further [*sic*] strengthen our preparedness and response."[2] Although there has been an increasing focus on coordination among the agencies responsible for protecting the homeland by the Executive and Legislative branches of the U.S. Government, there remains opportunity for continued improvement.

The focus of this strategic research project is to identify a model whereby U.S. military representatives have greater involvement with U.S. civilian law enforcement agencies in counterterrorism operations within the United States. By examining the current environment, issues in homeland security and homeland defense, the current threats, the current U. S. model for counterterrorism, the issue of *Posse Comitatus*, and

Special Operations capabilities, this paper will propose a new model for the way ahead that incorporates members of DOD into the 103 Joint Terrorism Task Forces across the U.S.

The citizens of the United States have many expectations related to security and possess great trust that their security will be provided by a team of professionals to which they continue to dedicate their tax dollars. If you were to ask a U.S. citizen what their expectation is, if an aircraft is flown by a suspected terrorist and enters into U.S. airspace, quite possibly the response from the citizen would be an expectation that a U.S. military aircraft (Air Force/Navy/Marine) would intercept the suspected terrorist and take appropriate action, even destruction, so as to ensure the safety of the American citizens. And if you were to ask a U.S. citizen about another similar situation but change the scenario to a suspected terrorist operating a watercraft entering U.S. territorial waters, likely you would get a similar response from the U.S. citizen who would have an expectation that a U.S. Navy vessel (or Coast Guard) would intercept and take appropriate action, even destruction, to ensure the safety of U.S. citizens. Likewise, if a U.S. citizen was asked about a similar terrorist threat in space, quite possibly the response given would be the expectation of a citizen of the U.S. that the U.S. Air Force would be able to mitigate the threat by neutralizing the weapon used by a terrorist in the domain of space. Similarly, if a U.S. citizen were asked about the lesser understood cyber domain, there still rests within the citizen a faith, built on trust, that there exists somewhere in the Department of Defense (DOD) a strategy and capability to mitigate the potential damage that can be inflicted to the U.S. by a terrorist in the cyber domain. Although the cyber domain is the newest and arguably the least

understood domain, there exists an abiding faith from the people of the U.S. that the U.S. Military is preparing for a cyber-attack and additionally a faith abides that the DOD is preparing to use technology to give the capability for a cyber-attack by the U.S. offensively if the need arises for the U.S. In all of the 4 domains mentioned above, air, sea, space and cyber, the citizens of the U.S. and the U.S. Government appear congruent in what the expectations are from the American people and the actual planned response. However, when we add the "land" domain as a proposed scenario we see the expectations of the U.S. citizens still aligned and consistent with an expected military response but the planned U.S. Government response changes. In the land domain, the U.S. Government response to a terrorist attack is more complicated and turns to a more law enforcement-centric approach until specific targets are identified which require the capability of U.S. military weapon systems. There exists a gap in the land domain that doesn't exist in the domains of air, sea, space and cyber. The expectations of the American people do not change but certainly the U.S. Government strategy on how to deal with terrorists in a land domain and how we conduct counterterrorism operations is clearly different than our strategy in the other domains.

There are a variety of constitutional, cultural and complex issues related to the U.S. Government's strategy in conducting counterterrorist operations or responding to a terrorist attack within the U.S. The scope of this paper is not to address them all nor the U.S. Government's response to a terrorist attack in the other domains, but to focus on some of the issues involved in counterterrorism operations in the U.S. within the land domain. It is in the land domain that there exists a continued difference of opinion in

U.S. constitutional interpretation, cultural and political ideals of personal liberties, historical norms – specifically a resistance to the military enforcing U.S. law, multiple governmental agencies authorized to conduct these type of operations and a host of other issues that come into play when dealing with the security of the U.S. homeland.

"There are two central questions for the Department of Defense in the homeland security debate today. First, what is its overall relationship with the rest of government - and DHS in particular - in protecting the U.S. homeland from possible terrorist attack? Second, should its force structure in particular that of the Reserves and the National Guard be significantly modified in light of the new threats facing the country?"[3] The first question regarding the DOD's overall relationship with other agencies relative to protecting the homeland against terrorist attacks deserves continual evaluation. Arguably, there is not a citizen in the United States who does not have an expectation that the DOD, the Department of Homeland Security (DHS) and the U.S. Law Enforcement Community will work together closely in order to provide for the "common defense" of the United States of America. This is exactly why the American people allow money to be appropriated by their elected representatives in Congress to be spent on security & defense. In order to meet this expectation the President and Congress created a U.S. Military major command which would be uniquely focused on the American homeland called NORTHCOM (Northern Command).[4] Recognizing gaps, made visible by the September 11 attacks, the DOD attempted to solve identified national security shortcomings and "by the creation of Northern Command on October 1, 2002, the U.S. Military added an organization designed to carry out the general

defense of North America as well as the oceans out to several hundred miles' distance from the U.S. shoreline."[5]

Even before the creation of NORTHCOM, and still today, most of the narratives written by representatives of the DOD are consistent with the necessity for all agencies to work together and secure the defense of the homeland. In the 2012 Army Posture statement's summary, Gen. Raymond Odierno, our Army Chief of Staff explains; "the danger extends from the homeland to the theater where combat operations might occur. Conflict is the norm; a stable peace the exception. In such a world, our adversaries will adapt to gain advantage, especially in the land domain. And it is on land, that our challenges will be the most complex because of dynamic human relationships and terrain variables."[6] A focus on counterterrorism operations on the U.S. mainland, the danger that could exist, and the structure of the force necessary to meet this challenge points us to the DOD's land power which is primarily nested in the United States Army. By design, just as the Air Force prepares for future threats in the dimension of the air, space & cyber, and the Navy at sea, the Army is responsible for the operations necessary to ensure security on land.

As the DOD and notably, the U.S. Army absorbs future defense funding cuts, as we rebalance towards the Asian-Pacific area, as we complete combat operations in Afghanistan and design the future force for the U.S. Army, the security of the U.S. homeland remains non-negotiable and we will need to discover new ways and means to address this complex problem. This paper presents an argument for an increased role for DOD and specifically U.S. Army personnel involved in counterterrorism operations for protection of the U.S. homeland.

The National Military Strategy of the United States of America 2011 explains that the Joint Force in the land domain, "will be capable of full spectrum operations, and be organized to provide a versatile mix of tailorable and networked organizations operating on a sustainable rotational cycle."[7] A positive side to budget cuts is the requirement to re-examine and restructure the force allowing creativity to be applied to existing and older problems.

The Army has created new and effective ideas when tasked with finding solutions for security as it did after the attacks of September 11, 2001. The Army needed to transform and become more agile in its response to a national crisis in the U.S. homeland. One solution designed to assist with the danger of terrorist attacks was the Army's approach to delegate an on call force. "The Army is also in the process of creating the Guardian Brigade from existing units, with a headquarters element and trained personnel, to provide a specialized and tailored response force in the event of an attack involving the use of WMD at home."[8]

While the terrorist attacks of September 11, triggered this solution**,** there exists currently another opportunity to restructure the force and tailor a new design for protecting against the current and future threat. For far too long the defense of the U.S. homeland has been heralded as the primary mission of the U.S. Military but respective to the land domain the U.S. Military focus has been very foreign-centric. "The Army's approach to Homeland Security has, therefore, been to rely on active and reserve forces that have been sized, organized, trained, and equipped to fight *foreign* [*sic*] wars, essentially treating Homeland Security as a lesser included case."[9]

Homeland Defense and Homeland Security

From the Whiskey Rebellion to Hurricane Katrina in 2005 and Superstorm Sandy in 2012, the DOD has a lengthy track record of working with the civil authorities while engaging in actions that assist in the enforcement of U.S. laws. Before designing a new force tailored to meet the security needs of the U.S., we must understand the current framework utilized to secure our homeland. Securing our homeland has a larger impact than just that of security for the U.S. contiguous borders. As the DOD Joint Publication 3-28, Civil Support, clearly states; "A secure U.S. homeland is the Nation's first priority, and is a fundamental aspect of the national military presence."[10] Our allies and partners across the world are also impacted psychologically if the United States is unable to secure its homeland, for as a world power many global friends look to the United States as the hope of, and example for, a continuous democratic government. The U.S. framework for securing the homeland is nested in a variety of strategic level documents each defining the importance of and details required in Homeland Defense and Homeland Security. "The DOD organizational construct to support the HS mission, through its war-fighting and civil support missions, is characterized by: prepare, detect, deter, prevent, defend, respond and recover."[11] Specifically the deterrence effect is caused when U.S. military assets are arrayed by "overt support to the DHS or other Federal and State Law Enforcement Agencies (LEAs)"[12] causing terrorists to defer their intended action because of the overwhelming display of force.

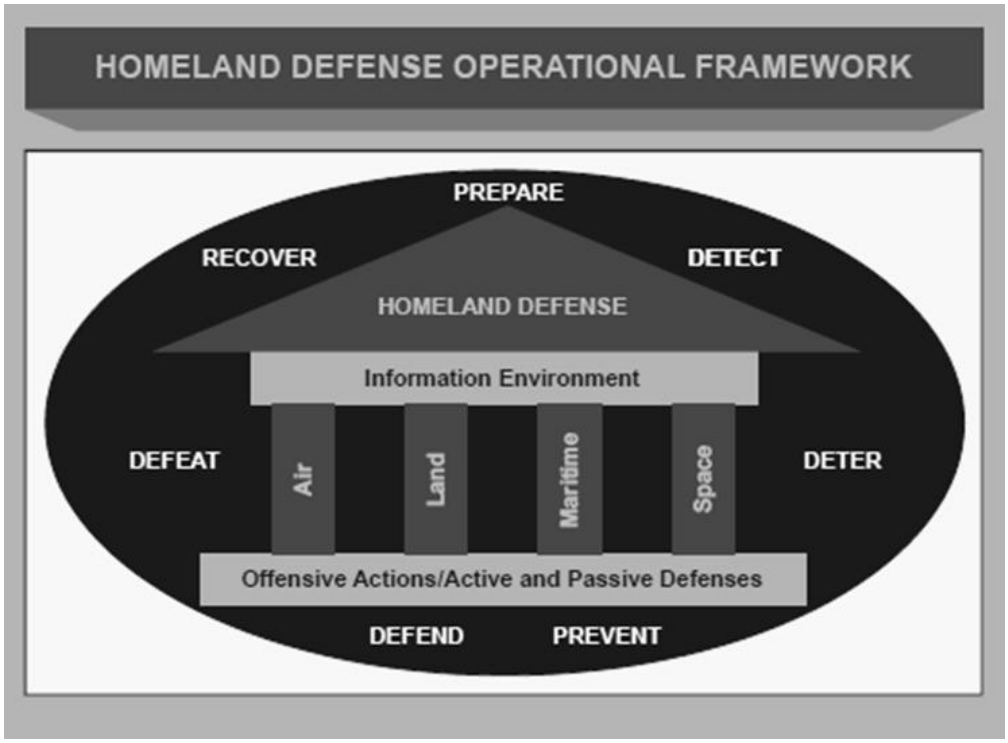

Figure 1: Homeland Defense Operational Framework from Joint Publication 3-27[13]

The terms Homeland Security and Homeland Defense are often used synonymously but the U.S. Government has two distinct meanings for their application. Homeland Security, as defined in the National Strategy for Homeland Security (NSHS), "is a concerted national effort to prevent terrorist acts within the United States, reduce America's vulnerabilities to terrorism, minimize the damage, and recover from attacks that do occur."[14] The Department of Homeland Security is led by a Cabinet level civilian, currently Secretary Janet Napolitano, whose mission is to secure the homeland.

The DOD's role in Homeland Security (HS) is to "protect the homeland through two distinct but interrelated missions – Homeland Defense (HD) and Civil Support (CS),"[15] and in the updated 2011 manual on *How the Army Runs*, the DOD strategy for HS identified "two broad mission areas: Homeland Defense (HD) and Defense Support

of Civil Authorities (DSCA)."[16] "The DOD has lead responsibility for HD and is the primary federal agency for this mission. HD is DOD's primary responsibility and is defined as "the protection of US sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression, or other threats as directed by the President."[17]

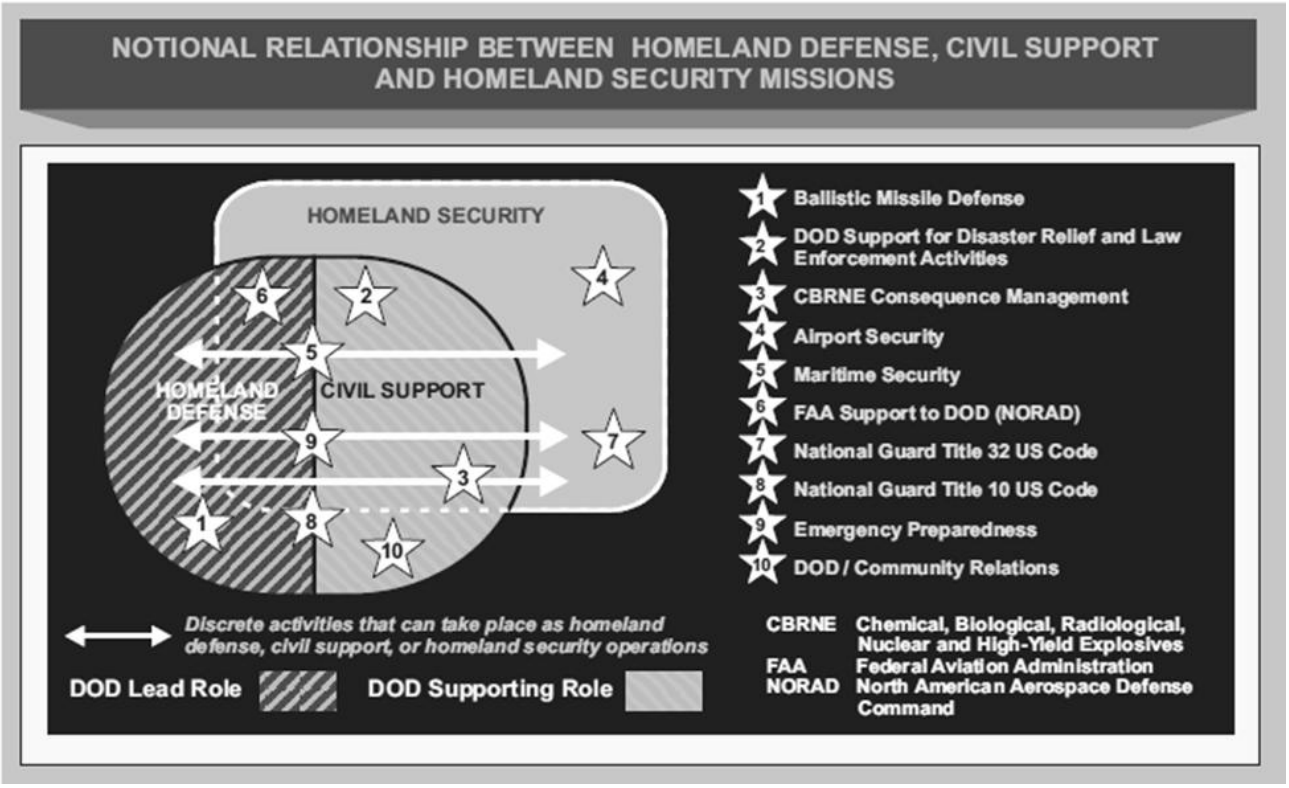

Figure 2: Notional Relationship between Homeland Defense, Civil Support, and Homeland Security Missions[18]

In many situations "the mere presence of DOD assets operating in support of law enforcement along the borders or in the airspace adjacent to our public lands can deter transnational threat actors such as foreign terrorist organizations."[19]

It would be unwise to create a picture where all of the U.S. Government planning could be mistaken for seamless execution. History proves otherwise, and there has

been great friction not only between government agencies, e.g. law enforcement agencies and DOD**,** but specifically friction has existed within DOD regarding the limited resourcing for defense for the homeland. DOD has had a past reluctance to take on the civil support mission, considering it a mission to accept when it had the resources available to assist. Perhaps the most significant change for DOD today is the unconventional and unprecedented threat to the U.S. homeland.

There has been significant improvement and continued progress through interagency cooperation, NORTHCOM training exercises, and actual U.S. natural disasters where current experience and "lessons learned" continue to serve as a step on the staircase for the way ahead. After suffering through a brutal terrorist attack in New York City, the Pentagon and numerous natural disasters, the expectations of U.S. citizens has changed with a demand for a more coordinated federal effort. Currently, once civil authorities have gained approval for their request for assistance, the DOD assists to provide the support. "The DOD can also provide support when directed by the President or the SECDEF, or when authorized under separate established authorities, DOD remains in support of civil authority and generally in support of a primary federal agency."[20] In the future the DOD will remain the lead agency for homeland defense and will continue to provide resources when requested and approved for support of another Federal or State agency.

Threats

As members of the U.S. Military have returned home from Iraq and will be returning soon from Afghanistan and other areas where the DOD has been engaged fighting terrorism, terrorists will be less engaged on their own lands and may seek to use their liberty to focus their future efforts back towards the U.S. homeland. The DOD

Joint Publication 3-28, Civil Support, addresses this issue in explaining; “the homeland is confronted by a spectrum of threats and hazards. Some can be difficult to categorize as either a traditional military threat requiring only a DOD response capability or a purely law enforcement threat requiring a non-military response from the Department of Homeland Security (DHS), Department of Justice (DOJ), or other civilian agency.”[21] The threats to our Nation are unique and continually changing. As DHS Secretary Janet Napolitano noted on July 30, 2009; “We cannot forget that the 9/11 attackers conceived of their plans in the Philippines, planned in Malaysia and Germany, recruited from Yemen and Saudi Arabia, trained in Pakistan and Afghanistan, and carried them out in the United States.”[22] The minds of terrorists are creative and continually developing new strategies to exploit our weaknesses. The minds that developed and executed the 9/11 attacks utilized our security weaknesses against us in a powerful way. The U.S. must place its best assets into the fight in order to prevent a future attack on U.S. soil and preserve our national security. The post 9/11 conventional wisdom for U.S. national security has focused our efforts on prevention**,** crisis and consequence management. “At home the United States is pursuing a strategy capable of meeting the full range of threats and hazards to our communities. These threats and hazards include terrorism, natural disasters, large-scale cyber-attacks, and pandemics.”[23] One of the primary concerns for the U.S. is the dangerous type of weapons that could be acquired by an enemy nation, non-state actor or terrorist group. “The proliferation of nuclear, biological, and chemical weapons technology has the potential to magnify the threats posed by regional state actors, giving them more freedom of action to challenge U.S. interests.”[24] Even as representatives of the U.S. Government work tirelessly to mitigate the threat of

Weapons of Mass Destruction (WMD) and their potentially devastating impact for U.S. interests abroad, there remains an even greater potential for devastation for this type of mass-casualty producing weapons if utilized on targets within the U.S. "Terrorist access to even simple nuclear devices poses the prospect of devastating consequences for the United States. Accordingly, the DOD will continue to enhance its capabilities, acting with an array of domestic and foreign partners, to conduct effective operations to counter the proliferation of WMD."[25]

The Department of Homeland Security has visualized, planned, funded and executed numerous campaigns to assist Federal, State, County and Municipal law enforcement agencies and other government agencies on crisis and consequence management. The U.S. is certainly more prepared for any crisis situation than it was a decade ago but real success for the U.S. is not measured in the ability to handle the crisis or how quickly the Federal Bureau of Investigation (FBI) can identify the group responsible for a terrorist action (crisis management), although helpful in the crisis. Nor is success measured by how quickly the Federal Emergency Management Agency (FEMA) can mitigate the impact, clean up the damage and coordinate the restoration of services from the devastation caused by a terrorist (consequence management), although immensely helpful after the crisis. Real success for the U.S. is and will be measured by the prevention of a terrorist attack.

While prevention is the optimum outcome of all this effort, it is also the most difficult to achieve. In order to prevent a terrorist attack we must identify the terrorist or terrorist group that poses the threat to the U.S. and influence them in such a manner as to ensure their potential to cause harm to the American people is thwarted. In the land

domain, this effort is complex, messy and a continual business which is entangled in our constitution, public laws, presidential directives, current policy and not the least of which is U.S. public opinion. In addition, U.S. Government counterterrorism efforts have "forced the terrorists to evolve and modify their ways of doing business."[26] "Today, the principal terrorist enemy confronting the United States is a transnational movement of extremist organizations, networks, and individuals – and their state and non-state supporters – which have in common that they exploit Islam and use terrorism for ideological ends."[27]

Preventing the threat of terrorist action is complex and resource consuming, but there is no other viable alternative for the welfare of the American people. Prevention requires all U.S. governmental agencies cooperating, along with the American people, as seamlessly as possible toward the desired end of security. The complexity of this issue is understood as DOD and law enforcement agencies' attempt to work together on the issue of securing the homeland. "In certain cases DOD performs Civil Support to assist law enforcement agencies to prevent threats to the homeland. Ideally, this will occur as far forward as possible, prior to any threat reaching the homeland."[28] A futuristic relationship between the DOD and law enforcement agencies for securing the homeland and addressing a way through some of the current complexity and ambiguity will be addressed later in this paper.

The bottom line of threat analyses of a terrorist attack against the U.S. is that the threat is real, current and growing. The Rand Corporation in a paper titled; *A Strategic Planning Approach, Defining Alternative Counterterrorism Strategies as an Illustration*, laid out a strategic goal that is applicable for today; "Prevent attacks by al Qaeda and

other Salafi-jihadist groups from occurring within the United States that are psychologically significant (i.e., attacks involving tens of casualties or smaller frequent attacks)."[29] The paper states; "Prevention here is understood to pertain not only to the operational phase of an attack but also to attempts to attack-in other words, to precursor activities such as recruiting, training, planning and material acquisition."[30]

In order to counter this threat of a terrorist attack on the U.S. homeland, the U.S. Government will need to question "assumptions" of strategies developed in the past. To take a new and continually fresh look at the threat as it evolves and creatively apply new techniques to counter the ever evolving threat. The real success of this focus will be when measures to prevent the attack have met that challenge and were successful in preventing the attack from ever occurring.

The Current Model

If prevention is the focus for the U.S. Government, then it is proper to evaluate the current model to determine if there is a better design that orients more assets toward the goal of prevention. Notwithstanding the very best effort and intentions of the DOD and law enforcement agencies, the lack of civil military cooperation is a problem. The military has well trained assets that have developed a skill set by fighting terrorism on foreign soil, but they and their acquired skills have not been integrated into civilian law enforcement agencies for protection of the U.S. homeland in a new model. The agencies directed to lead efforts to prevent terrorist attacks on the U.S. homeland are not from the DOD, but law enforcement agencies. Although the current model, as mentioned earlier in this paper, has DOD with a responsibility in HD and will utilize assets to counter a terrorist strike on U.S. soil, the authority in this lane belongs to the law enforcement agencies. "Law enforcement entities have critical authorities and

responsibilities concerning potential and actual terrorist attacks and incidents. As affirmed and clarified by the Homeland Security Act of 2002: primary responsibility for investigating and prosecuting acts of terrorism shall be vested not in DHS, but rather in federal, state and local law enforcement agencies with jurisdiction over the acts in question."[31]

There is no question that every member of the DOD and every member of America's law enforcement agencies have the same goal to prevent a terrorist attack on the U.S. and collectively to provide for national security. It takes both entities successful in their enterprise to cause the desired prevention. Both the DOD and law enforcement agencies have been successful on many fronts in the past decade. Although continual improvement and refinement is an eternal effort which requires absolute vigilance, the DOD and law enforcement agencies have thwarted numerous attacks against the U.S. and our interests around the world.

The future will be defined in Afghanistan as it is now in Iraq, where a once large contingent of members of the DOD are gone and with it the interaction with the enemy on foreign soil far away from the U.S. mainland. The enemies of the U.S. will not just fade away**;** to believe so is to misunderstand the threat and fail to take a realistic look at history. The terrorist networks and enemies of the U.S. will seek the continued confrontation they desire. For this struggle is why they exist and their success in it will be an eternal reward**,** which is why they continue to seek the confrontation with the U.S. - whom many terrorist networks deem as their chief enemy. This is not difficult to understand as the United States of America is currently the only world power. This allows the terrorist network to have a clearly defined enemy and a nation to blame for

their current condition. Unfortunately the U.S. has become the target of the anger for many terrorist cells.

The passage of security from the Coalition forces to Afghan soldiers over the next year won't stop terrorist networks from their desire for a confrontation with the U.S. As American and Coalition forces exit Afghanistan there is great hope that the Afghan soldiers can secure their country and provide conditions where democratically elected governments' will assist the people of Afghanistan and allow their country to flourish forever. Even if this hope becomes a reality for the people of Afghanistan it does not guarantee a safer condition for the people of the United States. Stability in any country is an enemy to terrorist networks that normally thrive when weak central governments exist. However, stability in one country does not necessarily guarantee the stability of another. A stable Afghanistan in the years ahead may help to mitigate the threat of terrorist action in the U.S. but it will not reduce it entirely.

As noted earlier, we are likely to face an increase in terrorist activity focused on the U.S. homeland due to the following:

- Terrorist networks will continue to desire a struggle with the United States as the ultimate obstacle to their strategic goals.
- As U.S. military forces are returned home from Southwest and South Asia, the opportunities for terrorist networks to struggle with the U.S. abroad will reduce significantly.

The need for civil-military cooperation in counterterrorism operations has never been greater, and the limited cooperation between the DOD and law enforcement must

be improved in this environment. As such, there exists the need for a new model to counter the evolving threat at home.

Posse Comitatus

If there is an overarching causation factor impeding civil military cooperation for counterterrorism operations within the U.S., it is the misapplication of *Posse Comitatus*. The DOD deserves a lion-share of the blame as it has historically been so sensitive about applying a military solution in the U.S. that it has practically been absent in the land domain. The DOD is providing Homeland Defense in the air, space and sea domains and quickly becoming the lead for America in the cyber domain**,** but the DOD is not the primary provider of security for the land domain. That belongs to the DHS until such time DOD is requested to provide assistance because of a need for a specific DOD asset.

In defense of the DOD, they are continuing in a long tradition of respect for the spirit of *Posse Comitatus*. "This high level of respect is largely contingent on the military being used to protect—and not to control—the American people."[32] The trust between the DOD and the American people is built on a time-honored tradition that has not caused the American people to question if their military will be using its capability against the citizenry. The DOD is careful not to get close to the line that causes the American people concern that the military intends to use its assets against them**.** Thus, the DOD has been ever ready to claim it can't get involved with anything that resembles law enforcement based on the requirements of *Posse Comitatus*. "Remember that the framers of the Constitution gave Congress the power to "provide and maintain" a navy, but only to "raise and support" an army when needed. This reflects a wariness of

standing armies arising from the European practice of monarchs using their standing armies not only to wage war, but also to control their own people."[33]

While U.S. national security policy makers have been reluctant to commit the DOD in operations to enforce U.S. laws within the U.S. because of *Posse Comitatus*, they have not held the same feeling in regard to the state militias. "The American Civil War was a cataclysmic event on many levels. The use of military force to put down the rebellion resulted in bitter animosity that persisted in the former confederacy for generations. It was perceptions of the abuse of federal military power during Reconstruction that led to the passage of the *Posse Comitatus* Act, which continues to impact operations today."[34]

Conversely, the respective States view their local militias and National Guard units from a different perspective and have benefitted greatly from the assistance and security that units under the control of a state's Governor can provide to the citizens of a particular state. This different feeling exists for military units controlled at the state level, usually because of the citizen soldier's familiarity with a community.

Some of the former negative perspectives of the U.S. Military being utilized for operations on the U.S. homeland has dissipated because of DOD's successful disaster assistance. The American people have witnessed first-hand the benefit of federal and federalized soldiers performing crisis response missions in the U.S. homeland. Through the utilization of these soldiers, security was established, suffering was reduced and stability was restored more quickly. Hurricane Katrina is a good example of the DOD utilizing federal soldiers to assist with FEMA operations to secure the citizenry and prevent further property loss.

Even though the sentiment of the American people may have softened over the years toward a federal military response in times of domestic disaster or disorder**,** the attitude of professional military officers has not kept pace with this change. "*Posse Comitatus* looms larger in the minds of many officers than its actual legal impact would justify."[35]

It is fair to say the issues surrounding the interpretation of *Posse Comitatus* have had a tremendous amount of commentary both for and against its application. Even so "despite what you've heard, the *Posse Comitatus* Act is not a significant impediment to DOD participation in law enforcement or homeland security."[36] The real issue in dealing with the application of *Posse Comitatus* is in fact the application. "Simply put, *Posse Comitatus* does not prohibit the use of federal military forces in a law enforcement role: it just requires that such use be constitutional. The more common is the military law enforcement like missions such as counter-drug operations."[37]

Across the U.S. most National Guard forces, while operating under a state command, have and currently conduct a "full range of security and law enforcement operations, assuming state law and the governor authorized such actions."[38] It is interesting to note here that this practice is widely accepted and does little to even pique the interest of the American citizens or federal and state constitutional scholars. "The authority for National Guard forces to perform law enforcement functions varies from state to state, but nothing in federal law or DOD policy prohibits a state from using its military assets in this role." [39] While routinely we can witness the State committing military assets towards a domestic problem set, the real friction is created when the military asset is requested from the federal government. There are certain examples of

national security for the homeland where the spirit of *Posse Comitatus* seems like a moot point. "It is important to keep in mind, DOD policy notwithstanding, that neither *Posse Comitatus* nor any other law prohibits the President from using the military in a domestic security role if he deems it necessary."[40]

The newest domain of the cyber-world can serve as a good example for our current understanding of *Posse Comitatus*. The American people have an expectation that the U.S. Government will protect them from the dangers of a cyber-attack and, as mentioned earlier, an expectation that the U.S. Government is building a capability to develop cyber-weapons to disrupt any enemy who poses a threat to the U.S. in the cyber domain. Laws and bills continue to be debated by the U.S. Congress regarding how the cyber domain will be arrayed and how the U.S. Government will protect the American people from a cyber-attack. While the FBI and other law enforcement agencies continue to build capability for this enforcement, the DOD has taken a lead in this area of technology and is quickly building an infrastructure that looks to be headed toward a separate Combatant Command in the future.

The application of *Posse Comitatus* could come into play as the DOD could find itself with the responsibility of enforcing U.S. cyber law against cyber-attackers both domestic and foreign. Since the capability exists in the DOD, there are few Americans who would conclude that it would be better to suffer a cyber-attack than to violate *Posse Comitatus* and have the DOD be involved in an investigation that could mitigate the attack. The DHS could still remain the lead agency for enforcing America's laws in the cyber domain, but the DOD could operate in a supporting role to DHS. General Renuart, in his article titled; *How the Military Supports Homeland Security* stated; "Our role in

homeland security is to build confidence among our partners and be there in support when they ask for it, bringing capabilities and capacities that DOD can provide to help our civilian partners to protect our citizens."[41] "Nowhere in law does it say that DOD is in command of any civil law enforcement agencies. *Posse Comitatus* prohibits it, and we are especially sensitive not to step outside those guidelines."[42] General Renuart continued to articulate the current military support by explaining; "We support civil agencies that do counter-drug and border-security operations of many kinds, including legally authorized tunnel detection and logistical and sensor support to law enforcement agency interdiction of illegal trafficking."[43] The DOD is involved supporting the law enforcement agencies because it possesses the capability to do so.

"Terrorists, however, are enemies who look a lot like criminals, especially when they are amongst us. This is the crux of the issue."[44] Ensuring national security against terrorists operating within the U.S. should be based on those branches of the government that possess the capabilities (technology, manpower, weapons systems and resources) to counter a terrorist threat to the American people. Locating terrorist networks is certainly complex and fraught with legal minefields. This necessitates a holistic approach by the U.S. Government utilizing all its capabilities with DHS in the lead and DOD in support.

Special Operations Capabilities

The U.S. Military, specifically Special Operations Forces (SOF), possesses a pool of talent in advanced counterterrorism operations that is not being utilized in cooperation with civilian law enforcement**.** This is because of current law enforcement models and the traditional interpretation by the U.S. Military of its role in domestic operations. The SOF could assist the DHS because of the capabilities that exist within

the SOF community from over a decade's worth of experience in counterterrorism operations. If mobilized to assist the DHS in the domestic war on terror, the SOF could expand the capability of the DHS led Joint Terrorism Task Forces (JTTF). The benefit of the unique skill-sets that the SOF could bring to the joint domestic counterterrorism effort would be instantly evident. Much of what the SOF could provide for the JTTFs would be in the lane of training and sharing lessons learned from their experience deployed abroad in Iraq, Afghanistan, the Horn of Africa, or wherever they have been deployed participating in counterterrorism operations. "The SOF community, operators or the trainers from the Joint Special Operations University, could theoretically provide training to municipal and regional authorities in methods to reduce their vulnerability to terrorist attack and how to minimize the damage and recover from attacks that do occur."[45] "For example, facial recognition software associated with biometric capabilities helps military and law enforcement personnel identify terrorists and piece together their human networks as part of combating terrorism"[46] More focused tactical instruction would benefit the members assigned to the JTTF and allow them not only the ability to learn some refined military processes but also to learn the best practices the military has employed in counterterrorism efforts. "Instruction on the military decision making process, intelligence preparation of the battlefield, and conducting vulnerability assessments could provide planners and first responders with the tools to identify their critical infrastructure and local high value targets and greatly enhance planning for the protection of these assets."[47]

The SOF possess the knowledge and experience to be able to teach a current strategy for counterterrorism operations, much of which exists in understanding the

strategy of the terrorists. Sun Tzu taught "thus, what is of supreme importance in war is to attack the enemy's strategy" [48] Utilization of the experienced SOF to join the JTTFs for domestic counterterrorism operations is the efficient use of the nation's best resources for the counterterrorism fight. By assisting the law enforcement agencies in the JTTFs with instruction, intelligence, communications and when approved – operations, the U.S. homeland will be protected better than if we allow our nation's most experienced warriors in counterterrorism operations to continue not to be engaged within the homeland and just train for a future fight abroad. And arguably that is what the American population expects as well.

A New Model

U.S. Military assets have been committed for over a decade to fighting abroad and it is time to change our national law enforcement models and create improved civil military cooperation in counter terrorism operations within the U.S. by assigning DOD personnel to assist and serve in the DHS led JTTFs. Moving forward, "in the next ten years, the terrorists [sic] groups poised to attack the United States and actively seeking to inflict mass casualties or disrupt U.S. Military operations, represent the most immediate challenge to the nation's security."[49] As many of these skilled SOF counterterrorism warriors are no longer deploying abroad where the U.S. Military is fighting terrorism around the world, this talent pool should partner with civilian law enforcement in order to utilize their skill set and posture the U.S. towards greater national security. "The defining characteristic of the security environment over the next ten years is the risk of substantial, diverse, and asymmetric challenges to the United States, our allies and interests."[50]

The national security policy makers have understood the asymmetrical threat for a number of years and have started down the path for increased intelligence sharing from DOD to DHS. The Joint Publication 3-28, Civil Support; "DOD also supports civil authorities' efforts to prevent threats by providing similar analytical support to key law enforcement centers within the continental US (CONUS) such as the joint terrorism task forces."[51] For the way ahead, "we will find ourselves surprised by the creativity and capability of our adversaries."[52] The Joint Operating Environment 2010 publication suggests the nation will be best served by, "a joint force capable of adjusting with minimum difficulty when the surprise inevitably comes."[53] As DOD's paper dated January 2012 on *Sustaining U.S. Global Leadership: Priorities for the 21st Century Defense* explains, "the primary missions of the U.S. Armed Forces is to succeed first of all in the mission of 'counterterrorism and irregular warfare' and to accomplish the counterterrorism mission 'we will continue to build and sustain tailored capabilities for counterterrorism and irregular warfare'."[54] The JTTF is the best framework for DOD to tailor its capabilities for counterterrorism operations.

JTTFs were established in the 1980s and remain FBI led and have grown significantly after the 9/11 terrorist attacks. "The JTTFs serve three main purposes: (1) prevent terrorist attacks; (2) respond to and investigate terrorist incidents or terrorist-related activity; and (3) identify and investigate domestic and foreign terrorists groups and individuals targeting or operating within the United States."[55] The American people have an expectation that their government is cooperating in these endeavors and expect the DOD and DHS to work together in order to accomplish the three main

purposes of the JTTF's existence as both DOD and DHS have statutory responsibility for these missions related to terrorism.

"Today, JTTFs exist in 103 cities throughout the nation, with a least one in each of the FBI's 56 field offices, as well as others in outlying FBI resident agency annexes."[56] The DOD already has assigned two soldiers to the National Joint Terrorism Task Force (N-JTTF) located at the FBI headquarters.[57] Speaking to NORTHCOM interaction, "we also have liaison officers from other combatant commands and an FBI representative who briefs me routinely on counterterrorism operations. We, in turn, have two action officers at the National Counterterrorism Center and another in the FBI's National Joint Terrorism Task Force."[58] JTTF's generally comprise the Federal Bureau of Investigation, other federal agencies (notably Department of Homeland Security components such as U.S. Coast Guard Investigative Service, U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, the Transportation Security Administration, and the U.S. Secret Service as well as the Department of State's Diplomatic Security Service), state and local law enforcement, and specialized agencies, such as railroad police.

Conclusion

"National unity was deemed by Sun Tzu to be an essential requirement of victorious war. This could be attained only under a government which was devoted to the people's welfare."[59] The U.S. government must be devoted to the people's welfare and devise a strategy for future national security. The U.S. Army must participate fully in developing this strategy as the nation's main effort in the land domain. The best design to tailor future U.S. governmental assets for counterterrorism operations within the U.S. is for the Army to assign SOF or other skilled soldiers to the 103 JTTFs across

the U.S. to ensure that the U.S. military and civilian law enforcement agencies are integrated for efforts in the national security arena.

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