

Joint Forces Staff College
Joint Advanced Warfighting School



**“CURRENT OBSTACLES TO FULLY PREPARING TITLE 10 FORCES FOR
HOMELAND DEFENSE AND CIVIL SUPPORT”**

by

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A paper submitted to the Faculty of the Joint Advanced Warfighting School in partial satisfaction of the requirements of a Master of Science Degree in Joint Campaign Planning and Strategy.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Joint Forces Staff College or the Department of Defense.

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Title: “Current Obstacles to Fully Preparing Title 10 Forces for Homeland Defense”**Author:**

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Abstract:

The National Strategy for Homeland Security, The National Military Strategic Plan for the War of Terrorism, the Strategy for Homeland Defense and Civil Support, numerous CONPLANS and DOD instructions, all reference the use of Title 10 forces INCONUS. However current law creates many obstacles to ensuring our active forces are fully prepared. During a crisis, the President and Secretary of Defense could authorize use of Title 10 forces. However, this “just in time” approach does not allow for the units assigned the opportunity to be fully trained to respond. I suggest that changes in law and policy are required to support the training needed to ensure our active forces are adequately prepared to defend against asymmetric threats in the US.

In this paper, I will discuss the definitions and legal authority of Homeland Defense and Civil Support then explore the history and precedence of assigning forces to missions on U.S. soil. Also explored are the military forces available to respond to include National Guard, Coast Guard and Active Duty forces. I will review several case studies of where the military has been used INCONUS as well as look at plans and scenarios that may require the use of Title 10 in the future. Finally, I will provide recommendations that might be considered.

We constantly prepare to fight the last war. We are now in a war unlike any we have fought, we must let go of the last war, embrace this one and make the changes needed militarily, politically and legally. No longer is our threat another state’s military power on distant shores. It is against criminals that we call terrorists here at home. Criminals are normally fought within the law of our great nation but when the law prevents bringing the full force of our nation’s capabilities against the enemy in this war, the law should be changed.

Keywords:

Homeland Defense, Military Support to Civil Authority, Posse Comitatus Act, Title 10

INTRODUCTION

In the post 9/11 era of Homeland Security and Homeland Defense, active duty DOD forces have the potential of being tasked more frequently to perform missions on U.S. soil. These missions range in size from a few volunteers supporting a wild fire; to a natural catastrophic event requiring several hundred personnel; to a coordinated multiple terrorist attacks coupled with Weapons of Mass Destruction requiring the response of several thousand military personnel to establish law and order. There are many obstacles to accomplishing these missions to include: an OCONUS training focus; a lack of INCONUS specific doctrine; numerous legal obstacles; historical concerns by many groups of giving the military too much authority; and simply a lack of understanding of what can be legally accomplished. Due to a lack of clear directives, I propose that currently the active components of the services are not adequately trained and prepared to respond to many INCONUS Homeland Defense scenarios. This brings into question just how prepared the United States military is to combat a domestic catastrophic terrorist event.

The National Strategy for Homeland Security, The National Military Strategic Plan for the War of Terrorism, the Strategy for Homeland Defense and Civil Support, and numerous CONPLANS and DOD instructions, all reference the use of Title 10 (active duty military) forces in support of Homeland Security. However current law creates many obstacles to ensuring our active forces are fully prepared for this contingency. During a crisis, the President and Secretary of Defense could authorize use of Title 10 forces to respond. However, this “just in time” approach does not allow for the units assigned the opportunity to be fully trained and ready. I suggest that changes in law and

policy are required to ensure our active forces are adequately prepared to defend against asymmetric threats in the US.

The thesis statement for this paper is: In order for the Title 10 component of US military forces to provide their full capabilities to INCONUS Homeland Defense and Civil Support missions, significant changes must be made in law, policy and training to ensure mission readiness, and ultimately success, of our forces to defend against these threats in the domestic environment.

In my thesis, I will explore current directives to show where strategic and operational problems exist in assigning Active Component Forces to INCONUS missions. Today, our Active Forces train primarily for OCONUS missions, as certainly is required in the current operational environment. However training is inadequate to completely prepare our forces for these potential INCONUS operations. The result is when our Title 10 forces are called upon, the response will be with our fingers crossed that everything will be within the legal limits of the law. I suggest our forces are very prepared to deploy to Baghdad, but are not adequately prepared to respond to potential homeland defense or civil support scenarios in downtown Atlanta, Los Angeles or Washington D.C.

I will start by discussing the definitions and legal authority of Homeland Defense and Civil Support (HD/CS). Then I will explore some of the history and precedence of assigning forces to missions on U.S. soil. I will then follow by discussing the military forces available to respond to HD/CS missions including the National Guard, Coast Guard and Active forces. I will also briefly investigate the laws that grant their authority. From that foundation, I will review several case studies where the military has been used

INCONUS, followed by a review of plans and scenarios that may require the use of Title 10 forces in the future. Finally, I will summarize the issues and provide recommendations that might be considered if the U.S. is to be best prepared to respond to an attack utilizing these forces.

These issues are important to consider as we continue to develop in Homeland Defense and Civil Support. There is significant risk in putting combat personnel, trained in the Preplanned Responses and Rules of Engagement for hostile areas of operations, such as Iraq and Afghanistan, in the middle of chaos in downtown Richmond, Va. with very little warning or time to retrain. Actions are required now, to mitigate these risks.

“The world changed on September 11, 2001. We learned that a threat that gathers on the other side of the earth can strike our own cities and kill our own citizens. It’s an important lesson; one we can never forget. Oceans no longer protect America from the dangers of this world. We’re protected by daily vigilance at home. And we will be protected by resolute and decisive action against threats abroad.”

President George W. Bush, September 17, 2002

Chapter 1

Homeland Security and Homeland Defense

In order to develop an understanding of the complexities of DoD use in Homeland Security, we must review some of the key definitions, the national strategies, organization, legal authorities and the forces, that support Homeland Security. We will start with defining Homeland Security (HS), Homeland Defense (HD), Defense Support of Civil Authorities (DSCA), and how they relate to each other.

Homeland Security (HS), as defined in the National Strategy for Homeland Security¹, is “a concerted national effort to prevent terrorist attacks within the United States, reduce America’s vulnerability to terrorism, and minimize the damage and recover from attacks that do occur.” *The Department of Homeland Security is the lead Federal agency for homeland security.* In addition, its responsibilities extend beyond terrorism to preventing, preparing for, responding to, and recovering from a wide range of major domestic disasters and other emergencies.² It is the primary mission of the Department of Homeland Security to prevent terrorist attacks within the United States. The Attorney General leads our Nation’s law enforcement effort to detect, prevent, and investigate terrorist activity within the United States. The Department of Defense does not have the assigned responsibility to stop terrorists from coming across our borders, to stop terrorists from coming through US ports, or to stop terrorists from hijacking aircraft inside or outside the United States. These responsibilities belong to the Department of

¹ The White House, *National Strategy for Homeland Security*, Washington, DC, USGPO, Office of Homeland Security, July 2002, pg 13, pg 43

² Department of Defense, *Strategy for Homeland Defense and Civil Support*, Washington, D.C. June 2005, pg 2

Homeland Security. DoD does not have the authority to seek out and arrest terrorists in the United States, these responsibilities belong to the Department of Justice.³

Homeland Defense is 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. *The Department of Defense is responsible for Homeland Defense.* The DoD Strategy for Homeland Defense and Civil Support clearly states, “When directed by the President or the Secretary of Defense, *we will also defeat direct threats within US airspace and on US territory.*”⁴ DoD recognizes that threats planned or inspired by “external” actors may materialize internally. The reference to “external threats” does not limit where or how attacks could be planned and executed. The Department is prepared to conduct homeland defense (HD) missions whenever the President, exercising his constitutional authority as Commander in Chief, authorizes military actions. Examples of Homeland Defense include missions such as domestic air defense and Maritime Interdiction of suspect merchant vessels. Figure 1 below shows the overlapping relationship of Homeland Defense and Homeland Security.⁵

Another important definition is **Defense Support of Civil Authorities** (DSCA). Often referred to as “Civil Support”, this is DoD support, for domestic emergencies and for *designated law enforcement and other activities*. The Department of Defense provides defense support of civil authorities when directed to do so by the President or Secretary of Defense.⁶

³ Ibid, pg 2

⁴ Ibid, pg 2

⁵ Ibid, pg 3

⁶ Ibid pg 4

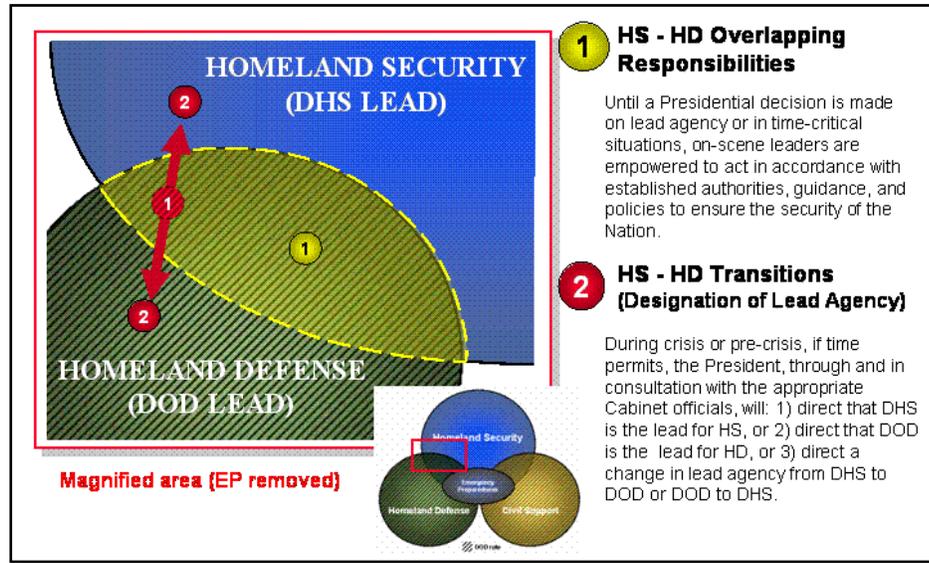


Figure 1: Paradigm Overlaps and Transitions

In accordance with the National Strategy for Homeland Security (NSHS), the Department of Defense contributes to homeland security through its military missions overseas, homeland defense, and support to civil authorities. Ongoing military operations abroad, work to reduce the terrorist threat against the United States. According to the NSHS, there are three circumstances under which the DoD would be involved in supporting security at home.⁷ DoD's Strategy for Homeland Defense and Civil Support (HDCS) further divides those activities into lead, supporting or enabling roles.⁸

First, in extraordinary circumstances, DoD would take the lead in conducting military missions such as combat air patrols or maritime defense operations with the supporting effort of other agencies. Plans for such contingencies will continue to be coordinated, as appropriate, with the National Security Council, Homeland Security

⁷ National Strategy for Homeland Security, pg 13

⁸ Strategy for HDCS, pg 2

Council, and other federal departments and agencies.⁹ This would be considered Homeland Defense, where DoD has the lead.

Second, the Department of Defense would be involved during emergencies such as responding to an attack¹⁰ or to forest fires, floods, tornadoes, or other catastrophes. In these circumstances, DoD may be asked to act quickly to support with capabilities that other agencies do not have.¹¹ This example would be considered Defense Support to Civil Authorities (DSCA).

Finally, the Department of Defense would also take part in “limited scope” missions where other agencies have the lead—for example, security at a special event like the recent Olympics.¹² These events are more deliberately planned than the catastrophes of the previous paragraph. As another example, DoD may assist the Department of Homeland Security in its efforts to develop intelligence analytical capabilities, training and simulation technologies or unmanned aerial vehicle technologies for civilian surveillance along the nation’s borders. This would also be an example of Defense Support to Civil Authority by giving them technology to enable them to better accomplish their mission.

The Strategic Planning Guidance of March 2004 directed that the Strategy for Homeland Defense and Civil Support integrate the objectives and guidance expressed in the National Security Strategy, the National Strategy for Homeland Security, and the

⁹ *NSHS*, pg 5

¹⁰ Note from Strategy for HDCS, pg 5: Homeland Defense includes missions such as domestic air defense. The Department recognizes that threats planned or inspired by “external” actors may materialize internally. The reference to “external threats” does not limit where or how attacks could be planned and executed. The Department is prepared to conduct homeland defense missions whenever the President, exercising his constitutional authority as Commander in Chief, authorizes military actions.

¹¹ *NSHS*, pg 13

¹² *NSHS*, , pg 13, pg 43

National Defense Strategy to guide Department of Defense operations to protect the US homeland. Figure 2 below, reflects how these strategies are linked and nested together.¹³

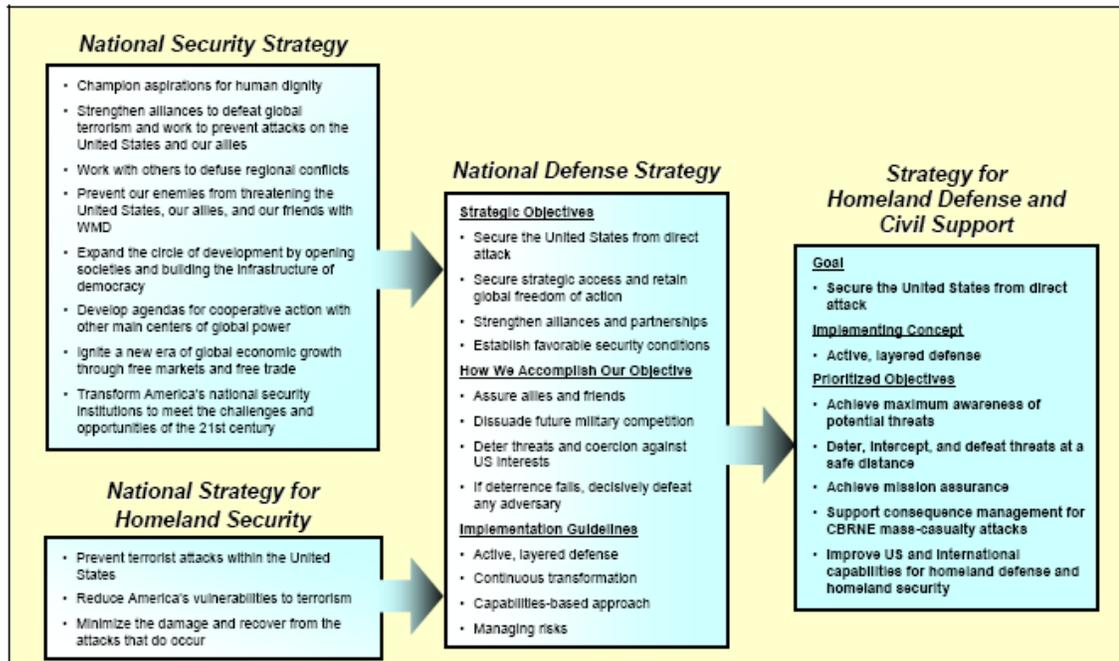


Figure 2: Strategic Underpinnings of Homeland Defense and Civil Support Strategy

Figure 1: Strategic Underpinnings of the Homeland Defense and Civil Support Strategy

- Organization Restructuring to Enhance Homeland Security and Homeland Defense

As a direct result of the renewed emphasis on Homeland Security and Homeland Defense, several important changes have been made in government organization. Of most significance, the Department of Homeland Security was established in 2002. This reorganization in the federal government brought over 200,000 personnel, in many Homeland Security related agencies, under the leadership of a new Presidential cabinet member, the Secretary of Homeland Security. Included in this reorganization were the

¹³ *Strategy for Homeland Defense and Civil Support*, Department of Defense Washington, D.C. June 2005, pg 6

U.S. Coast Guard, U.S. Customs and Boarder Protection, Federal Emergency Management Agency and the U.S. Secret Service.

Further, the Department of Defense transformed its organization to better support Homeland Defense. First, it established the position of Assistant Secretary of Defense for Homeland Defense in order to provide overall supervision of DoD's Homeland Defense activities. This change was in response to the need for improved policy guidance to DoD components on HD/CS issues.¹⁴

Additionally, DoD established a new Combatant Command, US Northern Command, headquartered in Colorado Springs, Colorado in 2002. US Northern Command (USNORTHCOM) is responsible for planning, organizing, and executing homeland defense and civil support missions within the continental United States, Alaska, and our territorial waters. It also coordinates security cooperation with Canada and Mexico. In addition to the landmasses of the United States, Canada, and Mexico, US Northern Command's area of responsibility includes the coastal approaches, the Gulf of Mexico, Puerto Rico, and the US Virgin Islands.¹⁵

- Legal Authority and DoD Guidance for Military Response

The legal authority for the use of DoD forces domestically comes from several Articles in the constitution and acts passed at various times in our nations history. They are often a source of debate and provide the guidelines within which our military must operate. It is important to review them to better understand what is currently legally allowed, and what the limitations are.

¹⁴ Strategy for Homeland Defense and Civil Support, Department of Defense, June 2005, pg 7

¹⁵ Ibid, pg 8

The Constitution gives the President the inherent authority to protect the property and functionality of the federal government when state and local officials can not, or will not. As Commander in Chief, this authority includes the use of military force. In Title 10 of the United States Code, Section 332 (known as the Insurrection Act), Congress gave the President the authority to commit the military to enforce federal laws within the continental U.S.¹⁶ In addition, the President may call into federal service the National Guard units of any state and use the armed forces as he considers necessary to enforce those laws or to suppress a rebellion.¹⁷ As two examples, the provisions of this law were used to enforce public school desegregation in Arkansas in 1957 and in Alabama in 1963.¹⁸ The same provisions were used to send in troops to help quell civil rights protests in Mississippi in 1962 and again in Alabama in 1963.¹⁹ In addition to the civil rights support, the laws were also applied to restore law and order during the countless anti-war demonstrations of the 1960's. A summary of the key laws and regulations follow:

- **Article II, Section 2 of the U.S. Constitution.** “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States....”
- **Article IV, Section 4 of the U.S. Constitution.** “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall *protect each of them against Invasion*; and on application of the Legislature,

¹⁶ 18 Title 10, *United States Code*, Section 331-335 (The Insurrection Act) (July 29, 1861).

¹⁷ Title 10, *United States Code*, Section 332 (Use of Militia and Armed Forces to Enforce Federal Authority).

¹⁸ Executive Order Number 10,730, 22 *Federal Register* 7,628 (24 September 1957); Executive Order Number 11,118, 28 *Federal Register* 9,863 (10 September 1963).

¹⁹ Executive Order Number 11,053, 27 *Federal Register* 9,681 (30 September 1962); Executive Order Number 11,111, 28 *Federal Register* 5,709 (11 June 1963).

or of the Executive (when the Legislature cannot be convened) *against domestic Violence.*”

- **Title 10 U.S. Code Sections 331-335, 672.** Commonly known as The Insurrection Act, provides an exception to the Posse Comitatus Act. It gives the President constitutional authority to:
 - Provide assistance to a state to suppress an insurrection,
 - enforce Federal authority or suppress a rebellion,
 - suppress an insurrection, domestic violence, unlawful combination, or conspiracy that deprives any part or class of people of rights, that the state is unable to provide protection of law,
 - order insurgents to disperse and retire peaceably to their abodes within a limited time restore public order as result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack, or other condition beyond State’s ability to maintain public order.²⁰

You can see where the Title 10 of U.S. Code above, coupled with Article II and IV of the U.S. Constitution, give the POTUS the authority to utilize Title 10 forces within the CONUS when the situation requires these extreme measures. Some have argued that this is adequate authority and no additional changes are required. Others in the Executive and Legislative branches feel it is inadequate.

On September 30, 2006, the Congress modified the Insurrection Act as part of the 2007 Defense Authorization Bill. Section 1076 of the new law changed Sec. 333 of the "Insurrection Act," and widened the President's ability to deploy troops within the United

²⁰ 18 Title 10, *United States Code*, Section 331-335 (The Insurrection Act) (July 29, 1861).

States to enforce the laws. Under this act, the President may also deploy troops to enforce laws to restore order during a natural disaster, epidemic, serious public health emergency, terrorist attack, or other condition, when the President determines that the authorities of the state are incapable of maintaining public order. The bill also modified Sec. 334 of the Insurrection Act, giving the President authority to order the dispersal of either insurgents or "those obstructing the enforcement of the laws." The 2007 Defense Authorization Bill changed the name of the chapter from "Insurrection" to "Enforcement of the Laws to Restore Public Order." The objective of this change was to clarify the wording of the bill to better match current events.

Unfortunately, it appears the 2008 Defense Authorization Bill, signed January 28, 2008, repealed the changes made in the 2007 bill largely due to state governors concern of giving the President more control of the National Guard forces. The result is the original wording of the Insurrection Act of 1861, remains in place.²¹ The 2007 Bill was a significant and needed change to the law giving Title 10 forces additional clarification in what present day missions require. It is a key point to recognize that the 2007 Bill was repealed not from issues with the use of Title 10 forces, but from the perceived impact on

²¹ JOHN WARNER NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2007 enhanced DoD's homeland defense capabilities, notably:

- Authorized the Secretary of Defense to expand the types of emergencies for which the Weapons of Mass Destruction-Civil Support Teams (WMD-CSTs) could be deployed to include the intentional or unintentional release of nuclear, biological, radiological, toxic or poisonous chemical materials; or natural or manmade disasters.
- Required the Secretary of Defense, in consultation with the Secretary of Homeland Security, to develop plans to support civilian authorities, and to maintain a database of emergency response capabilities resident in each State's National Guard that could be deployed in response to a natural or manmade disaster.
- Authorized the Secretary of Defense to preposition prepackaged food, water, communications equipment, and medical supplies to improve the ability of the Department of Defense to respond to requests from civil authorities.
- Revised and updated the Insurrection Act, to clarify the President's authority to use the armed forces in cases where, as the result of natural disaster, terrorism, or other event, public order has broken down and is beyond the capacity of the constituted authorities to restore.

These changes were repealed in the FY 2008 NATIONAL DEFENSE AUTHORIZATION ACT

the Title 32, National Guard forces. Additional legal statutes impacting Title 10 forces follow:

- **Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, 42 U.S.C. § 5121**, is the primary legal authority for federal government, including DoD, to participate in domestic disaster relief. Some key points of the Stafford Act follow:
 - Applies in 50 States, DC, Puerto Rico, Virgin Islands, Guam, American Samoa, Mariana Islands, and Trust Territories of Pacific Islands,
 - Is FEMA's statutory basis for disaster relief,
 - Allows the President to direct federal agencies, including DoD, to provide personnel, equipment, supplies, facilities, and managerial, technical, and advisory services.

- **Homeland Security Presidential Directive/HSPD-5, Management of Domestic Incidents.** Signed 28 February 2003, HSPD 5 assigns the Secretary of the Department of Homeland Security as the principal Federal official for domestic incident management to coordinate the Federal Government's resources utilized in response to, or recovery from terrorist attacks, major disasters, or other emergencies. Key points in the HSPD are:
 - The Federal Government will assist state and local authorities when their resources are overwhelmed, or when Federal interests are involved.
 - SecDef will provide military support to civil authorities for domestic incidents as directed by the President. SecDef will retain command of military forces providing civil support.

DoD further amplifies the above authorities through numerous directives to provide clarification to its forces. These include DODD 3025.15, *Military Assistance to Civil Authorities (MACA)*, which governs all DoD military assistance INCONUS. This includes support in connection with incidents involving an act or threat of terrorism. As Figure 3 below reflects, there are numerous other amplifying documents to address the unique requirements for disaster related civil emergencies, civil disturbance operations, support to law enforcement, CBRNE attack and Counter Drug Operations.²²



Fig 3, Defense Support of Civil Authorities

²² OPERATIONAL LAW HANDBOOK (August 2006), International and Operational Law Department, The Judge Advocate General's Legal Center and School, pg 439

- Posse Comitatus Act

. . . the Army is not composed of lawyers, capable of judging at a moment's notice of just how far they can go in the maintenance of law and order . . .

President Ulysses S. Grant Letter to Congress, 13 January 1875

Another law that significantly *limits* the authority of DoD forces is the Posse Comitatus Act. This law is often a source of confusion in what DoD forces can and can not do. For this issue, an understanding of this law is critical. I will start to make a case that due largely to this outdated law, the policies and training are inadequate to best prepare our forces for INCONUS operations.

Section 1385 of U.S. Code Title 18, commonly known as the “Posse Comitatus Act”, prohibits the use of the Armed Forces to perform in a law enforcement capacity, except in cases and under circumstances expressly authorized by the Constitution or act of Congress. The Oxford English Dictionary defines Posse Comitatus as the force of the county; the body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or ‘raise’ to repress a riot or for other purposes; also, a body of men actually so raised and commanded by the sheriff.²³ By the late 18th century, the Posse Comitatus had become an acknowledged duty as a citizen²⁴ and was frequently utilized to assist the sheriff to restore law and order. American Western movies often portrayed the local sheriff ordering his deputy to

²³ Ibid, pg 430

²⁴ *Black's Law Dictionary* simply describes the term as “a group of citizens who are called together to assist the sheriff in keeping the peace.” Bryan A. Garner, ed., *Black's Law Dictionary*, 7th ed., s.v. “posse comitatus”; *The Oxford Companion to Law* more specifically defines it as: “In early English law, the force of able-bodied citizens of the county summoned and commanded by the sheriff to assist in maintaining public order, to pursue felons, or to participate in the military defense of the country. Attendance was enforced by the penalty of culvertag or turntail, which implied forfeiture of property and perpetual servitude. As the sheriff's authority declined, the posse became a purely civil body and in time, the authority to call out such assistance was entrusted to justices and magistrates.” *The Oxford Companion to Law* (1980), s.v. “posse comitatus,” by David M. Walker.

raise a “posse” to catch the bad guys in the 1800’s, as had been done for several centuries before in England.

Before 1878, the use of the U.S. Army in support of, and at times instead of, civil law enforcement was rare. However, it was not considered unlawful. At the insistence of Southern legislators in the Civil War Reconstruction period, a reexamination of those legal principles was conducted. Enacted in 1878, the Posse Comitatus Act (PCA) was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal law. The law states “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army 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.”

After the passage of the Posse Comitatus Act (PCA) in 1878, the Armed Forces have been called on much less frequently to conduct civil law enforcement duties. When employed, their use has been controversial, and the constitutional basis for their use has been challenged in the media, in politics, and in the courts.²⁵

There have been several exceptions to the Posse Comitatus Act since it was passed for a range of domestic purposes.²⁶ Current exceptions to the law include Chapter 15 of Title 10, commonly known as the “Insurrection Act”, and the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, both discussed previously. Both of these grant the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation. These laws

²⁵ Matthews, Matt, *The Posse Comitatus Act and the United States Army: A Historical Perspective*, Combat Studies Institute Press, Fort Leavenworth, Kansas, March 2006, Introduction.

²⁶ *Ibid*, pg 1

specifically authorize the President to use the Armed Forces to help restore public order.²⁷

“Not only is the law confusing to pundits and commentators, it is confusing to soldiers of all ranks, as well as political leaders in Congress and the executive branch. Even military lawyers, who have the luxury of spending time in academic settings studying the Act have found it to be confusing.”

Donald J. Currier, Carlisle Papers in Security Strategy²⁸

The PCA law originally applied to all Active duty personnel and Reservists on active or inactive duty for training, in the Army and Air Force. In 10 U.S.C. § 375, Congress directed SecDef to promulgate regulations forbidding direct participation “by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity.”²⁹ The law also pertains to National Guard personnel in Federal service (i.e., Title 10 status) as well as civilian employees of DoD when under the direct command and control of a military officer.³⁰ The PCA imposes no restriction on use of U.S. Armed Forces abroad, noting that Congress intended to preclude military intervention only in domestic affairs.

The law does not apply to a member of a military service when off duty and acting in a private capacity, a member of the National Guard when not in Federal Service, a member of a Reserve Component when not on active duty, active duty for training, or inactive duty for training. Further under U.S. Code Title 14, members of the Coast Guard

²⁷ OPERATIONAL LAW HANDBOOK (August 2006), International and Operational Law Department, The Judge Advocate General's Legal Center and School, pg 439

²⁸ “The Army and the Militia,” Donald J. Currier, “The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?” *Carlisle Papers in Security Strategy* (Carlisle Barracks, PA: US Army War College, September 2003), 5–6.

²⁹ SecDef completed this requirement in DoDD 5525.5.

³⁰ OPLAW handbook, pg 439

are also exempt from the PCA at all times. Thus, National Guard and Coast Guard personnel are authorized to conduct law enforcement missions.

Also exempt are members who are not a “part of the Army or Air Force.” In a 1970 Department of Justice opinion, then Assistant Attorney General William Rehnquist addressed the assignment of Army personnel to the Department of Transportation (DoT) to act as U.S. Marshals. He determined that this was not a violation of the PCA since: (a) a statute (49 U.S.C. §1657) expressly authorized the detailing of military members to DoT; (b) under the statute, the assigned members were not charged against statutory limits on grade or end strength; and (c) the members were not subject to direct or indirect command of their military department of any officer thereof. He determined, therefore, that they were DoT employees for the duration of the detail and therefore not “part of the Army or Air Force”.³¹

To decide what actions are covered by the PCA one must review both *DoD directives* (policy) and *case law*, as they are not identical. DoDD 5525³² (which is DoD policy, but not law) prohibits direct law enforcement assistance, including:

- a. Interdiction of a vehicle, vessel, aircraft, or other similar activity,
- b. Search or seizure,
- c. Arrest, apprehension, stop and frisk, or similar activity,
- d. Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.

Case Law instead applies three separate tests to determine whether the use of military personnel has violated the PCA.

³¹ Ibid, pg 441

³² DoDD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials, December 20, 1989.

- a. First Test: Whether the action of the military personnel was “active” or “passive”,
- b. Second Test: Whether use of the armed forces pervaded the activities of civilian law enforcement officials,
- c. Third Test: Whether the military personnel subjected citizens to the exercise of military power that was:
 - Regulatory (a power that controls or directs);
 - Proscriptive (a power that prohibits or condemns); or
 - Compulsory (a power that exerts some coercive force).³³

The PCA does not apply to actions furthering a military or foreign affairs function of the United States. The primary purpose in these instances must be to further a military interest such as:

- a. Investigations and other actions related to enforcement of the UCMJ,
- b. Investigations and other actions that are likely to result in administrative proceedings by DoD,
- c. Investigations and other actions related to the commander’s inherent authority to maintain law and order on a military installation or facility. Civilians may be detained for an on-base violation long enough to determine whether the civilian authorities are interested in assuming the prosecution,
- d. Protection of classified military information or equipment,
- e. Protection of DoD personnel, DoD equipment, and official guests of the DoD (NCIS investigation of civilians undertaken for independent purpose of recovering military equipment is permissible),

³³ OPLAW, pg 442

f. Other actions undertaken primarily for a military or foreign affairs purpose.³⁴

“The old law is widely misunderstood and unclear. It leaves plenty of room for people to do unwise and perhaps unlawful things while trying to comply with their particular version. It certainly does not provide a basis for defining a useful relationship of military forces and civil authority in a global war with terrorism.”

John R. Brinkerhoff, *Journal of Homeland Security*³⁵

Anytime the use of U.S. Armed Forces in support of civil authorities is considered, government and military leaders, media, and citizens reflexively turn to the Posse Comitatus Act for guidance and legality. Since 9/11, the US Armed Forces face an increased likelihood that they will be called on to participate in actions typically viewed as civil matters. Many have also called for an increased role for the U.S. Armed Forces in responding to natural and manmade disasters. In 2006, Congress debated this antiquated law with Senator John Warner, Chairman of the Senate Armed Forces Committee, pressing the Department of Defense for a complete review of the law. Then newly appointed Chairman of the Joint Chiefs of Staff, General Peter Pace, also recommended that political leaders consider modification to the PCA.³⁶

As the proceeding paragraphs hopefully reflected, PCA is complex and often causes confusion. It definitely impacts INCONUS missions of our military, and since it has no applicability OCONUS, the majority of our active forces have no reason to train to it. The PCA places our forces in a significantly different legal environment than they are normally trained in. It puts major restrictions on the use of military forces when operating

³⁴ DoD 5525.5, para E-4

³⁵ Brinkerhoff, John R. “The Posse Comitatus Act and Homeland Security.” *Journal of Homeland Security*. <http://www.homelandsecurity.org/journal/Articles/brinkerhoffposs> (12 September 2005).

³⁶ Art Pine, “Should Congress Scrap Posse Comitatus?” *U.S. Naval Institute Proceedings, The Independent Forum on National Defense*, December 2005, 46–48.

domestically. This is a critical point in this paper, focusing on the questions of “are our forces being adequately trained for INCONUS missions” and “are there outdated laws and policy preventing them from being trained.”

- Forces available for use INCONUS

We have reviewed the key definitions, the policy and the laws that provide the guidance for DoD forces during INCONUS operations and I will now review the forces available to the Commander-in-Chief to be assigned to such missions, and the unique legal authorities each possesses.

The Department of Defense currently uses a “Total Force” approach to fulfill its missions overseas and at home, drawing on the strengths and capabilities of active-duty, reserve, and National Guard forces.³⁷ Whether built into operational and contingency plans or directly assigned, the use of National Guard and Reserve Component forces, as part of an integral Total Force package, helps ensure that forces are available in the defense of the Homeland.

The forces available for response to with Homeland Defense (HD) and Civil Support (CS) by law are: National Guard and State Defense Force (U.S. Code Title 32); Coast Guard (U.S. Code Title 14); and the Active and Reserve Army, Navy, Marines and Air force (U.S. Code Title 10). Each of these forces, by law, has unique authorities.

National Guard

The National Guard is an integral element of the Total Force and plays a key role in DOD responsibilities associated with Homeland Defense (HD) and Civil Support (CS). The specialized low density / high demand skill sets in the National Guard, coupled with their unique relationship with civil authorities at the local and state level, often allow

³⁷ Strategy for Homeland Defense and Civil Support, section V.

them to deploy locally within 24 hours of an event. The National Guard is unique in that even though it normally belongs to the state, it is organized, trained, and equipped by DOD. It can operate in most traditional DOD missions within the spectrum of Title 10 (federalized status) or Title 32 (state status). The National Guard in State, or Title 32, status remains responsive to State sovereign authorities free of many of the limitations that constrain Title 10 forces operating INCONUS. The most significant of these, as it pertains to this paper, is that while under state control, the National Guard has law enforcement authority; the PCA does not apply to the National Guard in Title 32 status. With the approval of the President and the Governor, the National Guard can be mobilized under Title 10 if required, as is currently being done for Iraq and Afghanistan deployments. Once mobilized under Title 10, National Guard forces fall under the same laws, including Posse Comitatus Act, as active duty forces.

State Defense Force

Another potential state force provider available for support in Homeland Security, is the State Defense Force (SDF). The State Defense Force is a form of militia and is authorized to the states by federal statute (Title 32 U.S. § 109). State Defense Forces are never entities of the federal government. They are organized, equipped, trained, employed and funded according to state laws and are under the exclusive jurisdiction of the governor.³⁸ SDFs, along with the state National Guard, comprise the State Militia, but unlike the National Guard, cannot be federalized, and always remain under state

³⁸ National Guard Bureau Fact Sheet National Guard and Militias, viewable at http://www.ngb.army.mil/downloads/fact_sheets/doc/militias_word.doc

control. State Defense Forces (SDF) are already integrated into the emergency management operations of over 20 states.³⁹

Reserve Force

Army, Air Force, Marine and Navy Reserve forces are always under Title 10 authority, and therefore subject to the same law enforcement constraints as active duty forces. These citizen soldiers serve as a primary backup to the active forces and do not come under state control.

Coast Guard

The legal basis for the Coast Guard is title 14 U.S. Code § 1. The Coast Guard was established in 1915 as a military service and a branch of the armed forces of the United States. A significant point here is that Title 14 gives the Coast Guard law enforcement authority. In 2003, the Coast Guard was placed under the Department of Homeland Security and reports directly to the Secretary of Homeland Security. Under title 14 U.S.C. § 3, as amended by section 211 of the Coast Guard and Maritime Transportation Act of 2006, upon the declaration of war and when directed by Congress, the Coast Guard will report to the Department of Defense.

³⁹ State Defense Force is a generic term – the actual title is the prerogative of the state. See National Guard Regulation 10-4, *State Defense Forces, National Guard Bureau, and State National Guard Interaction*, Washington D.C., 21 September 1987, p. 2. SDFs have also been described as “Home Guards” and “Home Defense Forces” and, depending on the state, are officially known as National Guard Reserves, State Military Reserves, State Guards, State Military Forces and Militia. The term Home Guard was used in reference to the organized State Defense Forces of several states during World War I, many of which had the term in their official names. See Barry M. Stentiford, *The American Home Guard: The State Militia in the Twentieth Century*, Texas A&M University Press, College Station, TX, 2002, p. xi. The term was also used to describe the organized auxiliary “Local Defence Volunteers” established in May 1940 employed for the defense of Great Britain during World War II. Today, the term is used only for purposes of comparison of present-day SDFs to their earlier American manifestations and foreign counterparts. See George J. Stein, “State Defense Forces: The Missing Link in National Security,” *Military Review*, September 1984, Vol. LXIV, No. 9, pp. 3 & 4.

Active Duty Forces

U.S. Code Title 10 grants the authority for the creation and employment of active duty forces. These forces include the Navy, Marines, Air Force and the Army. These forces are expected to be trained and equipped to respond as the Commander in Chief may order. There are significant limitations on authorities Title 10 forces routinely have INCONUS, the most pertinent being the lack of law enforcement authority. The President may however authorize Title 10 forces to respond to INCONUS emergencies ranging from wild fire control to the *Enforcement of the Laws to Restore Public Order*. Since World War I, the main focus of active duty training has been for OCONUS employment with very little focus on response to potential INCONUS missions.

As shown in this section, the President has several sources of military force to draw on to respond an INCONUS crisis. Provided no law enforcement is required, active and reserve forces can serve alongside National Guard and Coast Guard with few limitations. The limitations manifest when active duty is called to respond to a crisis at home, that has *not* received the proper declaration by the President. We will discuss this further in the next sections as we look at past and potential future uses of Title 10 forces for INCONUS missions.

Chapter 2

Past Use of Forces INCONUS

In chapter II, I will review from a historical perspective, where Title 10 forces have been used INCONUS as well as some of the key lessons learned from those missions. It is important to understand the precedents that are in place, as well as the major gaps our forces have in policy and training as they pertain to INCONUS operations.

- 1776 to 1986

Homeland Defense and domestic security was not a top priority for the U.S. military in the fifty years prior to the September 11, 2001 terrorist attacks. But as history shows, the military has been used extensively at times, in our nations past. Many senior officials in the intelligence community had been warning of the potential for terrorist attack, likely with chemical or biological weapons in the U.S. for years leading up to 9/11. Nevertheless, officials stubbornly contended that the U.S. military had only the resources to fulfill its traditional duties, and not take on new responsibilities.⁴⁰ However, the events of September 11, 2001, brought the role of the military in homeland defense back into the forefront. Many Congressmen, including John Warner, the ranking Republican on the Senate Armed Services Committee, called for more military involvement in homeland defense.⁴¹ Perhaps it is time to review the policy and laws that hamper full utilization of the U.S. military as a weapon against domestic terrorism.

⁴⁰ Yochi J. Dreazen & David S. Cloud, *Questions of Security: Pentagon, White House Consider New Command Against U.S. Attacks*, WALL ST. J., Nov. 21, 2001, at A8.

⁴¹ War Prompts Debate on Military Law: Posse Comitatus Act of 1878 Bans Use of Troops for Many Actions on U.S. Soil, HOUSTON CHRONICLE, Nov. 11, 2001

According to the Strategy for Homeland Defense and Civil Support, protecting the United States from direct attack is the highest priority of the Department of Defense.⁴² As the following short review of history reflects, Homeland Defense has often been a top priority of the Department of Defense in the past. Many Americans may have forgotten this because of the nature of how that defense has been accomplished over the years. The priority of Homeland Defense is even reflected in the congressionally approved oaths that our officers and enlisted personnel swear to, which includes the phrase “I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, *foreign or domestic*....”

From our nation’s beginning, providing for the common defense of the nation was so crucial and basic to the government’s obligation that our forefathers explicitly stated in the Preamble of the Constitution, “Provide for the common defence”. In 1789, "common defense" primarily meant two things: defeating a foreign invasion and defending against Native Americans. In this period, the United States was certainly in no position for significant power projection overseas.⁴³

Military forces, including state militias, were raised to defend the country. With the Revolution fresh in their minds, American leaders considered Britain the most significant threat. France and Spain were also of concern due to their extensive land ownership at our nation’s borders. French and British naval ships preyed on American merchant ships at sea, and there were Native Americans in the interior that attacked our civilian settlers.⁴⁴

⁴² *Strategy for Homeland Defense and Civil Support*, Department of Defense Washington, D.C. June 2005, pg 2

⁴³ Garamone, Jim, *A Short History of Homeland Defense*, American Forces Press Service, date unknown., pg 1

⁴⁴ *Ibid*, pg 1

During this period, the Army and the Navy were our homeland defense. And that homeland defense was within our borders, not overseas. Congress authorized the Army to build fixed harbor defenses and forts, and authorized the Navy to build ships to defend America's right to the sea lanes.⁴⁵ Our nation's armed forces have been used many times since to suppress rebellion, repel invasion, and enforce internal law and order. Some examples follow:

1794-1878, Pre-Posse Comitatus

- 1794, The Whiskey Rebellion. The Army ordered to western Pennsylvania to suppress a frontier rebellion against paying federal excise taxes on whiskey.
- 1812-1814, War of 1812. The military defended the U.S. against British invasion.
- 1800's, The Western Frontier. Patrols protected settlers, and often was the only law enforcement to be found.⁴⁶
- 1850's, Kansas Territory. The Army ordered for peace-keeping missions to suppress violence between pro-slavery and free-state forces.
- 1857, Utah Territory. The Army ordered to suppress an armed dispute between the Mormon community and the Federal government.
- 1859, Harpers Ferry, Virginia. The Army suppressed what would be considered America's first terrorist attack by John Brown and 18 abolitionists who had seized government buildings and had taken hostages.⁴⁷
- 1865-1877, Post Civil War Reconstruction. The Army occupied and policed the south. It established military courts and protected former slaves. Soldiers had legal authority to arrest U.S. citizens during this period. This period resulted in congress passing the *Posse Comitatus Act*.

1878-2001, Post-Posse Comitatus⁴⁸

- 1878-1892, Trans-Mississippi West. The Army was engaged in helping to maintain law and order.
- 1885-1886, Washington and Wyoming Territories. Army ordered to suppress the Anti-Chinese riots. The riots were over labor disputes where the Union Pacific Railroad Company hired Chinese workers as strikebreakers in its mines.

⁴⁵ Ibid, pg 2

⁴⁶ Garamone, pg 3

⁴⁷ Chowder, Ken, "The Father of American Terrorism," *American Heritage* (February/March 2000): pg 91. According to Ken Chowder, "The Oklahoma City bombing in 1995 was a frontal attack on a US government building, just like the Harpers Ferry raid. Antiabortion murders, government bombings, anarchist bombs in the mail—nearly every time political violence surfaces, it gets described in the press as a part of a long American tradition of terrorism, with John Brown as a precursor and hero, a founding father of principled violence.

⁴⁸ The *Posse Comitatus Act*, 18 USC, Section 1385, states, "Whoever, except in the 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 to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both." 1878.

- 1894, Chicago Pullman Strike. The strike occurred when over 40,000 workers reacted violently to a 28% wage cut bringing traffic west of Chicago to a halt. 12,000 Army troops were ordered to suppress the strike on the premise that it interfered with the delivery of U.S. Mail, ignored a federal injunction and represented a threat to public safety.

- 1894, Idaho. Army ordered to assist in peace keeping between miners and corporate officials also over labor disputes.⁴⁹

- 1898, Spanish American War. The Army manned the Coastal Artillery units, significantly increasing the standing operational forces on the U.S. soil.⁵⁰

- 1941, WWII. Japanese attacked on Pearl Harbor. The Army manned Coastal Artillery units once again and conducted forcible relocation and internment of approximately 110,000 Japanese nationals and Japanese Americans to War Relocation Camps.

- 1945–1990, The Civil Defense Program.⁵¹ DoD given responsibility for integrating offensive and defensive activities in response to Soviet Nuclear attack of the U.S.

- 1958, North American Air Defense Command (NORAD). DoD stood up to provide an additional layer of defense against Soviet nuclear attack of U.S.⁵²

- 1960's, Civil rights demonstrations. Military forces ordered to assist law enforcement due to volatile race relations most notably in Mississippi in 1962 and Alabama in 1963.⁵³

- 1960's, Anti-Vietnam War Demonstrations. In several instances the military was used to help restore or maintain order in the nation's capital, Washington D.C

- 1957 and 1963, Federal Law Enforcement. DoD ordered to enforce public school desegregation in Arkansas and in Alabama.⁵⁴

- 1981, Counter Drug Operations. Congress passed law enabling DoD to assume an increasingly active role in supporting domestic civil law enforcement agencies to fight the flow of illegal narcotics into and through the United States.

- 1986, War of Drugs. The executive branch issued a Department of Defense Directive declaring the "war on drugs" a national security matter, and ordered the military to assist law enforcement both in the United States and around the world.

As reflected above, the military has played a major role in many operations and missions that appear to be closely related to law enforcement in the past, both before and

⁴⁹ Laurie, Clayton and Cole, Ronald, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945* (Washington, DC: Center of Military History, US Army, 1997), 57–178

⁵⁰ Ibid

⁵¹ LaCrosse, Thomas L., *Homeland Security and Homeland Defense: America's New Paradigm*, THE QUARTERLY JOURNAL FALL 2005

⁵² Garamone, pg 4

⁵³ Executive Order Number 11,053, 27 *Federal Register* 9,681 (30 September 1962); Executive Order Number 11,111, 28 *Federal Register* 5,709 (11 June 1963).

⁵⁴ Executive Order Number 10,730, 22 *Federal Register* 7,628 (24 September 1957); Executive Order Number 11,118, 28 *Federal Register* 9,863 (10 September 1963).

after the passing of the Posse Comitatus Act. As history shows, and I suggest, our military forces will be called upon to conduct law enforcement operations in the future and they must be prepared.

The next several pages will review several case studies on more recent use of military forces in domestic operations. These more detailed reviews are to capture more of the lessons learned and challenges that our forces have faced recently, and most likely will face in the future.

- 1992 Los Angeles Riots

The April 1992 Los Angeles (LA) riots were the most destructive civil disturbance in US history, causing the deaths of at least 54 people, and more than \$800 million in property damage throughout LA County. More than 10,000 troops from the California National Guard (CANG), 2000 active duty Army soldiers, and 1500 Marines were deployed to the area at the height of operations. The LA riots provide an important case study to illustrate some of the unique characteristics of domestic operations other than war. The military response to the LA riots is also noteworthy because active component and National Guard troops served together in a single command. Furthermore, to better assess the divergence in legal authorities, CANG troops served first in a state status (under the command of the governor), and were subsequently federalized (placed under the active component chain of command), and then reverted back to state control.

The LA riots erupted on 29 April 1992 after a jury acquitted four LA police officers accused in the beating of Rodney King, who while driving under the influence of

alcohol, had led California Highway Patrol and Los Angeles Police Department officers on a high-speed chase and subsequently attempted to assault the arresting officers.

It began as a small disturbance in south central Los Angeles, but quickly escalated and spread rapidly throughout the city and county. The violence overwhelmed law enforcement authorities initially, resulting in the burning of large areas of the city. The governor of California committed the state police and two thousand National Guard soldiers to assist in restoring law and order in the early morning hours of 30 April. A National Guard military police company arrived in the area that afternoon and immediately began operations to support local police.⁵⁵

The city and state civilian leadership had become increasingly concerned about the riot's progress: 5,000 incidents and 30 fires with 800 firefighters committed. It appeared to the Mayor and Governor that the National Guard was deploying too slowly to effectively handle the problem. As a result, federal troops were called for early on the third day. Joint Task Force Los Angeles (JTF-LA) was formed following a Presidential Executive Order on the evening of 1 May. The Executive Order also federalized units of the California National Guard (CAARNG) and *authorized active military forces* to assist in the *restoration of law and order*.⁵⁶

JTF-LA formed and deployed within twenty-four hours, assembled from Active Duty U.S. Army and Marine forces. It operated in a unique domestic disturbance environment, while working with city, county, state, federal agencies and the California National Guard. The CANG was federalized at this point in the crisis. At the peak of

⁵⁵ Christopher M. Schnaubelt, *Parameters*, Summer 1997, pp. 88-109.

⁵⁶ Schnaubelt, pg 88

forces, 10,465 California National Guard troops, 2,023 Regular Army from the 7th Infantry Division and 1,508 Marines from Camp Pendleton were assigned to JTF-LA.⁵⁷

One significant issue that came out during the military response was the substantial reduction in military support following federalization of the CANG. The reason was confusion of the legal restrictions imposed by the *Posse Comitatus Act of 1878* (United States Code, Title 18, Section 1385). The Presidential Executive Order of 1 May provided JTF-LA the authority to "restore law and order," *which included the performance of law enforcement activities*. Posse Comitatus therefore did not limit the military's options in this circumstance. Nevertheless, the JTF-LA commander's mission analysis concluded that his essential tasks did not include the requirement to *maintain* law and order. According to Major General Marvin Covault, the JTF commander, "It was not the military's mission to solve Los Angeles's crime problem, nor were we trained to do so." The police, the public, and the media, however, expected the military to keep the peace rather than disengage quickly.⁵⁸ This lack of familiarity with the law, the lack of training, and the short notice tasking, left all the units confused and limited their immediate effectiveness in "restoring law and order."

Further, a lack of a standard process to respond to requests for support resulted in a six to eight hours response time by JTF-LA forces. Each request was carefully scrutinized to ensure it was in fact legal for federal forces to respond, which wasn't necessary, as they were under full authority to handle all issues.

⁵⁷ *ibid*, pg 89

⁵⁸ James D. Delk, *Fires & Furies: The L.A. Riots* (Palm Springs, Calif.: ETC Publications, 1995), pg. 221

Further, the riots showed that National Guard and Federal troops needed to be better equipped for civil disturbance operations. Radios suitable for the city environment, personal protective equipment, and *less lethal means* of dealing with well-armed criminal gangs are required in sufficient numbers to support police and military involved in a large civil disturbance.⁵⁹

Prior to federalization, the CANG readily deployed troops in numbers tailored to mission requirements. Soldiers were frequently deployed in squads (12 personnel), and noncommissioned officers were expected to perform their jobs. JTF-LA, in an effort to emphasize control in an uncommon environment, ordered the deployment in formations of at least platoon size (36 personnel) with an officer in charge at all times.⁶⁰

Another contentious issue was over arming orders. Arming orders ranged from the lowest level: rifle at sling arms, bayonet in its scabbard, magazine in the ammunition pouch, and chamber empty--to the highest level: rifle at port arms, bayonet fixed, magazine in the weapon, and a round in the chamber. With concern for accidental discharge or unjustified shooting of a civilian, the JTF commander had ordered the lowest level. However most of the soldiers and NCOs on the street felt they needed more and did so. The result was the JTF commander did not have control of his weapons with various units assigned in various arming orders.⁶¹

The previous examples point out the significant problem with the doctrine most of our troops train to verses the situation they faced in LA. American operational doctrine,

⁵⁹ Ibid, pg 222

⁶⁰ Schnaubelt, pg 89

⁶¹ Ibid, pg 90

resolves the dilemma of control versus freedom of action largely in favor of freedom of action. Great value is placed on initiative at even the lowest echelons. According to FM 100-5, *Operations*, "initiative requires a willingness and ability to act independently within the framework of the commander's intent."⁶² Tactical units in combat are trained to exercise self initiative to exploit opportunities or react immediately when the adversary does something unexpected rather than wait for orders from headquarters. However, in a very politically charged INCONUS environment with heavy media coverage, the always looming Posse Comitatus Act, and the fact of now being assigned a mission that has different rules than that trained for, commanders may attempt to micromanage their troops to avoid the negative spotlight. In so doing, this places the advantage with the adversary allowing him to operate inside the friendly decision cycle.⁶³

- 9/11

The September 11, 2001, terrorist attacks dramatically changed the Pentagon's priorities. Within hours of the attacks, the DoD leapt into the role of Homeland Defense in a very public role. In Operation Noble Eagle, Air Force fighters flew continuous combat air patrols over New York City, Washington D.C., and other selected cities or critical infrastructures. In the following months, NORAD intercepted more than 400 civilian planes.⁶⁴ Navy warships patrolled off our nations coasts supporting Noble Eagle, monitoring the skies and ready to intercept threats. At the request of President Bush,

⁶² FM 100-5, *Operations*, p. 2-6.

⁶³ Christopher M. Schnaubelt, *Parameters*, Summer 1997, pp. 95.

⁶⁴ *U.S. Fighter Jets Escort Civilian Plane to New York*, REUTERS, July 17 2002 (on file with the WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY).

governors and their adjutant generals responded, and deployed over 9,110 Army and Air National Guard personnel to supplement civilian law enforcement and security forces. Their deployment lasted for a period of six months. During that time, the Transportation Security Administration was created, and subsequently assumed the responsibility for passenger screening, and later the screening of checked baggage. The physical presence of uniformed military in U.S. airports provided the traveling public reassurance that their government would go to extraordinary lengths to ensure their security.⁶⁵

In the fall of 2001, while the nation was still coming to grips with the terrorist attacks, additional incidents occurred in the use of anthrax. Terrorists used the United States Postal Service to distribute a deadly anthrax virus to several news media outlets, and to two United States senators in Washington, D.C. Thirty-nine individuals developed anthrax infections, and five of those died from inhalation anthrax. When anthrax contaminated letters were discovered in the Hart Senate Office Building, next to the United States Capitol, the United States Marine Corps' Chemical/Biological Incident Response Force (CBIRF) was called in to conduct agent detection and identification, as well as limited decontamination. During this and subsequent anthrax threats on Capitol Hill, CBIRF provided assistance to federal and District of Columbia authorities, including the U.S. Capitol Police, the Federal Bureau of Investigation, the Environmental Protection Agency, the Federal Emergency Management Agency, D.C. Metro Police, and the Emergency Management Office.⁶⁶

⁶⁵ Colonel Thomas L. LaCrosse, "Homeland Security and Homeland Defense: America's New Paradigm" THE QUARTERLY JOURNAL, FALL 2005 pg 8

⁶⁶ Barbara Hatch Rosenberg, "Analysis of the Anthrax Attacks," *Federation of American Scientists* (22 September 2002).

Prior to the creation of the Department of Homeland Security, securing the nations' borders was a responsibility shared by the Immigration and Naturalization Service, the U.S. Border Patrol—both of which were part of the Department of Justice—and the U.S. Customs Service, which was part of the Department of Treasury. In February 2002, through a cooperative arrangement between the Departments of Defense, Justice, and Treasury, the DoD mobilized, trained, and deployed National Guard personnel to assist in border operations. Missions included cargo inspections, traffic management, terrain and trend analysis, and limited flights of fixed and rotary wing aircraft to provide basic observation flights over remote portions of the U.S. border with Canada.

When deployed to provide airport security, National Guard personnel remained under the command and control of their respective state governors, and politically appointed adjutant generals. For these boarder operations however, the National Guard personnel were mobilized and brought into federal service (Title 10). The rationale behind that decision was debated at the senior levels of government, with the prevailing thought being that border security is the responsibility of the federal government, and that it cannot be delegated to individual states. Once mobilized and trained, personnel were detailed to provide technical assistance and support to the Border Patrol, Customs, and the Immigration and Naturalization Service. Because they were performing a support function rather than enforcing laws, there was no violation of the Posse Comitatus Act (PCA).

During the national crises of 9/11, and the chaos that ensued, the President had the support of public opinion and legislature to do what he felt needed to be done. As time

passes, the public, and their representatives in Congress, become more restrictive in what they feel the President should be able to do as our nations' mentality slowly drifts back into pre 9/11 "normalcy". The balance between civil liberties and Homeland Defense considerations will continue to be debated, as indicated by the recent resistance to renewal of the Protect America Act. This same struggle may ultimately hamper making needed changes in the PCA and policy that are necessary to ensure our forces are ready for the next attack.

- Hurricane Katrina

Hurricane Katrina is another significant case in that it provides many valuable and recent lessons learned in Defense Support of Civil Authorities (DSCA). It was also NORTHCOM's first significant real world event as a Combatant Commander (COCOM). Katrina was a complex operation in the sheer number of Title 10 personnel and state National Guardsman deployed, sharing to same Joint Operations Area under separate commanders. A natural disaster, Katrina lends a good case study as to the importance of preparation to manage the chaos of such an event, natural or manmade.

Prior to Katrina's landfall in Louisiana on August 29, 2005, NORTHCOM began implementing alert and coordination procedures. In addition, the Defense Department assessed what resources would be needed and started deployment preparations. Most deployments began after President Bush declared a state of emergency on August 30, and making it an Incident of National Significance on August 31. The National Response Plan and the Defense Department's Homeland Security Doctrine both expect the DOD to wait for such formal presidential pronouncements before acting. NORTHCOM activated

Joint Task Force–Katrina (JTF–Katrina) on August 30. By August 31, the Defense Department had started medical airlift operations and the USS *Bataan* had arrived off New Orleans. As the situation deteriorated, the DOD sent in additional active duty ground forces, including elements of the 82nd Airborne and 1st Cavalry, which arrived on September 5. A second amphibious assault ship and an aircraft carrier arrived on September 6. In total, the military had 42,990 National Guard members, 17,417 active duty personnel, 20 ships, 360 helicopters, and 93 fixed-wing aircraft in the affected area by September 7.⁶⁷

Title 32 National Guard forces that deployed to Louisiana and Mississippi operated under the command of their respective Governors. Title 10 active duty forces, on the other hand, fell under the command of the President and had more limited civil response authority.⁶⁸ On August 30, Deputy Secretary of Defense Gordon England authorized U.S. Northern Command (USNORTHCOM) and the Joint Chiefs of Staff to take all appropriate measures to plan and conduct disaster relief operations in support of FEMA. USNORTHCOM established Joint Task Force Katrina (JTF-Katrina) at Camp Shelby to coordinate the growing military response to the disaster.⁶⁹ By September 1, JTF-Katrina, commanded by LTG Honoré, was established. LTG Honoré’s leadership, combined with the Department of Defense’s resources, manpower, and advanced planning, contributed to the military’s success in the Federal response, but was limited by

⁶⁷ Kochems, Alane, Military Support to Civilian Authorities: An Assessment of the Response to Hurricane Katrina, November 2005

⁶⁸ U.S. Department of Defense, Under Secretary of Defense for Policy, *Manual 3025.1-M, Manual for Civil Emergencies* (Washington, D.C., June 1994), para. C2.2. Active duty forces are authorized to perform critical functions such as rescue, evacuation, and emergency treatment of casualties; emergency restoration of power; debris removal; food distribution; roadway control, and emergency communications.

⁶⁹ The White House, *The Federal Response to Hurricane Katrina Lessons Learned*, Washington, DC, February 2006, pg 42

law and DoD policy to areas such as search and rescue, security, and logistical support and not allowed to directly support law enforcement.⁷⁰

In the 2006 White House document, “*The Federal Response to Hurricane Katrina Lessons Learned*”, the disaster critiqued the response of many federal government agencies, including DoD. Much of the following is derived from those lessons learned.

The fragmented deployment system and lack of an integrated command structure for both active duty and National Guard forces exacerbated communications and coordination issues during the initial response. Deployments for Title 32 (National Guard) forces were coordinated State-to-State through Emergency Management Assistance Compact (EMAC) agreements and also by the National Guard Bureau. Title 10 (active duty) force deployments were coordinated through USNORTHCOM. Once forces arrived in the Joint Operations Area, they fell under separate command structures, thus lacking unity of command. The separate commands divided the area of operations geographically and supported response efforts separately, with the exception of the evacuations of the Superdome and the Convention Center in New Orleans.⁷¹ The separate command structures for active duty military and the National Guard hindered their unity of effort. U.S. Northern Command (USNORTHCOM) commanded active duty forces, while each State government commanded its National Guard forces.⁷² Further, as these forces were divided into two separate areas and had different authorities (Title 32 and Title 10), meant that the Title 10 units were limited in what missions they could respond to in their assigned area (i.e. no law enforcement).

⁷⁰ Ibid, pg 43

⁷¹ Ibid, pg 44

⁷² Ibid, pg 55

Another problem pointed out in the White House Katrina Lessons Learned was that equipment interoperability also hindered an integrated response. Similar issues of bifurcated operations and interoperability challenges were also present between the military and civilian leadership. This lack of interoperable communications was apparent at the tactical level, resulting from the fact that emergency responders, National Guard, and active duty military use different equipment, specifically discussed was radios.⁷³

For Federal domestic disaster relief operations, DOD currently uses a “pull” system that provides support to civil authorities based upon specific requests from local, State, or Federal authorities. This process is slow and bureaucratic.⁷⁴ Assigning active duty military forces or capabilities to support disaster relief efforts usually requires a request from FEMA and an assessment by DOD on whether the request can be supported. After being staffed, approval must be received from the Secretary of Defense or his designated representative before a mission assignment of military forces or capabilities. From the time a request is initiated until the military force or capability is delivered to the disaster site requires a 21-step process. While this overly bureaucratic approach has been

⁷³ Paul McHale, Assistant Secretary of Defense for Homeland Defense, testimony before a hearing on Responding to Catastrophic Events: The Role of the Military and National Guard in Disaster Response, on November 9, 2005, Emergency Preparedness, Science, and Technology Subcommittee, House Homeland Security Committee, 109th Congress, 1st session. According to Assistant Secretary McHale, a police officer is likely to be carrying a handheld Motorola while an active duty military officer is likely to use a secure SINCGARS radio; these two radios cannot easily talk to one another.

⁷⁴ A DHS request to DOD on September 2 that “DOD provide the support, planning, and execution of the full logistical support to the Katrina disaster in all declared states in coordination with FEMA” was initially denied because the request did not come from the Secretary of DHS to the Secretary of Defense. The Secretary of DHS immediately resubmitted the request to the Secretary of Defense which was then granted. Ultimately, DOD (OSD & Joint Staff) worked with the FEMA Response Division to meet this requirement. The Joint Staff and the Office of the Secretary of Defense (OSD) worked throughout the weekend of September 3-5 to meet this Mission Assignment. U.S. Department of Homeland Security, Federal Emergency Management Agency, “Mission Assignment, Program Code/Event #: 1604DR-MS: HURRICANE KATRINA, Action Request #:1509-32760,” September 3, 2005; U.S. Department of Defense, “Hurricane Katrina/Rita/Ophelia Interim Timeline (August – September 2005),” November 2, 2005, 1, 8, 10-11; and “Hurricane Katrina: Preparedness and Response by the Department of Defense, the Coast Guard, and the National Guard of Louisiana, Mississippi and Alabama, October 27, 2005, hearing before the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, 109th Congress, 1st session (Congressman Tom Davis, quoting from Ken Burris, email to Mathew Broderick et al., Subject: request, September 2, 2005.)

adequate for most disasters, in a catastrophic event like Hurricane Katrina the delays inherent in this “pull” system of responding to requests resulted in critical needs not being met.⁷⁵ It is easy to imagine a situation in which a catastrophic event is of such a magnitude that it would require an even greater role for the Department of Defense. The White House Lessons Learned stated that the system should be changed to both expedite the mission assignment request and the approval process, but also define the circumstances under which we will push resources to State and local governments absent a request.⁷⁶

Other significant points from The White House Hurricane Katrina Lessons Learned included recommendation that DOD revise its policy to allow commanders, in appropriate circumstances, to exercise immediate response even without a request from local authorities. The report also recommended the Departments of Homeland Security and Defense should jointly plan for the Department of Defense’s support of Federal response activities as well as those extraordinary circumstances when it is appropriate for the *Department of Defense to lead the Federal response*. In addition the report stated the Department of Defense should ensure the transformation of the National Guard is focused on increased integration with active duty forces for homeland security plans and activities.

Also recommended was that DoD and DHS should plan and prepare for a significant DoD supporting role during a catastrophic event. DoD’s joint operational response doctrine is an integral part of the national effort and must be fully integrated

⁷⁵ 14 Melvin “Kip” Holden, Mayor-President of Baton Rouge, Louisiana, noted that requirements for paperwork and form completions hindered immediate action and deployment of people and material to assist in rescue and recovery efforts. Melvin “Kip” Holden, written statement submitted for a hearing on Recovering from Hurricane Katrina: Responding to the Immediate Needs of Its Victims, on September 28, 2005, Senate Homeland Security and Governmental Affairs Committee, 109th Congress, 1st session.

⁷⁶ White House, Hurricane Katrina Lessons Learned, pg 54

into the national response at all levels of government. DoD should have a contingency role and a requirement to assist DHS with expertise in logistics, planning, and total asset visibility. DoD should coordinate with DHS and DOT to identify DoD's contingency role in airport operations and evacuations, and the planning and use of Ready Reserve Fleet vessels for housing, evacuation, communications, command, control, and logistics. The NRP and Catastrophic Incident Supplement (CIS) should specify the specific requirements for DoD resources based on the magnitude and type of a catastrophic event.⁷⁷

Of particular note, the report also recommended that in addition to the National Guard, the other Reserve Components (Title 10) of the military services should modify their organization and training to include a priority mission to prepare and deploy in support of homeland security missions. Reserve components historically have focused on military and war fighting missions, which must continue; however, we should recognize that the Reserve components are too valuable a skilled and available resource at home not to be ready to incorporate them in any Federal response planning and effort.⁷⁸

Hurricane Katrina was the most destructive natural disaster in U.S. history. The overall destruction wrought by Hurricane Katrina, which was both a large and powerful hurricane as well as a catastrophic flood, vastly exceeded that of any other major disaster, such as the Chicago Fire of 1871, the San Francisco Earthquake and Fire of 1906, and Hurricane Andrew in 1992. Our government has been criticized for its response to the disaster.

⁷⁷ Ibid, pg 94

⁷⁸ Ibid, pg 95

- Summary

History has given us many examples of when our military forces have been required to respond to crises on U.S. soil. As discussed in this chapter, a disaster of the proportion of Hurricane Katrina, large scale riots such as those in 1992 Los Angeles or terrorist attacks similar to 9/11, local and National Guard resources can be quickly overwhelmed. At that point, the Title 10 forces must be ready to respond. In order for them to be fully ready to respond, a more efficient process must be put in place. To make that process work, policy and training, to include exercises must be in place to ensure the Title 10 personnel are prepared.

Consider such a disaster resulting from the use of a WMD, with a sizable terrorist force hampering stability. It quickly becomes clear that our Title 10 forces need to be armed and prepared to respond to any and all inherent problems, including the potential need to conduct law enforcement operations.

Chapter 3

Potential Use of Forces in the Future

*“The Homeland is confronted with threats ranging from traditional national security threats (for example, ballistic missile attack) to law enforcement threats (for example, bank robbery). There are clear definitions of both ends and less clarity in the middle where military and civilian roles often overlap. **In the middle is a “seam” of ambiguity where threats are neither clearly national security threats nor clearly law enforcement threats.**”*

Homeland Defense and Civil Support Joint Operating Concept

In this chapter, I will review where Title 10 forces may be use in the future. In several cases, such as OPERATION NOBLE EAGLE, these missions are ongoing. Other examples come from National Strategies, NORTHCOM CONPLANS and the National Planning Scenarios which are our operational plans and strategies of how we will respond to these catastrophic events.

- National Strategy Concept of Employment

The threats to the U.S. Homeland will continue to be diverse, adaptive, and in many cases difficult to exactly predict. Potential adversaries will attempt to surprise the U.S. as they adopt an array of persistent and emerging, irregular, catastrophic, and disruptive methods and capabilities to threaten the Homeland.⁷⁹

As already discussed, DoD protects the homeland through two distinct but interrelated missions, Homeland Defense (HD) and Civil Support (CS). While these missions are distinct, some roles and responsibilities overlap, and operations require extensive coordination between lead and supporting agencies. Figure 4 below illustrates a

⁷⁹ Department of Defense, *Strategy for Homeland Defense and Civil Support*, Washington, D.C. June 2005, pg 2

notional relationship between HD, CS and Homeland Security (HLS) lead and supporting relationships with examples of the types of operations that can take place for each

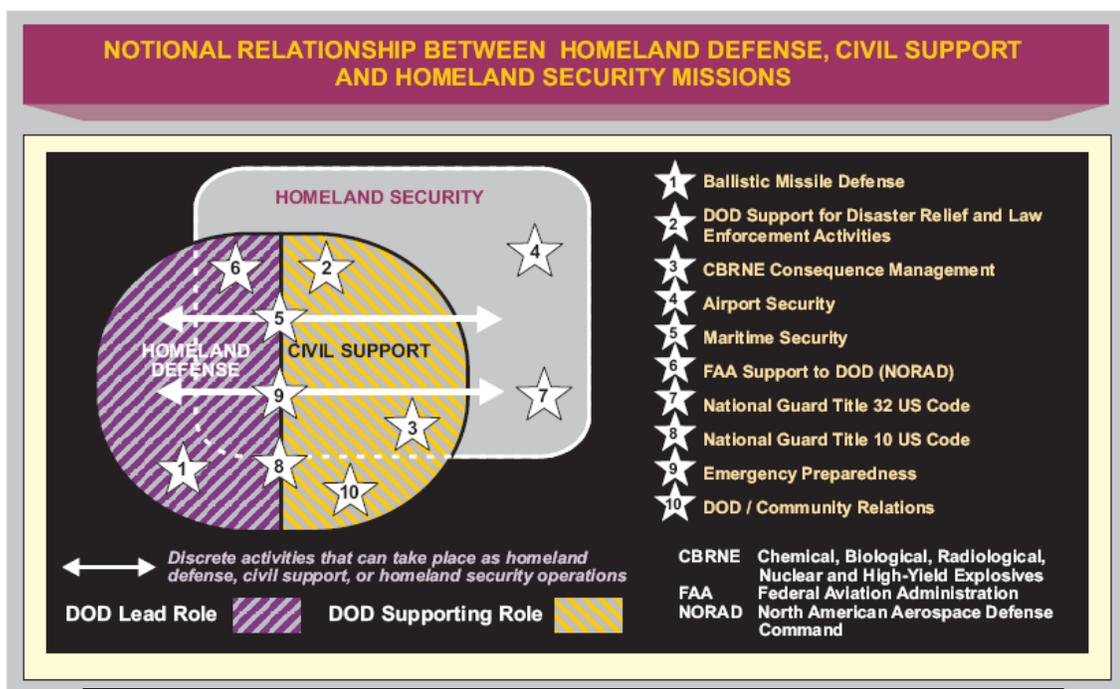


Fig 4 Notional Relationship between HD, CS and HLS missions

mission.⁸⁰ The HD, CS, and HLS missions are separate, but have areas where roles and responsibilities may overlap and/or lead and supporting roles may transition between organizations. DoD serves as the federal agency with lead responsibility for HD, which may be executed by DoD alone for tasks such as Ballistic Missile Defense or include support provided to DoD by other agencies such as DHS or DOT. HD and CS operations may occur in parallel and require extensive integration and synchronization.⁸¹ In addition, operations may also transition from HD to CS to HS or vice versa (e.g.,

⁸⁰ *Strategy for Homeland Defense and Civil Support*, pg 6

⁸¹ HD/CS Joint Operating Concept, pg 16

maritime security), with the lead depending on the situation and USG's desired outcome.⁸²

There are several HD and CS scenarios where the DoD may assign forces to INCONUS missions. These forces are assigned based on a layered protection as discussed in the DoD Strategy for Homeland Defense and Civil Support (HD/CS). This active, layered defense seamlessly integrates US capabilities in the forward regions of the world, in the geographic approaches to US territory, and within the US homeland.⁸³ *This defense in depth approach attempts to keep the fight away from our shores, but also mandates that we are prepared for engagement in the homeland.* USNORTHCOM places the potential Civil Support missions into three major operational areas: Military Assistance to Civil Authorities (MACA), Military Support to Civilian Law Enforcement Agencies (MSCLEA) and Military Assistance for Civil Disturbances (MACDIS) support.⁸⁴ The DoD Strategy for HD/CS further provides where the military would likely operate.⁸⁵ It describes these areas as Tier 1, Tier 2 and Tier 3.

In Tier 1, DoD will provide appropriate defense assets in support of domestic law enforcement authority. Normally the lead federal agency will be the FBI. Of note, military forces assigned will remain under the command and control of DoD.

For Tier 2, when directed by the Governor or appropriate state authority, National Guard forces and assets in state active duty status will respond to perform homeland defense and homeland security activities within US territory.

⁸² DoD Joint Publication 3-27, Homeland Defense, 12 July 2007, pg A-1

⁸³ *Strategy for Homeland Defense and Civil Support*, Department of Defense Washington, D.C. June 2005, pg 2

⁸⁴ USNORTHCOM, CIVIL SUPPORT CONCEPT OF EMPLOYMENT, 20 August 2004, PG 13

⁸⁵ Strategy for HD/CS, pg 4

Finally in Tier 3, when directed by the President, military forces and assets may be assigned *to intercept and defeat threats on US territory*. Conducting land defense missions on US territory fulfills the Commander in Chief's Constitutional obligation to defend the nation. To fulfill this responsibility, *DoD will ensure the availability of appropriately organized, trained, equipped, and ready forces*.⁸⁶ Currently, this capability is tasked to be provided by quick reaction forces (QRFs) and rapid reaction forces (RRFs).⁸⁷

- Air Defense

At the direction of the President through the Secretary of Defense, DoD conducts homeland air defense using defensive counter air operations, which are comprised of active and passive air and missile defense. Operation Noble Eagle (ONE) is the overall umbrella operation covering air defense for North America and Hawaii. As the binational leading element of this operation, NORAD is tasked to support ONE by employing the forces and command and control necessary to protect North America from air attack.⁸⁸ Further, because terrorists and other adversaries consider an attack on the National Capital Region (NCR) a continuing goal, it requires focused defense and security measures. DoD employs an integrated air defense system as part of the around the clock, multilayered, joint military and interagency, effort.⁸⁹

- Maritime Defense

In the maritime operational domain the United States must be able to detect terrorists on the high seas armed with weapons of mass destruction. The Navy integrates

⁸⁶ *Strategy for Homeland Defense and Civil Support*, Department of Defense Washington, D.C. June 2005, p 27

⁸⁷ Note: IAW NORTHCOM CONPLAN 3502, JFCOM is tasked to provide. JFCOM's force provider is ARNORTH for this task of providing trained QRF forces.

⁸⁸ NORAD is a combined U.S. and Canada command.

⁸⁹ Homeland Defense, pg 5

its surface, subsurface, air, and surveillance assets, focusing them forward to identify, track and intercept threats at a safe distance from the US. The DoD has the lead role in defending the United States from direct maritime attack but will support the U.S. Coast Guard's responsibilities for maritime law enforcement and homeland security. The Navy and Coast Guard team must work together to strengthen the security in our ports and littorals, expanding maritime defense capabilities further seaward.⁹⁰ The Maritime Operational Threat Response (MOTR) Plan⁹¹ establishes procedures to assign responsibilities and to deconflict the effort of the involved agencies during a response. The MOTR protocols and procedures allow rapid response to short notice threats and require interagency partners to begin coordination activities at the earliest possible opportunity.

- Land Domain

The land operational domain remains the most debatable and the most complex due to the close interaction of military forces with large numbers of U.S civilians and law enforcement (LE). The Strategy for Homeland Defense and Civil Support states that *when directed by the President, the Department will **execute land based military operations** to detect, deter, and defeat foreign terrorist attacks **within the United States**.*⁹²

The Strategy for Homeland Defense and Civil Support goes on to say, to achieve these mission requirements, we must work closely with our neighbors, establish seamless relationships and organizational structures with interagency partners, “*and be prepared to*

⁹⁰ *Strategy for Homeland Defense and Civil Support*, Department of Defense Washington, D.C. June 2005, pg 25

⁹¹ Department of Defense and Homeland Security, *National Strategy for Maritime Security: Maritime Operational Threat Response Plan* (Washington, D.C.: October 2005)

⁹² *Strategy for Homeland Defense and Civil Support*, Department of Defense Washington, D.C. June 2005, pg 25

respond with military forces on our own soil quickly, responsively, and in a manner that is well coordinated with civilian law enforcement agencies.”⁹³ Historically, the United States has relied almost exclusively on forward deployed forces to confront and defeat nation state adversaries overseas. Although forward military power projection remains crucial, transnational terrorism has significantly reduced the effectiveness of this singular approach. *“Now and in the future, we must be prepared in every part of the globe—most especially the US homeland—to deter, prevent, and defeat terrorist or other asymmetric threats.”*⁹⁴ As acknowledged in the Strategy, the employment of military forces to conduct missions on US territory is constrained by law and historic public policy. This is the crux of the problem as amplified by the Heritage Foundation in the following paragraph.

In the Global War on Terrorism, the Army could find itself confronting a large faction of terrorists on US soil. James Carafano⁹⁵, a senior research fellow at the Heritage Foundation in Washington, writes: “A larger band of 100 or more terrorists is a level of threat nobody is prepared to deal with.” Carafano goes on to say he doubts U.S. troops are truly ready to handle even a platoon-sized terror threat in an American city or town.⁹⁶ Not surprisingly, planners are currently moving forward with stratagems to deal with such an eventuality, specifically an attack by 100 or more terrorists on an American town or city. The military must be able to react with utmost speed to a terrorist attack on

⁹³ Ibid, pg 26

⁹⁴ Ibid, pg 26

⁹⁵ James Carafano is a leading expert in defense affairs, military operations and strategy, and homeland security at The Heritage Foundation.

⁹⁶ Grossman, Elaine M. “DOD Urged to Ready Troops Against Larger Terrorist Force in US.” *Inside the Pentagon* (21 July 2005).

American soil and not find its actions bogged down with legal uncertainties inherent in the PCA.⁹⁷

- NORTHCOM Planning

The most dangerous circumstance for the US will be situations where DOD is confronted with multiple challenges simultaneously. The technical advances of hostile state and non-state actors, the proliferation and diffusion of key technologies, and the continued advancement of weapons and delivery systems will provide destructive mechanisms and the ability to deliver them to an increasing number of adversaries who will continue to threaten US territory, population, and critical infrastructure. These threats – some known and some unknown – fall into three broad categories:⁹⁸

- a. Hostile states using traditional means of attack, including missiles, other advanced technologies, and potentially weapons of mass destruction (WMD);
- b. Hostile states employing irregular means of attack such as smuggled WMD or cyber attacks;
- c. Terrorist groups and other non-state actors using primarily irregular means of attack, and to a lesser degree traditional means of attack in a range of ways, potentially including the use of WMD.

USNORTHCOM in its HD/CS Joint Operating Concept states Potential adversary objectives include:

- Inflicting large numbers of casualties;
- Destroying significant property;
- Disrupting the US economy;

⁹⁷ Matthews, Matt, *The Posse Comitatus Act and the United States Army: A Historical Perspective*, Combat Studies Institute Press, Fort Leavenworth, Kansas, March 2006

⁹⁸ Department of Defense, *Homeland Defense and Civil Support Joint Operating Concept*, October 2007, Version 2.0 USNORTHCOM ,pg 12

- Damaging US agriculture;
- Creating psychological shock;
- Impeding US military deployment or command and control.

Potential attacks by both hostile states and non-state actors will rely on surprise, deception, and asymmetric warfare and cover the full range of activities up to coordinated attacks with multiple weapons and forces.⁹⁹ This is a broad spectrum of possible attacks on U.S. soil, many of which will likely quickly overwhelm Law Enforcement and the National Guard. These potential attacks mandate training in order to be prepared for the event. While NORTHCOM and National Strategies have invested planning efforts in these catastrophes, there is little evidence our forces are training for them.

- NORTHCOM Concept Plans

The following concept plans (CONPLAN), address at the operational level more detail of the threat and what the intentions are to respond. The two plans we will review are NORTHCOM CONPLAN 3501, Defense Support of Civil Authorities (DSCA)¹⁰⁰ and CONPLAN 3502, Defense Support of Civil Authorities for Civil Disturbance Operations (CDO)¹⁰¹. Both of these plans reflect detailed use of DoD forces INCONUS.

CONPLAN 3501

CONPLAN 3501 provides guiding principles for DoD operations and the technical/operational architecture for DSCA. USNORTHCOM is also developing a reconnaissance annex to this CONPLAN, which will provide the mechanisms to request, approve, and coordinate DoD operations in support of civil authorities. USNORTHCOM

⁹⁹ Department of Defense, Homeland Defense and Civil Support Joint Operating Concept, October 2007, Version 2.0 USNORTHCOM, pg 11

¹⁰⁰ UNITED STATES NORTHERN COMMAND, CONCEPT PLAN (CONPLAN) 3501 (formerly 2501), Defense Support of Civil Authorities (DSCA), 11 April 2006

¹⁰¹ UNITED STATES NORTHERN COMMAND, CONPLAN 3502 (formerly 2502), Defense Support of Civil Authorities for Civil Disturbance Operations (CDO), 23 January 2007

tests many of CONPLAN 3501's concepts during ARDENT SENTRY and VIGILANT SHIELD exercises each year.¹⁰² CONPLAN 3501 is designed to be NORTHCOM's playbook for providing relief in the wake of a domestic natural disaster, in line with the Department of Homeland Security's National Response Plan, issued in December 2004¹⁰³. The National Response Plan is intended to better align the collage of federal special-purpose incident management and emergency response plans into a cohesive structure. The 2006 updated CONPLAN also reflects many lessons learned in Hurricane Katrina, the largest ever deployment of military personnel to deal with a natural disaster.¹⁰⁴

Where CONPLAN 3501 certainly can be complex, as discussed in the Hurricane Katrina paragraphs previously, it assumes little requirement for any law enforcement from its Title 10 forces. It seems to make the assumption that law enforcement personnel will be available.

CONPLAN 3502

In CONPLAN 3502, Civil Disturbance Operations (CDO), there is no question about the requirement of military forces to restore law and order. CONPLAN 3502 addresses Civil Disturbance and was tasked by the Joint Strategic Capabilities Plan (JSCP). The JSCP directed CDRUSNORTHCOM to conduct necessary planning and coordination to prepare DoD forces to assist civil authorities in response to civil

¹⁰² Statement by Honorable Paul McHale, Assistant Secretary of Defense for Homeland Defense, Before the 109th Congress Subcommittee on Terrorism, Unconventional Threats and Capabilities Committee on Armed Services United States House of Representatives, May 25, 2006

¹⁰³ US Department of Homeland Security, National Response Plan, December 2004. In Homeland Security Presidential Directive (HSPD)-5, the President directed the development of a new National Response Plan (NRP) to align Federal coordination structures, capabilities, and resources into a unified, all discipline, and all-hazards approach to domestic incident management.

¹⁰⁴ Sherman, Jason, DoD Drafts New Disaster Response Plan, InsideDefense.com NewsStand, February 23, 2006

disturbances, when directed by the President and Secretary of Defense. US domestic civil disturbances include riots, acts of violence, insurrections, unlawful obstructions or assemblages, group acts of violence, and disorders prejudicial to public law and order. Initial responsibility for the civil disturbance response rests with state and local authorities. This plan is implemented when the President determines that a civil disturbance situation exceeds either the capabilities or willingness of the state and local authorities to restore law and order.

In CONPLAN 3502, employment of Title 10 troops in response to a civil disturbance is contingent on the President invoking the *Enforcement of the Laws to Restore Public Order Act* (Title 10 United States Code, Chapter 15, sections 331 thru 334, commonly known as The Insurrection Act).¹⁰⁵ The Department of Justice (DOJ) is the supported agency for federal law enforcement and DoD is a supporting federal department. This CONPLAN also supports the National Response Plan (NRP) Emergency Response Function (ESF) #13 (Public Safety and Security).¹⁰⁶

Some key assumptions in CONPLAN 3502 are:

- Assumes the preponderance of tactical forces employed will be Army or Marine Corps (Title 10 forces).
- Limited warning and time for training of forces to be employed.
- Limited capabilities and unit proficiencies of Non-Lethal Weapon systems.
- Limited ability for NORTHCOM to adjust Response Posture Levels for Quick/Rapid Response Forces. (This is due to NORTHCOM not owning its forces.)
- Limited ability of JFCOM to alert and marshal additional forces.
- Limited TRANSCOM ability to stage necessary mobility assets or the sourced units' proximity to the incident area.
- Current DoD policy limits the pre-positioning of forces for Civil Disturbance Operations to less than a Battalion-sized unit unless authorized by the President.¹⁰⁷

¹⁰⁵ Enforcement of the Laws to Restore Public Order Act (Title 10 United States Code, Chapter 15, sections 331 thru 334) is also known as Insurgency Act. This is a by law exception to POSSE COMITATUS (PCA)

¹⁰⁶ CONPLAN 3502, pg vi

¹⁰⁷ CONPLAN 3502, pg vi

Even though a legal exception to the Posse Comitatus Act (PCA), CONPLAN 3502 clearly states the need for law enforcement training, specifically in the “*enforcement of the laws*” mission. This is where in my opinion our forces are unprepared due to the fear of associating “law enforcement” with our military training, and giving the perception to the public that our forces are training for martial law. The result is minimal training is completed for execution of CONPLAN 3502. Of note, 3502 is NOT martial law. In 3502, DoD is still supporting law enforcement to restore law and order.

The CONPLAN 3502 categorizes Civil Disturbance Operations (CDO) as Small Scale, Medium Scale or Large Scale. Depending on the size of the disturbance, the Army will scale its forces appropriately. A Level 1 force responds to a Small Scale CDO, a Level 2 force responds to a Medium Scale CDO, and a Level 3 force would respond to a Large Scale CDO. Level 4 forces refer to augmented capabilities as required such as aviation or other specialized units. A Level 1 force is one Brigade Combat Team (3000-5000 personnel), a Level 2 force is a Division (10,000-18,000 personnel) and a Level 3 is an Army Corps (20,000-36,000 personnel).

As Figure 5 below reflects, Commander, US Army North (CDRARNORTH) is tasked to designate a JTF-CDO (Civil Disturbance Operations) for a Level 1 or 2 Civil Disturbance Operation, and also to be prepared to operate as the JTF-CDO for a Level 3 CDO, with two or more subordinate, geographically separated, CDO Task Forces. In a Large Scale, Level 3 CDO, an Army Corps (20,000-36,000 personnel) would be

deployed and spread out over several cities in multiple task forces with an O-9 in charge.¹⁰⁸ This is a very large force that would have to be mobilized in a very short timeframe. An important point here is that nearly all of the assigned units will not be expecting to deploy INCONUS and will not have completed the training required in CONPLAN 3502. From what my research has found, it appears that even the relatively small designated Quick Reaction Force (QRF) units that are ready for a NORTHCOM deployment have primarily focused their training on disaster relief (CONPLAN 3501), with very limited to no training on law enforcement (or restoring law and order), as is needed for a Civil Disturbance Operation.

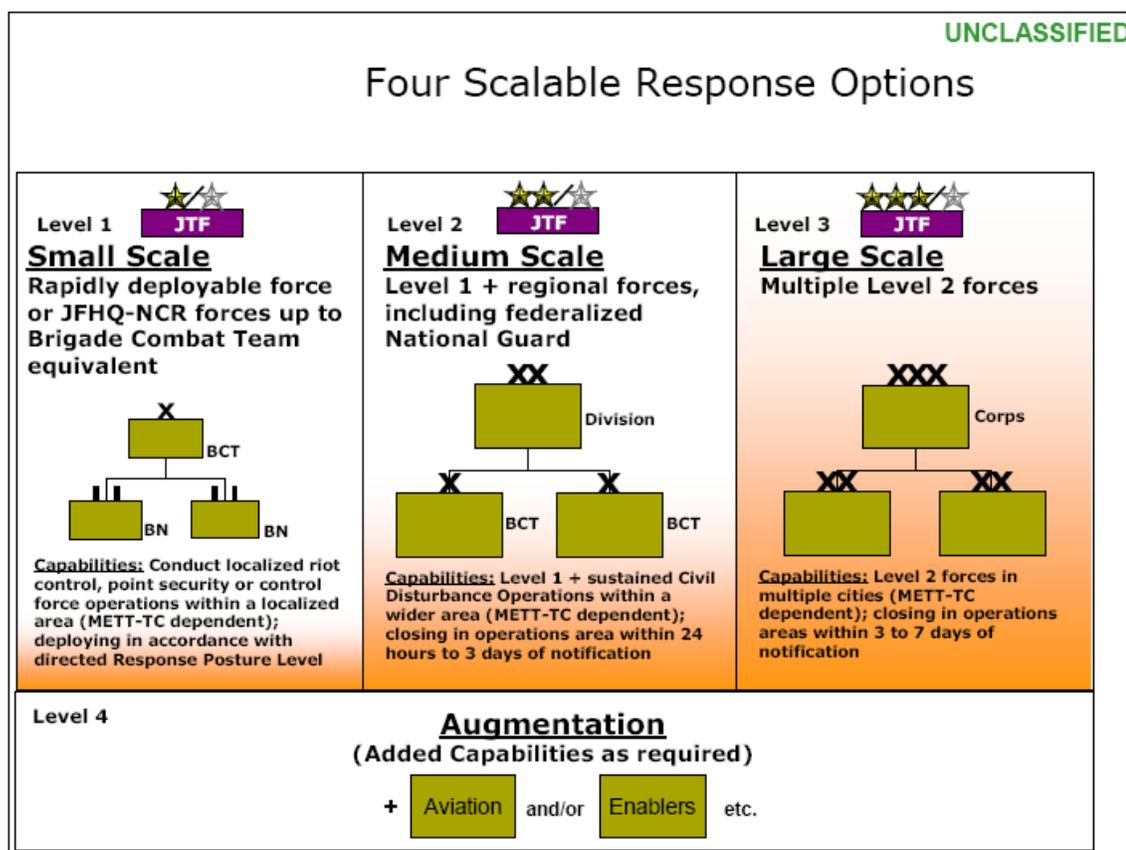


Figure 5. Scalable Response Options for Civil Disturbance¹⁰⁹

¹⁰⁸ Ibid, pg 15

The preceding paragraphs from the National Strategy and COCOM CONPLANS make it pretty clear that even with current statutory and self imposed limitations; U.S. forces must be prepared to respond to a CONUS threat. The U.S. can no longer remain focused on a distant adversary. That was the Cold War. We are fighting a new adversary, who has proven to be prepared to bring the fight to U.S. soil. We must also be trained and ready to respond and fight here on U.S. soil. Unfortunately, the strategy and the guidance remain vague, and send mixed signals concerning law enforcement functions and military use. The result is limited effort being placed in preparing Title 10 forces for the contingency of an attack on U.S. soil. This is the seam between Law Enforcement and a true Threat to National Security. Our forces need to be trained in “law enforcement” in order to be prepared to react and perform on short notice, “law enforcement” type actions.

- National Planning Scenarios

“Acquiring chemical and nuclear weapons for the defense of Muslims is a religious duty.”

- Usama bin Laden

The Federal Interagency (IA) – coordinated by the Homeland Security Council (HSC) and in partnership with the Department of Homeland Security (DHS) – has developed fifteen all-hazards National Planning Scenarios (NPS) for use in National, Federal, State, and local homeland security preparedness activities. These scenarios are designed to be the foundational structure for the development of national preparedness standards from which homeland security capabilities can be measured, as they represent

¹⁰⁹ Ibid, CONPLAN 3502, pg 15

threats or hazards of national significance with high consequence.¹¹⁰ The scenarios range from Nuclear Detonations, to Chemical Attack, to Earthquake, to Foot and Mouth Disease outbreak. DoD has tasking in many of the National Planning Scenarios, providing varying levels of support. In scenarios involving attack, such as IED or WMD, Title 10 forces would likely be deployed, and I suggest that in such situations, there would likely be widespread panic, civil disturbance and localized collapse of the rule of law. These situations may require Title 10 forces to respond in Civil Disturbance Operations.

All of my suggested difficulties would likely occur during the National Planning Scenario (NPS),¹¹¹ NPS-12, "Explosives Attack: Bombing Using an IED," which is based on the use of multiple devices and coordinated attacks by the enemy. It includes multiple suicide bombers within subways or entertainment arenas, vehicle bombs in sports or entertainment parking areas, or large vehicle bombs disguised as emergency response vehicles at the emergency room of the nearest hospital to the arena. For planning purposes, casualties are estimated at 100 fatalities and 450 hospitalized individuals. According to NPS -12, the economic impact would be in the millions of dollars and include significant damage to infrastructure by blast and fire, resulting in a recovery time of weeks to months.¹¹²

In April 2007, the executive branch hosted a Cabinet-level exercise that focused on testing the response to a domestic IED terrorist attack. The exercise focused on the need to coordinate the Federal response with the Nation's Governors and to better

¹¹⁰ Homeland Security Council, NATIONAL PLANNING SCENARIOS, April 2005, pg ii

¹¹¹ Ibid, DOH, NPS, pg 12-1

¹¹² Ibid, pg 12-1

understand the capabilities, limitations, and factors controlling the employment of DOD assets during an incident. It involved attacks against transportation assets such as subway and rail, key energy infrastructure, and unprotected targets such as churches and schools, all over a 23 day period. As part of the exercise, the Secretary of Defense, the Attorney General, and the Secretary of Homeland Defense, were asked to determine the most effective use of military forces (Title 10 Active duty, Title 32 National Guard, or a combination of both). The end results of the exercise would be incorporated into a revised National Response Plan.¹¹³

In this Cabinet level exercise, the first and primary threat is from Islamic terrorist organizations, specifically Al Qaeda. This threat will probably seek to leverage the contacts and capabilities of Al Qaeda in Iraq. Of main concern is the group's proficiency with conventional small arms and IEDs, along with its ability to develop new TTPs and to overcome obstacles to security. The threat will focus on prominent political, economic, and infrastructure targets with the goal of producing mass casualties, visually dramatic destruction, significant economic aftershocks, and/or fear within the U.S. population. To accomplish these goals, the group may employ chemical, biological, radiological, nuclear, or explosive (CBRNE) material.¹¹⁴

In the above scenario, if legally authorized and formally requested, DOD could provide significant intelligence, surveillance, and reconnaissance assets that could assist other agencies in defeating an IED campaign.¹¹⁵ If an escalation of explosive events occurred, the National Response Plan would be initiated and DOD could be tasked to

¹¹³ Kress, John and Grogger, Steven, The Domestic IED Threat, Joint Forces Quarterly, December 05, 2007

¹¹⁴ Ibid, Kress

¹¹⁵ Ibid, Kress

provide support to civil agencies. USNORTHCOM would expect to receive requests for law enforcement support, including bomb detection equipment and military working dogs. Due to current law limitations for Title 10 forces, any law enforcement augmentation would come from the affected state Governors by activating the National Guard in a Title 32 status. USNORTHCOM could expect mission assignments in accordance with defense support of civil authorities CONPLANS to include communications, transportation, logistics, medical, and incident awareness and assessment support. If explosive events continued to escalate, augmented by other attacks, at some point Federal law enforcement and state national guard could be overwhelmed in terms of its ability to provide security. If directed by the President, ***DOD could assume the lead*** and conduct operations in accordance with existing homeland defense concept plans,¹¹⁶ which may require Title 10 forces to be more involved in law enforcement operations.

To go to an even further extreme, in National Planning Scenario 1, Nuclear Detonation, states that it is likely that the National Guard and *the military will be involved directly in the areas of law enforcement*. It states “*A declaration of martial law may be considered.*” Actions of incident-site personnel will include site control and criminal investigation. Federal authorities, including the military, will probably conduct “*apprehension*” activities.¹¹⁷ There will certainly be economic, political, law enforcement, civil liberty, and military consequences that will likely change the very nature of the Country. Current forces do not prepare for this.

¹¹⁶ Ibid, Kress

¹¹⁷ Ibid, NPS, pg 1-8

The main point the previous paragraphs is that a terrorist incident may occur at any time of day with little or no warning, involve single or multiple geographic areas, and result in mass casualties. Defeating these attacks in the United States will be a joint effort between Federal lead agencies and other interagency partners, including the Department of Defense.

- Summary

As pointed out repeatedly by our national strategies and military doctrine, our nation is involved in a long war, and our forces must be ready to fight both abroad and at home. The preceding chapters of this thesis have shown the history and the policy involving Title 10 force use domestically and have listed several scenarios where Title 10 forces are being included in the planned response. Preparing for a fight in Baghdad, while important, does not completely prepare you for a fight in L.A., Atlanta or Washington D.C. It takes a dedicated attention to these differences (OCONUS vs INCONUS) to ensure our forces are prepared for the possible mission to “*defeat threats on US territory.*” In order to be successful in this environment, our forces must be prepared to move fast and be trained and ready. The response must be streamlined with no time for bureaucratic obstacles. If there truly is a desire and a need to respond to an INCONUS fight, then we must increase our training in INCONUS scenarios, especially Civil Disturbance Operations- which means train in law enforcement.

“Bush, reinforce your security measures. The Islamic nation which sent you the New York and Washington brigades has taken the firm decision to send you successive brigades to sow death and aspire to paradise.”

- al-Zawahiri

Chapter 4

Current Issues and Recommendations for using Title 10 Forces

In this chapter, I will discuss the current issues preventing Title 10 forces from providing their full capabilities INCONUS Homeland Defense and Civil Support missions. I will discuss how the world has changed and the unique war we find ourselves in. Further, I will also discuss the confusion that exists between whether a terrorist attack is a crime or an attack on national security, law enforcement or war. Then we will discuss the coordination required between law enforcement, federal agencies and DoD. I will address the Posse Comitatus Act yet again, both to summarize what has been discussed, stress the obstacle it is and to provide my recommendations on what I feel should be done. And finally I will discuss training and force availability, also providing my views of recommended improvements.

- A New Paradigm for War

The 9/11 attacks clearly placed global terrorism on center-stage, both domestically and internationally. This focus on global terrorism has resulted in a close examination of how to combat it. As the world is discovering since the September 11 attacks, combating terrorism, particularly terrorism from non-state organizations such as the al-Qaida network, does not fit neatly into any existing paradigms. U.S. involvement in the insurgency in Iraq against assorted sectarian groups, as well as the al-Qaida organization in Afghanistan and beyond, is not the traditional type of armed conflict contemplated by the drafters of existing law of war conventions. Since 9/11, many related issues and questions have been raised, and many remain unresolved. The manner in which the United States and the international community is combating terrorism will

continue to evolve. One thing is clear, the United States is leading an unprecedented worldwide campaign against global terrorism, wherever it exists, *including U.S. soil*.¹¹⁸

Well before 9/11, there were several studies proposing a greater role for the U.S. military in combating terrorism. The attacks on the homeland quickly moved the implementation forward. Specific examples of this greater role include the revision of the Standing Rules of Engagement and Standing Rules of Use of Force (SROE/SRUF)¹¹⁹, the establishment of USNORTHCOM, and creating the post of Assistant Secretary of Defense for Homeland Defense (ASD/HD). Also the 2007 Defense Authorization Act updated the Title 10 Insurrection Act to provide the President more latitude in the use of military in domestic incidents.¹²⁰ Although 9/11 certainly brought the issue to the forefront, it had been considered previously. Senator Sam Nunn proposed increased domestic roles for the U.S. military in 1992 and Bob Dole and Lamar Alexander made similar proposals during the 1996 presidential campaign.¹²¹

The U.S. is at war with an enemy who has no boarder, including inside U.S. Our armed forces are engaging the enemy throughout the world. This war was started on U.S.

¹¹⁸ The Judge Advocate General's (JAG) Legal Center and School, Operational Law Handbook, August 2006, pg 409

¹¹⁹ Previously Standing CJCS Rules of Engagement only addressed OCONUS operations. Standing Rules for Use of Force addresses INCONUS and were incorporated in most recent revision.

¹²⁰ JOHN WARNER NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2007 enhanced DoD's homeland defense capabilities, notably:

- Authorized the Secretary of Defense to expand the types of emergencies for which the Weapons of Mass Destruction-Civil Support Teams (WMD-CSTs) could be deployed to include the intentional or unintentional release of nuclear, biological, radiological, toxic or poisonous chemical materials; or natural or manmade disasters.
- Required the Secretary of Defense, in consultation with the Secretary of Homeland Security, to develop plans to support civilian authorities, and to maintain a database of emergency response capabilities resident in each State's National Guard that could be deployed in response to a natural or manmade disaster.
- Authorized the Secretary of Defense to preposition prepackaged food, water, communications equipment, and medical supplies to improve the ability of the Department of Defense to respond to requests from civil authorities.
- Revised and updated the Insurrection Act, to clarify the President's authority to use the armed forces in cases where, as the result of natural disaster, terrorism, or other event, public order has broken down and is beyond the capacity of the constituted authorities to restore.
- These changes were repealed in the FY 2008 National Defense Authorization Act.

¹²¹ JAG, pg 409

soil and it is naive to think that there will be no further attacks on the homeland. We must prepare our forces to respond. We must do this by changing the laws and policy that hampers their training in what is clearly law enforcement missions. This must be done NOT to replace existing law enforcement, but to ensure that DoD forces are prepared to coordinate efforts seamlessly when the inevitable next attack occurs.

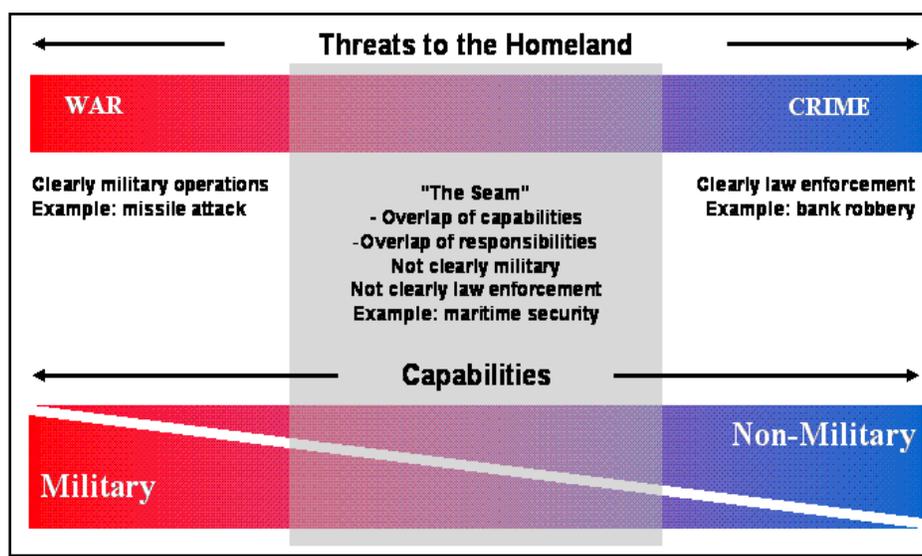


Figure 6: National Challenge

- Law Enforcement or War?

As Figure 6 above shows, detecting, deterring, preventing, or if necessary defeating threats to the Homeland is complicated by America's free and open society.¹²² The challenge for DOD, given the diversity and uncertainty of state and non-state actor threats, is detecting and deterring these threats often without a clear understanding of the threat, their goals, or the tactics they may employ. Understanding the threat environment

¹²² Department of Defense Homeland Defense and Civil Support Joint Operating Concept, October 2007 Version 2.0, USNORTHCOM, pg 10

and the challenges of that environment are vital to understanding the military problem facing DOD and the ways that threats can be prevented or if necessary defeated.¹²³

The Homeland is confronted by threats ranging from national security threats (for example, ballistic missile attack) to law enforcement threats (for example, bank robbery). As Figure 6 above reflects, this is a conceptual spectrum with clear definitions at both ends, and less clarity in the middle where the two blend together. In the middle is a “seam” of ambiguity where threats are neither clearly military wartime threats (requiring a military response from DOD) nor clearly criminal type threats (requiring a non-military response capability from the DHS, the DOJ, or other agency). Within this overlap area are threats, such as transnational terrorist groups that challenge the delineation of responsibility between agencies, because it is sometimes difficult to label them as either a national security threat or a law enforcement threat.¹²⁴

According to NORTHCOM’S Homeland Defense and Civil Support Joint Operating Concept, the significant issues of DOD completing the missions are:

1. How DOD detects, deters, prevents, or if necessary, defeats external threats or aggression to the Homeland;
2. How DOD will be prepared to respond to catastrophic incidents as appropriate or as directed, and;
3. How DOD will integrate and operate with non-DOD and international partners to achieve unity of effort for HD and CS.¹²⁵

A national challenge for DOD is integrating and operating with its non-DOD partners to determine when a particular threat to the Homeland is a national security threat requiring law enforcement agency action, or a law enforcement threat requiring

¹²³ Department of Defense Homeland Defense and Civil Support Joint Operating Concept, October 2007
Version 2.0, USNORTHCOM, pg 10

¹²⁴ Ibid pg 13

¹²⁵ Ibid, pg 14

DoD action. The absence of a clearly defined border between the overlap of HD and HS greatly complicates operational planning for DOD and requires an understanding and careful coordination with interagency partners.¹²⁶ It also greatly complicates the training required. Our training focuses on the War side of the scale, which leaves two-thirds of the spectrum unprepared for.

The implications of the spectrum of threats between “war” and “crime” will continue to challenge planning and execution efforts for DOD and non-DOD agencies to support HD and CS missions. However, on-going efforts to clarify existing and evolving policies, protocols, procedures, statutes, and legal authorities through legislative and / or executive action, and implementation of changes to the same, continue to reduce that challenge and enhance comprehensive and effective planning for DOD and its partners. The HD/CS JOC states *“Even if legislative and executive actions are not complete, DOD must be capable of operating against adversaries in all situations should the President so direct.”*¹²⁷

The previous sentence from the NORTHCOM HD/CS JOC, is a great example of the ambiguous and complex nature that planners and commanders must work within for the INCONUS mission. It is also an excellent indicator of our lack of readiness in our policies, our strategies, our CONPLANS, and ultimately our training in response to Homeland Defense and Civil Support INCONUS. What is even more disconcerting is that this is from a document that was just signed in October 2007, six years after 9/11. I can find no legislative or executive actions being pursued to give our forces the authorities required that help NORTHCOM better manage this challenge.

¹²⁶ Ibid

¹²⁷ Ibid, NORTHCOM HD/CS JOC, Oct 2007 pg 14

- Coordination

The overlap between clearly military and law enforcement operations *complicates planning and execution* for DOD in the operational environment. Within the Homeland, DOD must be able to interact at an appropriate level with other government agencies and States and Territories responsible for protecting their citizens.¹²⁸ In other words, they must be interacting and training with law enforcement. This is the crux of the problem, Title 10 forces do not routinely work with law enforcement. And I suggest due largely to the restrictions of the Posse Comitatus Act, creating our hesitancy to train to law enforcement.

A better method of coordination is required to address the complexities of working issues between DoD, law enforcement and the rest of the federal government Interagency. A possible model already exists in the Maritime Operational Threat Response (MOTR) Plan.

The Maritime Operational Threat Response Plan aims for “coordinated U.S. Government response to threats against the United States and its interests in the Maritime Domain” by establishing roles and responsibilities that enable the government to respond quickly and decisively.¹²⁹ To make this happen the Maritime Operational Threat Response Plan “directs the establishment of a network of integrated national-level maritime command centers, in order to achieve coordinated, unified, timely and effective U.S. Government Maritime Operational Threat Response (MOTR) planning and operational maritime command and control.”¹³⁰ The MOTR plan designates the lead

¹²⁸ Ibid

¹²⁹ Department of Defense and Homeland Security, *National Strategy for Maritime Security: Maritime Operational Threat Response Plan* (Washington, D.C.: October 2005), pg 2.

¹³⁰ Ibid.,pg 9.

federal agency for various roles in maritime security. DoD has the lead responsibility for a threat that is determined to be a likely Homeland Defense mission. If the threat is a Homeland Security mission, DoD provides support to the Lead Federal Agency (LFA). When there is any confusion about whether a situation falls under the mission of Homeland Defense or Homeland Security, the President is the arbitrator who makes the decision.¹³¹ While the seam between law enforcement and national security still exists, there is now a process to resolve the coordination issues that arise.

From a similar document for land operations, training and exercise requirements could be formed and exercised. A complication of course, is that in the maritime environment, the Coast Guard exists nationwide with a military and law enforcement authority. This is a key point, in that there is no similar nationwide federal organization on the land side that has military and law enforcement authority. The various National Guard units normally reside under the state control, and have limitations state to state. And of course, Title 10 forces run into the PCA yet again. Still, a similar mechanism to MOTR is needed to be put into place to help deconflict federal and state, law enforcement and DoD, efforts on very short notice.

-Posse Comitatus Act and Law

“The old law is widely misunderstood and unclear. It leaves plenty of room for people to do unwise and perhaps unlawful things while trying to comply with their particular version. It certainly does not provide a basis for defining a useful relationship of military forces and civil authority in a global war with terrorism.”

John R. Brinkerhoff, *Journal of Homeland Security*¹³²

¹³¹ 18 Joint Chiefs of Staff, *Joint Doctrine for Homeland Security*, Joint Pub 3-26 (Washington, D.C.: 2 August 2005), 1-4.

¹³² Brinkerhoff, John R. “The Posse Comitatus Act and Homeland Security.” *Journal of Homeland Security*. <http://www.homelandsecurity.org/journal/Articles/brinkerhoffposs> (12 September 2005).

In chapter II, I introduced the reader to the Posse Comitatus Act as it relates to the laws and authorities for Homeland Defense and Civil Support. Here I will discuss a more practical example of its impact.

Throughout much of this Nation's history, times of turmoil have called into play this obscure and often indefinable law. From its inception in 1878, lawmakers have heralded the act as a safeguard for limiting military involvement in civil law enforcement operations. Nevertheless, history clearly demonstrates that the initial intent of the law has been misconstrued. In times of crisis, the unclear and misleading nuances inherent in the act have hampered the expediency of military involvement. In many if not most cases, where civic need has resulted in military involvement, controversy followed.¹³³

A question of interest and concern to the military member is what effect violations of the PCA would have on a *state criminal case* brought against a military member. For example, if a military member shot and killed a U.S. civilian in the course of an HD/CS mission, and the states attorney determines that the service member was "executing the law" (i.e., searching or seizing an individual) and in violation of the PCA. He therefore would be acting outside the scope of his authority, and lose protection from state prosecution. The state could then charge the service member with murder.¹³⁴ The Federal Tort Claims Act states that military personnel acting in violation of the PCA *may not be found* to be acting "within the scope of their employment," and therefore may be

¹³³ Matthews, Matt, "The Posse Comitatus Act and the United States Army : a Historical Perspective" Combat Studies Institute Press, March 2006.

¹³⁴ Ibid, OPLAW, pg 443

subject to *individual personal liability*.¹³⁵ The following case study provides one example of this scenario.

- Joint Task Force 6

On 20 May 1997, Corporal Clemente Bañuelos, U.S. Marine Corps, shot and killed 19-year-old Esequiel Hernandez, Jr., a U.S. citizen, while leading a fire team of Marines. The fire team was manning a listening post and observation post (LP/OP) southeast of Redford, TX as part of Joint Task Force 6 (JTF 6). JTF 6 was a military mission in support of the U.S. Border Patrol's efforts to guard the U.S.-Mexico border against illegal narcotics trafficking. Mr. Hernandez was walking goats on the U.S. side of the border and carrying a rifle.

As the Marines were observing Hernandez, he fired one or two shots in their direction from approximately 190 meters away, and then proceeded in a manner that appeared to Cpl Bañuelos as a tactical relocation. Bañuelos maneuvered his team accordingly, concerned that Hernandez was moving to another position to fire again. In the midst of these maneuvers, Bañuelos saw Hernandez raise his rifle and point it at LCpl James Blood, a member of the fire team that had moved about 30 meters to the right of Bañuelos. At about 130 meters from Hernandez, Bañuelos fired one shot from his M16 rifle, striking Hernandez who died on the scene.¹³⁶

The case was sent to two Texas county grand juries and one federal grand jury who eventually concluded that the Marines committed no criminal or civil rights violations. Under current law, the JTF-6 shooting incident remains a powerful reminder

¹³⁵ *Wrynn v. U.S.*, 200, F. Supp. 457, (E.D.N.Y. 1961).

¹³⁶ Memorandum, MajGen Coyne to Commanding General, I Marine Expeditionary Force, Subj: Investigation to Inquire Into the Circumstances Surrounding the Joint Task Force 6 (JTF 6) Shooting Incident That Occurred on 20 May 1997 Near the Border Between the United States and Mexico, opinions (4)(a)-(b), 7 April 1998.

that when military members employ force, their actions and decisions and the rules that they follow may be subject to outside scrutiny from many levels, both militarily and even more significantly, in civilian courts. The increased potential for use of military forces at home makes this reminder all the more pronounced, and commanders must be continuously aware that there are different rules and laws when operating INCONUS that require attention and training. Otherwise, their Soldiers, Sailors, Airmen or Marines, may find themselves in a civilian state court being tried personally for being in violation of state law, and not protected by following military orders, military law and rules of engagement. The significant point is that in Iraq, if there is a question about a soldier's action, the military will investigate and bring charges if member is found to be in violation of military law. The member would not be prosecuted by a local court. If the same situation occurs in the U.S., then not only will the military investigate, it will likely also result in civilian prosecution.

JTF 6 is an important case study as it reflects the risk we put our active duty forces in when operating INCONUS. Although ultimately acquitted, a state was considering prosecution of a U.S. Marine following orders in a manner that he had trained to.

- PCA Recommendations

It is common today to find individuals from both ends of the political spectrum lecturing on the importance of the Posse Comitatus Act (PCA). Many groups would have us believe the PCA is a pillar of freedom designed in complete accordance with the views expressed by the founding fathers.¹³⁷ Nothing, however, could be further from the truth.

¹³⁷ "Civil libertarian groups such as the ACLU have been concerned about the Bush administration possibly casting a critical eye on the Posse Comitatus Act, particularly as the United States carries out its war against

Contrary to popular opinion, and as show in previous chapters, the US Army throughout most of its history has played an important role in civil law enforcement. There is not a Constitution Article that prevents the use of the military domestically. In fact, from 1807 to 1878 the United States government deemed the practice of using the Army and the federalized militia as a posse comitatus permissible.¹³⁸

The complication of PCA requires volumes of exceptions and DoD instructions to cover all of the dos and don'ts as we tap dance around the law. We make this overly complicated and further prevent training for any contingency resembling law enforcement even though we clearly have plans and strategies that expect our forces to be prepared. If Title 10 forces are planned to support in any Law Enforcement related function, PCA needs to not be an issue. National Guard in Title 32 and Coast Guard in Title 14 do not have to concern themselves about PCA, but our primary force must now learn a significantly different set of rules, on short notice, to complete tasking in our own back yard. It is with little wonder that on the occasions that military has been ordered to respond on short notice that criticism, legal issues and lessons learned have had to readdress the limitations over and over again.

I propose Insurgency Act U.S. Code Title 10, section 331-334 should be modified to increase the authority of the President by granting clear exceptions to PCA for Title 10 forces responding to natural or man made disasters. The modification should make it clear that those forces will have law enforcement authority and they must be prepared to

terrorists and implements its homeland defense strategy.” Kevin Drew, “ACLU examines Pentagon role in sniper probe: Military law experts warn of ‘slippery slope,’” *CNN.Com/Law Center*, 17 October 2002; “After repeatedly denying they plan to undermine or alter the Posse Comitatus Act of 1878, . . . Bush administration officials are starting to change their tune. . . . Unsatisfied with the broad authority federal statutes already provide it, the Bush administration seems to be looking at something closer to the normalization of military law enforcement. That is a dangerous idea . . .,” Gene Healy, “Misguided Mission for Military,” Cato Institute, 31 July 2002.

¹³⁸ Matthews pg 3

perform law enforcement in fulfilling those missions. Much of this was attempted with the FY 2007 National Defense Authorization Act which was subsequently repealed.¹³⁹ It further needs to give Title 10 forces unambiguous direction of what their tasking will be and **direct the services to develop and refine Techniques, Tactics and Procedures (TTP), AND train to accomplish this mission.** Once we can get beyond the concern of breaking the law, training will ensure our soldiers, sailors, airmen and marines are prepared to conduct law enforcement operations to suppress and arrest criminals with the same confidence we entrust in our National Guard, Coast Guard and Federal Agents. Currently, only a very small numbers of Title 10 forces broach this subject in training. The attitude that the OCONUS core missions are the same as INCONUS, and that “leadership” will ensure the transition is made, is much like including “hope” in the planning assumptions of an operational plan, not very convincing.

It is not without precedent, as the PCA has been modified before. A perfect example for the military is its law enforcement function in the “war on drugs.” It is arguable that this mission is an ordinary civil law enforcement responsibility. Notably, Congress enacted an exception to the Posse Comitatus Act to allow the military to assume the lead in drug interdiction.¹⁴⁰

- Training

In 2005, the Gilmore Commission was assigned as an advisory panel to assess domestic response capabilities for terrorism, involving Weapons of Mass Destruction.

The report stated that Army units due to very limited training time, and the requirement

¹³⁹ Note: The FY07 National Defense Authorization Act - Revised and updated the Insurrection Act, to clarify the President’s authority to use the armed forces in cases where, as the result of natural disaster, terrorism, or other event, public order has broken down and is beyond the capacity of the constituted authorities to restore. These *changes were repealed* in the FY 2008 National Defense Authorization Act.

¹⁴⁰ Matthews, pg 73

for those units involved in homeland security to work effectively with civilian agencies at various levels of government, would have difficulty in meeting their challenge. The Gilmore Commission's second report states, *The Panel is concerned that there is no assurance that specially-trained forces will be available to NORTHCOM prior to a crisis, and that current civil support training across the armed forces in general is insufficient.*¹⁴¹

The problem has been that insufficient attention has been paid to, and resources made available for, civil support training. We now know the pervasiveness of the threat, the increased probabilities of terrorist acts, and the need for enhanced preparation for effective response. Therefore, the Gilmore Commission suggests a significant increase in the emphasis on civil support missions for all hazards incidents, with special emphasis on response to acts of terror. *Specifically, the Department of Defense should increase the planning, training, and exercising of Active, Guard, and Reserve forces to execute civil support missions.*¹⁴²

In February 2006, Admiral Keating, Commander, USNORTHCOM reported to congress that military officials recognize the inherent shortcomings of the current plans for use of military in CONUS missions. "The challenge is exercising those plans in the field with sufficient fidelity to . . . consider the second-, third- and fourth-order consequences of a significant disaster," the admiral told the Senate Homeland Security and Governmental Affairs Committee. Paul McHale, the assistant secretary of defense for

¹⁴¹ The Gilmore Commission Report, (pp. 99-100), Advisory Panel to Assess Domestic Response Capabilities for Terrorism, Involving Weapons of Mass Destruction, Second Annual Report, *Toward a National Strategy for Combating Terrorism*, December 15, 2005.

¹⁴² Ibid

homeland defense, said at the same hearing that the Defense Department would like to address these shortcomings. “I think everyone in the Department of Defense, both in the Pentagon and out in the operating forces, would welcome the opportunity for more frequent, more challenging, more realistic catastrophic scenarios to test our capability to respond.”¹⁴³

Combating terrorism is more closely related to law enforcement and working to fight organized crime than traditional warfare. Even Counter Insurgency Operations (COIN), that our forces are conducting in Iraq and Afghanistan, use more small unit and SWAT like tactics than fighting that battle on the field. I suggest that training our units in law enforcement would actually complement the COIN training that many of our units are conducting in preparation for CENTCOM deployment.

- Availability of Trained Forces

The 2006 Quadrennial Defense Review (QDR) states: “As the terrorist attacks on September 11, 2001 showed, defending the homeland against air or missile attacks with little or no warning also requires the ability to act on very short notice. U.S. forces have demonstrated time and again their agility in responding rapidly to crises. However, operational agility has not yet been matched by the availability of sufficiently broad authorities or the processes and procedures needed to support the warfighter. In a number of recent operations, the lack of needed authorities hindered the ability of U.S. forces to

¹⁴³ Sherman, Jason, DoD Drafts New Disaster Response Plan, InsideDefense.com NewsStand ,February 23, 2006

act swiftly, and the process to get appropriate authorities has often taken months to achieve.”¹⁴⁴

The QDR goes on to say that in the future, should other catastrophes overwhelm civilian capacity, the Department may be called upon to respond rapidly with additional resources as part of a whole of government approach. In order to respond effectively to future catastrophic events, *the Department will provide U.S. NORTHCOM with authority to stage forces and equipment domestically prior to potential incidents* when possible. The Department will also seek to eliminate current legislative ceilings on pre-event spending.¹⁴⁵

Currently the only forces readily available to NORTHCOM to respond to an emergency are the Chemical, Biological, Radiological, Nuclear, Explosive (CBRNE) forces assigned to JTF-Civil Support and the designated QRF responsible to ARNORTH.¹⁴⁶ Other forces have to be requested via JFCOM to the services, and will be provided as approved. The result of the lack of forces permanently assigned to NORTHCOM. This point hampers having adequately trained units available, if needed and obviously slows down the response in the event of a crisis. It is a situation where NORTHCOM has the responsibility to respond to domestic crises, with virtually no forces assigned.

I propose that DoD place the HD/CS mission of NORTHCOM on a high priority as it schedules its assigned forces. The number one Strategic Objective of the National

¹⁴⁴ Department of Defense, Quadrennial Defense Review Report, Feb 2006, pg 18

¹⁴⁵ Ibid, pg 26

¹⁴⁶ According to authors discussions with staff members from NORTHCOM, JFCOM, JTF-CS and ARNORTH during research.

Defense Strategy states: Secure the United States from direct attack. But yet very few forces are trained and assigned to the COCOM where that attack will occur. Certainly we are attempting to do this afar, but as shown on 9/11, we may not always be successful and we need forces trained and ready. Title 10 forces should be assigned, trained and be prepared to respond to a domestic event.

- Summary

In the preceding paragraphs, I discuss several of the most significant issues preventing Title 10 forces from providing their full capabilities INCONUS Homeland Defense and Civil Support missions. These issues can be categorized into *LAW, POLICY and TRAINING*. Just as I stated in my thesis statement, significant changes must happen in these areas for our forces to be fully prepared. Currently the confusion between law enforcement and national defense creates ambiguity in the mission. Further, the Posse Comitatus Act often hampers the effective conduct of key component of the mission, law enforcement. As a result, the existing law helps create an apprehension to train in law enforcement. Additionally, DoD policy does not make training for these type missions a priority, nor does it mandate the requirements. Further, no forces are assigned to NORTHCOM, who has the responsibility to execute these mission sets. Collectively law and policy paralyze the training needed to prepare our forces for response to a significant terrorist attack.

Conclusion

We are in a war unlike any we have fought. We must let go of the last war, the Cold War, and fully embrace this Global War on Terrorism. A war, that has been, and may likely be, fought on U.S. soil. We must make the changes needed militarily, politically and legally. Terrorism, asymmetric threats, guerrilla warfare, and 4th generation warfare are all acknowledged to be a different type of warfare than our military has traditionally focused on. No longer is our only threat another state's military power. It is against criminals that we call terrorists. Criminals are normally fought within the law of our great nation, but when the law prevents bringing the full force of our nation's capabilities against the criminals, the law should be changed.

When you review the missions of Homeland Defense and Military Support to Civil Authority INCONUS, and start considering the scenarios presented by the National Response Plan and CONPLANS, the potential magnitude of destruction becomes evident. When you consider a civil disturbance, overwhelming law enforcement and the National Guard, and then requiring multiple divisions of Title 10 forces to *perform law enforcement missions*, you have to wonder: Are our forces properly trained for this? Are we ready to respond to this? I believe, we are not ready, and that lack of readiness is primarily due to an outdated law and policy.

In a domestic response, U.S. forces will need to move fast. We have excellent directives and are well prepared to respond to natural catastrophes and supporting missions...those are comparatively easy. These type missions are not the problem for the military, and cloud the real issue with DoD support. *The missions that get hard are the*

ones that require anything resembling law enforcement. Terrorist groups are not going to be openly sponsored by a state government, and will more closely resemble organized crime. The response becomes more like law enforcement tactics and training for such, must be considered to not constrain our nations premier forces. Our active military units must be trained in law enforcement, not to replace local and federal law enforcement, but to be ready to complement them when the next major attack occurs in the War on Terrorism.

We also require a change in law that not only allows Title 10 response to a “potential” terrorist threat, but allows all of the law enforcement authorities that the Coast Guard and National Guard have. The law must also mandate the required law enforcement training for potential INCONUS HD/CS operations. Further, assign dedicated forces to CDRUSNORTHCOM to ensure they are trained and are ready to respond to an INCONUS crisis.

In this Long War, we must be prepared to put all of our forces to bear on any and all fronts; otherwise that weakness will be exploited by our enemy. Changes in law, which some will view as chiseling away at our civil liberties, may be difficult. However, we owe it to the security of our nation to make those tough decisions and modify the laws to ensure we are ready for the fight wherever we meet the enemy. Our nation is at war. And while we continue to fight abroad, we are being negligent if we are not fully prepared to fight on U.S. soil.

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