

HARVARD UNIVERSITY  
JOHN F. KENNEDY SCHOOL OF GOVERNMENT

PHILIP D. ZELIKOW  
Associate Professor  
of Public Policy



79 JOHN F. KENNEDY STREET  
CAMBRIDGE, MASSACHUSETTS 02138  
(617) 496-6891  
FAX (617) 495-8963

February 9, 1998

To: Members, Universities Study Group on Grand Terrorism  
From: Philip Zelikow *PZ*  
Subj: Plan for Meeting on February 16

We will meet from 1:00 to 4:00 p.m. in Cambridge, Massachusetts. We will be at the John F. Kennedy School of Government on the third floor of the Littauer Building in the Fainsod Room. We will have a luncheon buffet prepared for those who wish to eat a late lunch.

In our last meeting on January 28 we made progress in thinking about the objectives for a national policy that would address the danger of grand terrorism.

At our next meeting we turn to the assignment of responsibility for the tasks implicit in the objectives. A copy of the matrix originally developed at our meeting of November 25 is attached at Tab A.

As you prepare to join us in working through the matrix, please reflect on:

- Where, if anywhere, is responsibility now assigned for this task?
- Who "owns" the operational capacities that are or would be required for the actual performance of this task?

Jamie Gorelick's office has already prepared a brief memo discussing the current legal limits on Department of Defense operations in the United States. A copy is attached at Tab B. Phil Heymann has agreed to offer an informal briefing on the legal limits affecting intelligence operations by various agencies, in and out of the United States. Finally Bob Hermann has agreed to offer another informal briefing, later in our meeting, on the allocation of responsibilities for the activities we group under the label of "crisis management."

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II. ASSIGNMENT OF RESPONSIBILITY

	NBC	Cyber	Critical Infrastrucs	Other
• Intelligence/Surveillance/Warning				
• Prevention				
• Deterrence				
• Protection				
• Crisis Management: (a) attribution/prosecution (b) covert, other preemptive action (c) retaliation				
• Consequence Management				
• Lessons Learned				

November 24, 1997

MEMORANDUM

To: Stevan Mitchell

From: Elizabeth Banker 

Subject: Posse Comitatus

One of the most important limitations on the ability of the Department of Defense to actively respond to infrastructure disruptions is the legal restriction on the use of the military as a "posse comitatus." This memorandum sets forth the conditions under which the Department of Defense is currently allowed to render assistance to law enforcement. It focuses on the applicability of these provisions in an infrastructure assurance context. Pertinent authorities are included as an appendix.

**Overview: Posse Comitatus**

18 U.S.C. § 1385 imposes a criminal penalty on whoever uses the Army or Air Force to execute the law without express authorization by the Constitution or by Congress. Congress has given authorization of Department of Defense (DOD) assistance to law enforcement both through a series of statutory provisions that set general parameters, as well as through specific provisions addressing particular problems for which DOD resources and expertise are needed.

**DOD Assistance to Law Enforcement: Generally**

Title 10, United States Code, requires the Secretary of Defense to prescribe regulations as necessary to ensure that DOD activities in support of law enforcement do not result in direct participation in search and seizure, arrest or similar activities, unless specifically authorized by law. 10 U.S.C. § 375. While direct support to law enforcement is limited by this provision, Title 10 provides for several avenues of permissible DOD assistance. The types of support available include: sharing of information collected during military operations, 10 U.S.C. § 371; sharing of military equipment and facilities, 10 U.S.C. § 372; providing training and advice, 10 U.S.C. § 373; and maintaining equipment, 10 U.S.C. § 374. Such assistance may be provided only if it will not adversely impact military preparedness, 10 U.S.C. § 376, and may be provided on a reimbursable basis. 10 U.S.C. § 377.

**Specific Authorizations of DOD Assistance to Law Enforcement**

In several instances, Congress has recognized that DOD has special capabilities that might be used in support of law enforcement efforts. In these special circumstances, provisions are built into either criminal statutes or other legislation to allow for very specific types of military assistance to be rendered to law enforcement when certain conditions are met. The types

of assistance available and the conditions under which such assistance is available depend on the particular issue being addressed. Provisions relating to nuclear material, drug interdiction, and chemical and biological agents of mass destruction provide recent examples of Congressional authorizations of military assistance to law enforcement carving out narrow exceptions to posse comitatus.

### **Nuclear Material**

In conjunction with the criminal provisions relating to "prohibited transactions involving nuclear materials," 18 U.S.C. § 831, the Attorney General is authorized to request DOD assistance with the enforcement of the criminal statute in accordance with the general legal requirements on assistance to law enforcement contained in Title 10, and to allow more direct involvement with law enforcement activities when specific conditions are met. Specifically, the statute authorizes the Attorney General to request, and the Secretary of Defense to provide, assistance if there is: (1) an emergency situation, and (2) such assistance will not adversely impact military preparedness. The Attorney General and Secretary of Defense are to jointly determine whether there is an emergency situation based on the following factors: (1) there is a circumstance that poses a serious threat to the interests of the United States; (2) enforcement of the specific law would be seriously impaired without DOD assistance; and (3) civilian law enforcement are not capable of enforcing the law. 18 U.S.C. § 831(e)(2). Such assistance may include use of DOD personnel to conduct searches and seizures and to make arrests, other activities to protect persons or property from prohibited conduct, and other activities incidental to the enforcement of the provision. The statute also provides that DOD may condition such assistance on reimbursement. 18 U.S.C. § 831(e)(4).

### **Drug Enforcement**

Congressional statutes specifically authorize DOD assistance to law enforcement on counter-drug activities. 10 U.S.C. Section 381 establishes a system for state and local law enforcement to procure needed equipment for counter-drug activities through DOD. Title 10 also requires DOD to provide, consistent with national security, all intelligence information related to drug interdiction to appropriate law enforcement officials. 10 U.S.C. § 371(c). The National Defense Authorization Act for Fiscal Year 1995, Public Law No. 103-337 (1994), created additional avenues of support between DOD and law enforcement related to counter-drug activities. Such assistance includes maintenance and repair of equipment; transportation of personnel; counter-drug training of law enforcement personnel; construction projects to deter smuggling activities; limited monitoring of air, sea and surface traffic; communications services; linguist and intelligence analysis services; and aerial and ground reconnaissance. Pub. L. No. 103-337, Div. A, Title X, § 1011(a) (1994). This support can be provided based on the request of a federal or state official with counter-drug responsibilities.

### **Chemical and Biological Agents of Mass Destruction**

There are two statutory provisions that authorize military assistance to law enforcement in situations involving chemical or biological weapons of mass destruction. First, 10 U.S.C.

Section 372 authorizes the Secretary of Defense to make available training facilities, sensors, protective clothing, antidotes, and other expertise and materials needed to prepare for or respond to emergencies involving chemical or biological agents. The materials and services may be provided to federal, state or local law enforcement if the Secretary of Defense determines that they are not reasonably available from another source.

Completely apart from the availability of equipment or training resources, 10 U.S.C. Section 382 authorizes DOD to assist law enforcement, upon request of the Attorney General, in activities relating to the enforcement of 18 U.S.C. Sections 175 (development of biological weapons) or 2332c (use of weapons of mass destruction), during "emergency situations." The Attorney General and Secretary of Defense are to jointly determine whether an emergency situation exists based on the following factors: Whether it is (1) a circumstance involving a biological or chemical weapon of mass destruction; (2) that poses a serious threat to the interests of the United States; and (3) civilian expertise and capabilities are not readily available to counter the threat immediately posed, special capabilities of DOD are necessary to counter the threat, and enforcement of the criminal statutes would be seriously impaired without DOD assistance. 10 U.S.C. § 382(b). Once such a determination has been made, DOD may assist law enforcement by operating equipment to monitor, contain, disable, or dispose the weapon or elements of the weapon. 10 U.S.C. § 382(c): DOD personnel may not make arrests or directly participate in searches and seizures or intelligence collection activities related to enforcement of the statutes unless necessary for the immediate protection of human life and civilian law enforcement officials are not capable of taking action. 10 U.S.C. § 382(d). DOD assistance may only be rendered under this provision on a reimbursable basis. 10 U.S.C. § 382(e).

### **Conclusion: Military Assistance to Law Enforcement for Critical Infrastructure Incidents**

Congress is legally able to allow DOD to take an active role in assisting law enforcement in wide variety of situations. Under current laws, DOD may provide limited support to law enforcement in the form of information sharing, limited sharing of equipment, and support in specifically authorized activities related to such things as weapons of mass destruction. While these exceptions to posse comitatus do support infrastructure assurance, additional DOD resources may be valuable to response efforts. Based on the specific statutory provisions allowing greater DOD participation in law enforcement activities, a role may be structured in such a way to stay within the spirit of posse comitatus while still taking advantage of the special expertise and vast resources of DOD. In drafting an appropriate statutory authorization, special care should be taken to define: (1) the circumstances under which DOD assistance to law enforcement related to infrastructures will be appropriate; (2) the nature of the assistance that DOD will be authorized to provide; and (3) any special requirements that should be included in other statutory provisions (e.g., sharing of intelligence information with law enforcement under 10 U.S.C. § 371).