

**Not In Our Own Backyard:
Posse Comitatus and the
Challenge of Government Reorganization**

by

James P. Harvey

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Not In Our Own Backyard: Posse Comitatus and the Challenge of Government Reorganization

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Introduction

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 actions against threats abroad.

-- President George Bush
*Strategy for Homeland Security
and Civil Support*

Historically, Americans tend to view the United States as a sanctuary, free from the influence of terrorists and international criminals. International organized crime is thought of as something that happens in Russia, Italy, or the Balkans, and it is something to read about it while sipping coffee and perusing the Sunday paper. Acts of terrorism committed on U.S. soil were unthinkable. After all, assassinations, bombings, and hijackings are activities that occur only in certain parts of the world: the Middle East, Europe, and South and Central America. Beyond that, most citizens might very well have told you that terrorism was on the decrease and that certainly we heard more about these sorts of

things in the 1980s than we do today. The world, however, is not as it appeared and in fact it has changed.

Today many refer to the September 11, 2001, attacks on the U.S. homeland as the turning point, believing that something changed on that day. This paper argues that in fact September 11th was merely an acute symptom of changes that have been underway for well over a decade—changes that are firmly anchored in extremism and fueled by the dramatic capabilities and advances realized through modern globalization. These changes have enabled business and commerce, education and diplomacy, governments, private organizations, and charities. As globalization and all that it represents is amoral, these same changes have granted equivalent capability to the malicious—especially criminals and terrorists—now empowered to act and influence globally in concert with, or in spite of legitimate and licit organizations and governments. These organizations have no burden or obligation to regard traditional state definitions of the rule of law and sovereignty.

With the advent of and increase in modern transnational activity, specifically violent activity, the United States is facing an increased risk of experiencing political and criminal violence within our own borders. This paper focuses on various aspects of unconventional warfare and terrorism. The arguments made here, however, are applicable across the broader spectrum of what is generally referred to as “Transnational Warfare.” Furthermore, this threat calls into question a line—or “seam”—that in most American’s minds traditionally divides jurisdictions over domestic and foreign “threats.” This seam is now blurring, and arguably in some cases has disappeared for our transnational enemies. This currently results in confusion within the United States Government as to which element or agency is best suited to specifically detect and subsequently counter or defeat these threats, who should legally respond to them, and how. The confusion is primarily driven by clinging to a geographic view of threats and the resultant clinging to a construct that requires the existence of the seam. Unfortunately, this remains true even with the advent of the Department of Homeland Security (DHS). Due to this confusion and the delays in response it causes, both foreign-based and domestic “powers” which are national, international, or transnational in nature are learning to attack the U.S. along this seam. The enemy who understands that such a seam exists can anticipate and even use to his advantage the resulting

delayed, insufficient, or incomplete responses required to counter the threat and provide for the common defense of the American people.

The challenge to our government is to attempt organizational reform, or even innovation, to best counter this new, non-traditional class of warfare. This requires the U.S. to abandon affinity for legacy definitions of threats to the state, to review its history and reasons for why it has embraced those various definitions, and to reconsider how it should best handle threats as they exist today and into the future. This paper argues that the Department of Defense (DoD) must resume its historic role as defender of the homeland, resuming equivalent responsibilities and authorities it once held that over time have slowly been relegated to the law enforcement community. In this broad context, current distinctions between homeland defense and security must be readdressed as hindrances to a proper defense. Finally, this in no way suggests the abandonment of proper oversight and governance to assure and preserve the liberties at the heart of the United States and all that it stands for. Nor does this paper argue that the modern transnational threat posed by terrorism should be addressed only by one element of governmental power. DoD and other federal agencies must continue to develop robust coordination and information sharing capabilities.

Traditional and classic military threats to national security will endure, as will traditional criminal threats to domestic law and order. Those general areas are not the focus of this paper. The rapidly emerging and exceedingly capable new class of transnational threats that do not neatly fit into either of these categories are a new class of non-state threats that show all the ability to challenge the very literal security of the state as if they were an equivalent or greater opposing military force. This paper will describe the nature and character of this threat and posit in the modern context the Department of Defense is best suited to serve as lead federal agency to address this global threat, regardless of former geography-based definitions anchored to domestic and foreign, national and international, etc.

As a nation, we must fight to preserve and protect the civil liberties that make the U.S. great, and do so in a way that does not cling to our memory of a comfortable past. New threats require new strategies, ironically firmly anchored to the most basic foundation set in place by the nation's Founding Fathers. From that point of departure, we can continue to address legacy threats as we have while credibly and responsibly

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addressing modern/emerging threats that presents itself as able to attack with a level of violent and non-violent actions far exceeding any reasonable definition of mere criminal conduct. The entire government must move forward, depending on the strength of its genesis documents, and equally employing the benefits of globalization along side government reform and reorganization. It is dangerous and trite to cling to an old view of the world while simply invoking the language of globalization to claim a new remedy—the most often of which are simplistic and overly optimistic claims of remedy brought through exceedingly important but insufficient capabilities such as “information sharing.” Government reorganization must occur in a way to actually apply all of the nation’s strength anew against a very real and new threat rather than in a way that simply works to preserve old definitions that suggest we cling to a comfortable past. Reorganization must properly and maturely include both word and deed.

Background

The West, the principle target of international terrorism, must organize itself for battle. It must, and can, adopt a variety of means—political, economic, and military—with which to fight back. But underlying them all must be the moral understanding that terrorism, under whatever guise or pretext, is an inexcusable evil, that it obliterates the political and moral distinctions which are the foundations of humane and free life under the rule of law; that the West, in short, must resist terrorism and ultimately defeat it.

-- Benjamin Netanyahu
Terrorism: How the West Can Win

Several disturbing trends are causing concern across the federal government. These trends begin to shake the framework upon which we hang our traditional American view of the world and our related view of threats, both internal (crime) and external (defense). This paper will demonstrate that the lines between types of domestic crime are blurring and the past several decades demonstrate new levels of criminal violence. Some of these activities more resemble acts of war than traditional crime, essentially blurring the line between these as well. This blurring is an international problem as well, as crime transcends state borders and is increasingly committed by non-state actors without regard for state sovereignty. The debate is open whether these acts are best addressed as crimes, acts of war, or both.¹

“Realism” remains the predominant view held by most western democracies, seeing all primary and credible actors as sovereign states, and placing political interests supreme. The trends mentioned above, however, give increasing credibility to “pluralism” or “liberalism.” Multinational, transnational, and non-governmental organizations may assume roles and wield power rival to states. “Liberalism” purports that everything is not always held in submission to politics, and not all primary actors are states.²

This leads to emerging diplomacy, security policy, and subsequent governmental structuring challenges and opportunities for the United States. The U.S. has a solid history of clearly distinguishing between domestic criminal activity, federally under the jurisdiction of the Department of Justice, and foreign-based threats to our nation's security, under the jurisdiction of the Department of Defense. Additionally, criminal activity originating in other states directed toward or involving U.S. persons or property also usually falls within the realm of law enforcement. Historically it has been easy to distinguish between the two. Even with the advent of the Department of Homeland Security this traditional division of responsibility has been generally preserved resulting in this convenient distinction growing blurry. A significant gray area has emerged resulting in increasing confusion over federal roles and jurisdictions, when jurisdiction is shared, which organization has lead, and increased confusion over whether actions are criminal, martial, or both. Traditional definitions of crime and war, and terms commonly used by one department or another have lost clarity. For example, uncertainty exists today about the true nature of terrorism.³ Related, the traditional and commonly accepted definition of a "weapon of mass destruction" (WMD) within the defense world revolving around the use of chemical, biological, and/or nuclear weapons has relatively recently been adopted and used by the Department of Justice in a manner inconsistent with traditional use.⁴ The point is not to argue that these various definitions cannot or should not evolve over time. Rather, it is to emphasize that the murk and confusion over how to define these emergent activities related to war, crime, WMD, etc., indicates a need for change to ensure clarity in understanding and action.

The reasons and consequences of misusing these terms are varied. The public language describing both war and terrorism is often emotionally loaded. This language is often (with the best of intentions) to impassion, enrage, anger, and attempt to build consensus against a criminal or enemy rather than to make unemotional and concise statements. The broad reason for this is the blurring of lines within the world of crime, and between criminal activities and the activities of war. This misuse of language demonstrates our extant formal framework for viewing these activities is failing at some level. When criminal activity approaches a level of violence only previously seen in war, or individual

and non-state actors truly threaten national security through means and ways only previously possessed by sovereign states, the tendency is to use language consistent with that level of violence, and previously only used for war.⁵ These threats have emerged with sufficient speed so as to not allow time to accurately clarify the new gray area activities, and as a nation, to adjust to meet the new threats in a calculated way. The attack on September 11, 2001, drove this home. The reflexive establishment of the Department of Homeland Security, arguably necessary in function, may not have been the form chosen if addressed proactively rather than reactively, resulting in a rapid attempt to bridge traditional views of justice and defense by bringing formerly disparate elements of the government together.⁶

When laws are broken, the goal of justice is to investigate and bring to trial those whom the evidence suggests are culpable. The result of the process is a trial. The Department of Defense, however, is not an instrument of law enforcement. The military is an instrument of policy and generally operates under different guidelines toward a related but different end—military victory as defined by policy makers. As these two areas grow more similar in character, but remain different in nature, to keep the American way of addressing them intact the U.S. needs an organization able to seamlessly place one foot in law enforcement and the other in defense. Currently we attempt to accomplish this by straddling the seam through the mechanism of the Department of Homeland Security.

There are generally five categories of activity that can fall into the broad category of Transnational Warfare. These are terrorism, information warfare, criminal drug activity, WMD, and mass migrations. Each of these activities can occur in a purely domestic setting; however, the transnational element is introduced when the traditional state takes a back seat or is not a component in the activity at all. The perpetrator either operates across traditional political boundaries freely, identifies with an organization or cause that is non-national/non-state by nature, or is a rogue in that he has no state affiliation or sponsor or state-based motive behind his activity. This is to say the motive for the violence transcends established political geography. Transnational violence often includes primary motivators such as religion, non-state or anti-state political ideology, or even simple hatred. In the list of things a given transnational

criminal or warrior identifies with, the state is often low on the list and in some cases, not on the list at all.

Terrorism Defined

Of all the areas generally included in the concept of transnational warfare, the one familiar to most people is probably terrorism. Beginning in the late 1970s, talk of terrorism was in vogue. Government officials and organizations, scholars, and Hollywood spend a great deal of time and money on the subject. Even recently, Hollywood produced a movie focusing on an upswing of international terrorist incidents committed within the United States. The violence increased to a point that it overwhelmed the law enforcement community's ability to counter it. The public demanded action. The subsequent result was a presidential declaration of martial law in New York City, the introduction of the U.S. Army into the fight, and the establishment of racial, ethnic, and religious profiling criteria, and internment camps in an effort to stop the violence.⁷

Terrorism may be like good art. With the exception of a select group who deal with art for a living, very few people can give a technical definition of what constitutes "good art." Nonetheless, almost everyone will tell you that they know it when they see it. So it goes for terrorism. Just as there are probably as many definitions of what constitutes good art as there are art scholars, communities of experts within the U.S. Government and internationally have yet to agree on a concise, single definition for terrorism and terror-related phenomena. Below are several definitions. All are drawn from Title 22 United States Code, Section 2656f(d) and have been used by the U.S. Government for statistical and analytical purposes since 1983, and are documented in the State Department's annual publication *Patterns of Global Terrorism*:⁸

Terrorism: premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience.⁹

International Terrorism: terrorism involving citizens or the territory of more than one country.

Terrorist Group: any group practicing, or that has significant sub-groups that practice, international terrorism.

These definitions are used throughout this paper when referring to terrorism, international terrorism, or terrorist groups unless otherwise specified. Note that the focus or specialty of every organization within the U.S. Government that deals with terrorism drives the nuances of the definition. For example, the Department of Defense uses similar definitions to the ones above, but may add or subtract from it to reflect the military's mission. Likewise, the Department of Justice and its Federal Bureau of Investigation will adjust the definition to better reflect their criminal prosecution concerns and jurisdictions. Regardless, all definitions accepted by elements of the U.S. Government include a common core, that is, that terrorism is political violence.

As much debate exists over a single, solid definition for terrorism, it is murkier when authors discuss "transnational terrorism." The word "transnational" is currently used prolifically in writings and discussions about crime, terrorism, networks, business, etc., however, there is no clear, commonly agreed to definition which is distinct from the current meaning of "international," especially in the context of terrorism. For example, the Oxford American Dictionaries defines transnational as "extending or operating across national boundaries" and "a large company operating internationally; a multinational."¹⁰ No distinction is made between international, multinational, and transnational. The most useful definition is used by Dr. Phil Williams in his writings, a definition originally offered by Robert Keohane and Joseph Nye. Williams suggests a definition that "delineates transnational activity in terms of the movements of information, money, physical objects, people or other tangible or intangible items across state boundaries, when at least one of the actors involved in this movement is non-governmental."¹¹

This definition is modified here to reflect transnational terrorism as international terrorism committed by an individual or group whose political motive is not nationalistic. This is to say their allegiance to a country, if it exists at all, is not the primary motive for their activity. For example, a terrorist group may be composed of international/multinational members, however the group's motive for political violence is rooted in an idea that transcends members' ties to their parent nations. The group, and potentially its members, are non-state actors. Williams discusses this

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attribute further when he states, “although non-state actors lack the attributes of sovereignty this is often an advantage rather than a constraint—they are sovereignty free rather than sovereignty bound. They are important not because of ‘their legal status, capabilities or sovereignty’ but because of their ‘capacity to initiate and sustain actions that are outside the bounds of state activity, and that challenge the traditional dominance of states’. Many of these sovereignty free organizations have managed to ‘obfuscate, even elude, the jurisdiction’ either of a single state or of the state system as a whole.”¹² This highlights the distinction between international and transnational, and the emerging problem that transnational terrorism poses to the state.

Warfare and Crime

Few criminal gangs, even in the third generation, have become full-fledged terrorist organizations as well, but there is some convergence occurring in terms of organizational designs and strategies and tactics. Thus, it behooves an analyst concerned about the future evolution of gangs to be cognizant of trends in the world of terrorism that could lead to imitation by criminal gangs, or worse yet, to links and alliances with terrorist organizations, whether as proxies or partners.

-- John P. Sullivan
*Urban Gangs Evolving As Criminal
Netwar Actors*

When I first entered military service, terrorism was typically defined as an event that fell in the low intensity portion of the spectrum of conflict. Although it was considered an act of political violence then as now, it was also considered an act of war—a form of combat or war-like behavior. Countering acts of terror was often viewed as a military function, and discussed as such. This is not to say that there was not an element of law involved in countering acts of terrorism, or that terrorist activities were not illegal by definition. Rather, not only in America, but also across the globe, the average citizen considered countering terrorism as a military function.

In the United States, this was not a real problem until the volume of international terrorism focused on U.S. citizens and property required the activity to fall entirely into the realm of law enforcement. The dilemma arises when an act of terror is committed within the United States given the historical apprehension against having federal troops operate within the borders of the U.S. Additionally, there are two philosophical reasons for defining terrorism as criminal activity instead of classifying it as a

form of warfare. First, many, if not all terrorists view themselves as patriots, freedom fighters, or as soldiers fighting for some other legitimate and possibly oppressed cause. If the U.S. Government defines terrorism as military behavior, it implies some level of legitimacy. On the other hand, if terrorism is by definition criminal activity, then terrorists are criminals and can in no way receive credit for their bad behavior. Second, when acts of terror occur on U.S. soil, the issues of the Posse Comitatus Act and the use of federal military forces domestically do not surface. Countering terrorism falls into the realm of law enforcement rather than the military. Additionally, when terrorists are caught, they can be prosecuted.¹³

Defining terrorism as criminal activity has also created problems. Although the numbers of terrorist acts have generally decreased of late, they have become increasingly more violent. According to the U.S. Department of State, “[t]here were 273 international terrorist attacks during 1998, a drop from the 304 attacks we recorded the previous year and the lowest annual total since 1971. The total number of persons killed or wounded in terrorist attacks, however, was the highest on record: 471 persons died, and 5,952 persons suffered injuries.”¹⁴ Of note is that 40 percent of these attacks (111) were directed at what are classed as U.S. targets, resulting in 12 U.S. citizens’ deaths. Not to let the statistics deceive, all of the fatalities occurred as a result of the bombing of the U.S. embassy in Nairobi. There were no international acts of terror conducted on U.S. soil in 1998 that met the State Department’s criteria for reporting. They do, however, acknowledge “there were several successful efforts to bring international terrorist suspects to justice.”¹⁵

Terrorism in America

It is also important to consider that many acts of international terror occur on U.S. soil each year, most of which are never chronicled as such. The reasons for this are many. The two most probable reasons are that law enforcement never recognizes the crime scene they are investigating is a result of terrorism, or, they determine well after the crime it was actually an act of terror. In some cases, while suspicion remains, they never conclusively determine an act of terror occurred even if it was suspected early on.

Louis R. Mizell, Jr., is a former State Department employee who worked as a Special Agent and Intelligence Officer for the Diplomatic Security Service his entire career. His focus was on conducting counterterrorism operations worldwide.¹⁶ Having retired from government service, he now heads a private organization dedicated to producing terrorism databases. In a recent book, he reports that “[b]etween January 1, 1977, and Jan 1, 1998, [he] recorded 3,150 incidents of political violence in the United States perpetrated by at least 128 domestic and international terrorist groups.”¹⁷ Elsewhere in his book he writes:

...the particulars are not widely known. The primary reason: a lot of terrorism is invisible. The police and the press record and report as so-called common crimes the hundreds of incidents each year that domestic and international terrorist groups perpetrate in this country. When terrorists don’t claim responsibility for a shooting, a robbery, or a bombing, as often happens, it appears that we have less terrorism than is actually occurring. The public may hear a news story about the incident but they do not associate the crime with terrorism, especially long after the fact.¹⁸

The result is that the American public remains somewhat complacent about terrorism. To the average citizen, who may never travel overseas where, in his mind, the “real terrorists” operate, terrorism and counterterrorism are primarily the things good action movies are made of. This same average American probably believes he will never experience the results of an act of terror. Mizell comments on this when he writes, “Good security, good intelligence, aggressive law enforcement, and a lot of luck have prevented hundreds of terrorist incidents over the years. If the perpetrators had been more successful, the public would have an entirely different perception of the terrorist reality in the United States.”¹⁹

The Posse Comitatus Act of 1878

The Posse Comitatus Act (PCA) of 1878 restricts the use of federal troops in a civil law enforcement capacity.²⁰ This is the act most often

referred to when questions arise over whether or not to allow the military to operate domestically. It is important to understand, however, that this act was designed to literally prevent the use of the military in a law enforcement capacity. The family of modern terrorist activities and its transnational variants such as narco-terrorism, cyber-terrorism, etc., were not the kinds of activities federal troops were improperly dispatched to address when the act was drafted and enacted. The DOPLAW Handbook states:

The PCA was enacted in 1878, primarily as a result of the military presence in the South during Reconstruction following the Civil War. This military presence increased during the bitter presidential election of 1876, when the Republican candidate, Rutherford B. Hayes, defeated the Democratic candidate, Samuel J. Tilden, by one electoral vote. Many historians attribute Hayes' victory to President Grant's decision to send federal troops to be used by U.S. Marshals as a Posse Comitatus at polling places in the states of South Carolina, Louisiana, and Florida. Hayes won the electoral votes of these three hotly contested states, possibly as a result of President Grant's use of the military in these states. This use of the military in this manner by a sitting President during a presidential election led Congress to enact the PCA.²¹

Although international and transnational political violence clearly contains criminal elements, federal, state, and local domestic law enforcement agencies are not and cannot be best trained or equipped to handle a level or scale of violence that bears a closer resemblance to combat than crime. The Department of Defense stands as the best equipped and trained line of defense against such violence, and the best for countering such violence when deemed appropriate politically.

This in no way suggests DoD should operate within this domain independently. Rather, the military, while remaining under the Constitutional and professional control of civil authorities, should serve as the lead agency/organization within the Government to execute counterterrorist operations to protect U.S. interests both within and outside

of the United States. Other federal agencies would continue to work in conjunction with the Department of Defense. What this suggests is a change in which government agency leads the fight, and makes it standard, regardless of political boundaries or domestic policies. While the U.S. military will assume primary responsibility for this mission area, the changes it would require to existing laws do not demand we throw the baby out with the bath water. This policy change in no way suggests the military begin to execute traditional law enforcement functions. An adjustment/addendum/amendment to Posse Comitatus, or a strong reaffirmation of the original intent is called for, allowing this law to accommodate both the criminal and military threats of today rather than those of 1878, and permit the best comprehensive application of government assets relative to the types of threats they are trained and equipped to handle. Modern terrorism is both more complex and violent than ever before. Although it clearly involves criminal activity, it truly possesses the character and nature of warfare, even by Carl von Clausewitz's definition—"an act of force to compel our enemy to do our will," "an act of policy," or simply "a true political instrument, a continuation of political intercourse, carried on with other means."²²

The Federal Military

All officers of the U.S. Armed Forces take the following oath of office:

I [full name], having been appointed a [grade], United States [branch of Service] do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter, SO HELP ME GOD.²³

The military and its officers have a clear and historic charter to defend against all enemies, foreign and domestic. Often times, discussions regarding this oath suggest that the concept of domestic threats

simply gives the President permission to declare martial law if need be. Additionally, some argue that should an enemy's military enter the United States, this language allows the Armed Forces to fight against that threat domestically. Although these are both true, this was not the sole intent behind the language of the oath. Domestic threats are just that, threats to the U.S. Constitution that present themselves from within the country. Modern terrorism and certain other forms of transnational warfare are within the scope of the oath, and constitute just such an enemy today. Over the course of our nation's history, we have seen the likelihood of a literal, physical invasion by a foreign military diminish, resulting in a general complacency about the need for proper military activity within the States. The threat has resurfaced, however, and it has taken a new form. Terrorism either as a tactic or as a strategy is as ancient as mankind. Today, it has become a sort of warfare for the weak, and due to technology, has become extremely lethal. Moreover, we now fight enemies that are not always the governments and militaries of traditional nation-states. As Louis Mizell puts it, "Terrorism, the new warfare, is here to stay. To defeat the enemy, the public will have to strive for higher levels of cooperation with the police and develop an educated eye for deception. Underestimating the terrorist threat in the United States would be a tragic mistake."²⁴ Mr. Mizell is correct in his assessment, however the police are often not trained or equipped to recognize and lead this fight, or to essentially fight this threat alone. This is all the more true and highlighted when international and transnational terrorism is considered.

Law Enforcement

The U.S. military has had troops assigned to facilities in Middle East since Operations Desert Shield and Desert Storm. These combat operations were classic in that they pitted one nation's military against another's, to resolve a political disagreement. With an approximate pause of 12 years at the conclusion of Desert Storm, major combat operations resumed during Operation Iraqi Freedom, with that traditional combat ending on May 1, 2003.²⁵ Although the political fight with the former government of Iraq has ended, the political fight with Al Qaeda and its related organizations has not. For Al Qaeda and others who are like-

minded the war is not over, and a “new” form of warfare is pursued—terrorism.

That terrorism continues today, however a turning point came during the 12-year pause in the war when American military members, businessmen, etc., remained in the region and became convenient targets. The inevitable happened on June 25, 1996. A truck full of explosives detonated beside the U.S. Khobar Towers compound, killing 21 airmen and wounding many others.²⁶ At the time, I was assigned to the Joint Chiefs of Staff, J2 organization and was selected to begin working as a military liaison to the Federal Bureau of Investigation. The purpose was to facilitate information sharing as the Bureau was tasked to put agents on the ground in Saudi Arabia and assume lead agency status for investigating the bombing.

From a military perspective, this was a predictable form of attack by a frustrated enemy who had his conventional capability taken from him. We had a significant number of troops in the theater, and in this case compelled them to remain together in a compound without adequate protection. The military did the best it could given the circumstances, providing the best organic defenses possible without insulting the host nation. The result was an attack on that compound by disgruntled members of a culture who opposed the sustained U.S. presence in the host nation and in the region—specifically the military presence. This was a military attack on a military target, using unconventional assets. For our enemy, the war simply continued by other means.²⁷

War Versus Crime

The Bush administration declared the devastating terrorist attacks of September 11 to be an act of war—not crime.²⁸

In this case the “clear distinction” between military and criminal activity is clear only in our minds, and is based on culture. The Khobar Towers bombing was criminal simply because we defined it as such. Interestingly enough, the Israelis made the same mistake when dealing with the Palestinian threat. Their failure, according to some scholars, was one of policy relative to the occupied territories. When Palestinian terrorists struck, the problem was dealt with as crime. The failure of the

military governors as well as Shin Bet officials was in not recognizing that the Palestinians were a political people, and that their actions were politically motivated and justifiable.²⁹ This is not to condone the actions of either the Palestinians or the Israelis. Rather, the illustration serves to highlight the very real differences between violent crime—even when it is excessively violent—and political violence. Although there are shared characteristics, these activities are very different and require different solutions.

Unfortunately the U.S. Government responded to the Khobar bombing by charging the FBI with responsibility for leading the investigation of the bombing. The justification for this was the bombing occurred at a U.S. military compound, albeit overseas, and therefore on U.S. soil, and was directed against U.S. non-combatants³⁰ and property. Therefore, the bombing was a criminal act. The mission of the Bureau was to determine what happened, who was responsible or involved, and to attempt to bring the perpetrator(s) to justice. The military was to support FBI efforts on the scene as required. My role was to aid the lead agents at FBI headquarters by providing any information possible that the Department of Defense may have on foreign terrorists or terrorist groups that made claims of responsibility. This arrangement was professional but awkward. The Bureau was not prepared to handle such a case. The agents at the headquarters did not have the tools at their disposal to execute the task efficiently. Nor did they have the contacts and training overseas for this kind of work.³¹ Tools were provided, however, facilitating DoD sharing critical information with FBI headquarters and to subsequently foster passing related information to and receiving it from FBI field agents working the case. Issues of security clearances and access to U.S. facilities required attention in order to use the DoD provided equipment and networks. Regarding individuals and groups claiming responsibility for the bombing, DoD possessed relevant information the Bureau needed and did not know existed. Additionally, FBI possessed information that they were reluctant or even refused to share out of concern that it might jeopardize future, yet still undetermined, legal cases against yet unknown perpetrators.

The list goes on. Intelligence oversight requirements and concern over multiple interpretations on the limits of *Posse Comitatus* were issues for DoD and FBI Offices of General Councils as they struggled to ensure

laws were not broken. Specific concern revolved around access to law enforcement information as DoD support was provided—whether intentional or inadvertent—as it pertained to the investigation and case development. The working environment, although professional and friendly, was generally maladroit as two skilled and professional organizations attempted to cooperate across the seam that academically separates foreign and domestic, war and crime, and effectively prohibited a seamless and fully-functioning focus on the marriage between the two. What is most troubling about this process is that it occurred in response to a foreign terrorist organization attacking a U.S. military facility in a foreign country in the context of combat operations. And yet, Posse Comitatus and intelligence oversight became the driving issue as if the effort was actually toward something grayer—a foreign terrorist organization attacking the U.S. homeland. The primary concern for DoD was to understand what information and intelligence the Bureau had and to reconcile that with what DoD could provide. Any remaining gaps could then be rapidly identified and addressed. Intentions were honorable, laudable and flawless—application of that same intent was immediately frustrated and remarkably slow due to enduring confusion over the law as well as deeply entrenched legacy guardianship of roles and responsibilities rooted in dated definitions of threats. Today the focus of attention is terrorist operations in and against the homeland and yet the current system established since the September 11th attacks still does not address the fundamental problems that dictate the nature of interagency cooperation and information sharing, while the modern context of the problem has dramatically changed.

A “New” Kind of War

Nevertheless, it must be obvious to you that, due to the imbalance of power between our armed forces and the enemy forces, a suitable means of fighting must be adopted i.e., using fast moving light forces that work under complete secrecy. In other word to initiate a guerrilla warfare, were [sic] the sons of the nation, and not the military forces, take part in it.

-- Osama bin Laden

Declaration of War against the Americans

The cliché “one man’s terrorist is another man’s freedom fighter” is unfortunate because it is all too true. The definition truly does depend upon where you stand. In the industrialized and “civilized” West, we have come to agree that war will only fit the Westphalian context perhaps best expressed by Prussian military theorist Carl von Clausewitz through the concept of his “paradoxical trinity.” This is no surprise since Clausewitz essentially experienced only this kind of warfare. As the theory goes, this trinity is composed of the three elements of violence or passion, chance or uncertainty, and reason. He goes on to say that they are embodied in a nation’s people, military, and political leadership respectively.³² Additionally, as Clausewitz discusses war, he submits that war is always subject to policy.³³

Some argue since terrorists and their groups—at least those not acting on behalf of a nation, or some recognized nation’s interests—are not states and do not manifest the traditional elements of Clausewitz’s trinity of war, their behavior is not and cannot be war. It is violent crime. Others make a convincing case that the true elements of Clausewitz’s trinity—passion, chance and reason—are indeed very present in any terrorist group; they just do not fall neatly into distinct elements of a society belonging to a traditional state as we have come to regard it in Western culture. With the terrorist group and the warfare it wages, much as with classic tribal or clan

warfare, the modern and clear distinction between the society's people, government and professional military does not exist, at least in a form we are comfortable recognizing. Nonetheless, the Clausewitzian elements are there and so to speak, we have possibly focused on and confused the clothing of the threat with the actual person wearing them. Moreover, even the U.S. Government defines and acknowledges terrorism is political violence. With the advent of transnational terrorism though, acts of terror truly take on a character more akin to tribal warfare than the more comfortable conduct of war by a modern state.

We have come full circle. A time existed when most warfare was tribal in character. As societies changed, the character of war changed. War became an act of the modern state, prosecuted by its military. Consider these observations from *The Transformation of War* by Martin van Creveld:

That organized violence should only be called 'war' if it were waged by the state, for the state, and against the state was a postulate that Clausewitz took almost for granted...war was an affair for sovereign princes and for them only.³⁴

Whether it was intended or not, one result of these agreements [that Princes settle their disputes with armies, and do so in a way so as to minimize harm to their soldiers and civilian population, who in return did not interfere with the quarrels of the sovereigns] was that ***non-European populations that did not know the state and its sharply-drawn division between government, army, and people were automatically declared to be bandits.***³⁵ (*Emphasis added.*)

It is worth pointing out that tribal societies, which do not have the state, also do not recognize the distinction between army and people. ***Such societies do not have armies; it would be more accurate to say that they themselves are armies, in which respect they are not so different either from the Greek city-state or, to select a contemporary***

example, the various terrorist organizations at present fighting each other in places such as Lebanon, Sri Lanka, or Aberdjan. Nor, in their case, would it be correct to speak of soldiers. What they have is warriors [sic], with the result that there are many languages—Masai, for example, or North American Indian languages—where the term for ‘warrior’ simply means ‘young man’. As the comparison with terrorist bands already shows, the rudimentary nature of tribal organizations does not mean that they are irrelevant to the present. Instead, they may point to the future, perhaps more so than the world of states from which we seem to be emerging.³⁶ (Emphasis added.)

Judged by the ordinary standards of trinitarian war, none of these movements stood the slightest chance of success. Often the economic resources at their disposal were nil. *Some had to resort to bank-robbing or drug-dealing, causing the distinction between war and crime to become blurred.³⁷ (Emphasis added.)*

Often, crime will be disguised as war, whereas in other cases *war itself will be treated as if waging it were a crime.³⁸ (Emphasis added.)*

Confusion and Delayed Response

The U.S. Government’s response to the consequences of Hurricane Katrina has unfortunately been caught in a partisan battle within the media, and even used to misrepresent the government’s effective capability to respond to similar but legally very different disasters—specifically acts of terrorism involving weapons of mass destruction or effect within the United States. Although limited in the scope of application, there are nonetheless specific issues that serve very well to illustrate there is a growing family of problems in terms of a federal capability to seamlessly respond to similar effects in a comprehensive manner; responses that involve multiple departments such as DoD, DHS,

and the related use of the National Guard operating as either State Active Duty or Title 32 forces.

The current construct, growing out of the response to Katrina has in fact added complexity and bureaucracy to the coordination process rather than reducing it. In spite of the best of intentions, this effort actually reinforces the seam. Specifically, the advent of a new, complex body of procedures typified in the concept of “dual status command”³⁹ is now maturing in an effort to address new problems while preserving the definition set discussed earlier and the current interpretation of *Posse Comitatus*. When applied outside the context of natural disaster response, this construct continues to force a new family of non-state national security threats into a system designed to respond to legacy threats that fell neatly into either “foreign” or “domestic” categories.

By September 7, 2005, U.S. Northern Command (NORTHCOM) reported the DoD response to Hurricane Katrina included approximately 60,000 military members, with 18,000 coming from the active duty component and almost 43,000 from the National Guard.⁴⁰ The September 19, 2005, Congressional Research Report entitled “Hurricane Katrina: DoD Disaster Response” documented the efforts to coordinate the relationship between military forces operating under multiple titles of the U.S. Code. The report detailed:

Congress revised the statutes governing National Guard officers called into federal service in the National Defense Authorization Act for FY2004 (P.L. 108-106). Prior to this revision, all National Guard personnel called to full-time duty in the active military service of the United States were automatically relieved from duty in the National Guard of their state. Section 516 provided an exception to this general rule for certain National Guard officers called to active duty. As the conference report explained, the provision would:

...allow officers of the Army or Air National Guard, called to active duty for the purpose of commanding a unit composed of both active duty and reserve component

personnel, to retain and exercise their Army or Air National Guard state commissions if authorized by the President and the governor. Such National Guard officers would have the authority to command subordinate active duty personnel by virtue of their own active duty status and also retain the authority to command National Guard personnel in a nonfederal status.

In testimony before the House Armed Services Subcommittee on Terrorism, Unconventional Threats and Capabilities last March, Assistant Secretary of Defense for Homeland Defense Paul McHale described how this authority had been used:

But utilizing a recent statutory provision, beginning at the G-8 summit, but then again at the Democratic convention, the Republican convention, and Operation Winter Freeze along the Canadian border, a single National Guard officer—one man—was given a dual-hatted command. He was placed in Title 32 status to command the Title 32 forces. He was placed simultaneously in Title 10 status under the command and control of the combatant commander so that unity of effort could be achieved, even though we maintained the distinction in terms of unity of command.

According to one report, a variation of this model—with an active duty officer being sworn into the Louisiana Guard, rather than a Louisiana National Guard officer being called to active duty—was advanced by the Administration in its discussions with the governor of Louisiana but she rejected it. “In a separate discussion last weekend,” the article stated, “the governor also rejected a more modest proposal

for a hybrid command structure in which both the Guard and active-duty troops would be under the command of an active-duty, three-star general — but only after he had been sworn into the Louisiana National Guard.” It is not yet clear whether the lack of a unified command over both National Guard and DoD active duty personnel has affected Katrina-related military operations.⁴¹

The critical point illustrated here is a genuine effort to address the problem while attempting to preserve the status quo with regards to the extant legal construct. The complexity of the military response alone is incredible. Furthermore, in spite of the demanding coordination required, the final sentence in the reference above is telling, “It is not yet clear whether the lack of a unified command... has affected Katrina-related military operations.” Regardless of how effective the work was, it seems inconceivable that the system detailed above can ever be more efficient or effective than the *de facto* establishment of true unified command. Military history tells us this, and there is no current evidence suggesting anything to the contrary whether in a military context, or in the context of civil support and response to manmade or natural disasters. It is also noteworthy that the Katrina discussion only involves U.S. military forces, and not an enemy. When this kind of effort is considered in the context of homeland defense and/or civil support, the complexity grows and the opportunity for confusion and delay increases with the addition of multiple non-DoD federal and local activities, the potential for allied/coalition contributions, non-governmental organization contributions, and an enemy which may choose to strike multiple locations simultaneously or nearly simultaneously. In this context, the added bureaucratic requirements that may provide some level of distinction and clarity during peacetime and in an administrative context will only serve to clutter and confuse when the call for the practice of homeland defense occurs.

Katrina was clearly seen by the involved state governments, and the federal government, as a federal problem, based primarily on the scale of destruction and human toll, and the resultant impact on the local and national economies. Yet, the response did not fully reflect this in that it remained a combined state and federal response (an attempted unity of effort, with at best a tenuous unity of command and control). The effort

resembled the 1991 Desert Storm command and control construct and not a truly unified and singular response. Consider the following from the U.S. Army War College publication Parameters:

The operation to liberate Kuwait, Operation Desert Storm, achieved a marked improvement on the command arrangements for Vietnam, but still did not achieve unity of command. Instead, the theater commander, CINCENT, strove to achieve unity of purpose and unity of effort. An interesting hybrid command relationship was established which was both parallel and lead nation, the United States leading the forces of the Western nations, and Saudi Arabia leading those of the Arab nations.⁴²

This in no way suggests Desert Storm was a failure, nor does it argue that by default, the federal government should overshadow the primacy of the states within a domestic context in the future. This does argue, however, that once a natural or man-made disaster dictates a comprehensive federal response and a federal government lead, the federal government should: (1) be structured to provide a singular response regardless of lead agency and the number of federal entities involved, and (2) should not look like a coalition assembled with foreign states, driven by political sensitivities and personalities, and encumbered with the associated complexity and resultant room for error.

In a presentation to the USAF Air War College, a senior defense official involved with Joint Task Force Katrina briefly discussed the “dual command structure” described above and its impact on relief operations. The system was complex and unwieldy. One chart depicting participating DoD and National Guard organizations showed at least 16 general officers involved in the response, with no single commander in charge. The burden of making it work ultimately depended upon personality and as the speaker stated, the willingness of those involved to put aside concern over what individuals and organizations would get credit. It was clear that in this case it was not efficient and that it worked in spite of the design, not because of it.⁴³

In his speech to the 125th National Guard Association of the United States (NGAUS) General Conference about the role of the National Guard

in Civil Support—primarily natural disasters, as well as consequence management missions in response to chemical, biological, radiological, nuclear, and explosive (CBRNE) attacks within the United States—the Assistant Secretary of Defense for Homeland Defense quoted President Lincoln saying, “because our cause is new, we must think and act anew.”⁴⁴ This outstanding challenge is well advised, and should be applied more comprehensively to include the breadth of threats to the United States—particularly at home—and should include the entire capability of the Department of Defense anchored to federal, active duty forces. The whole of the Department of Defense must think and act anew not only in response to attacks, but in advance of them. This new thought and action must reflect on the historic and Constitutional role and requirement for the federal military to serve as the primary tool in providing for the common defense, regardless of similar or even related law enforcement missions, or geographic borders. Otherwise with the advent of the new class of transnational threats, a more complex coordination environment exists, along with increased risk for sluggish and/or inadequate proaction against and reaction to the threat. As reaffirmed in the National Security Strategy, the best defense is a good offense, yet even in this document we have differentiated between more traditional threats to the state and this new class of threat, suggesting that homeland defense is somehow different than every other manifestation of the common defense provided for by the federal military.⁴⁵ We must strive to remove functional and administrative obstacles that encumber that defense, its ability to react and more importantly, its ability to proact. Today one of the primary obstacles is a continued effort to preserve the academic seam between traditional foreign threats and these new transnational threats to our state. The result of the thoughts expressed in the 2002 National Security Strategy was a massive government reorganization and the creation of the Department of Homeland Security. In essence though, we have only reorganized to make the traditional way we view and address threats more efficient based on the existence of the seam, and so the reorganization is only partially complete. The same intent and energy must now be applied so as to eliminate the seam, primarily between this new department and the Department of Defense.

Consider NORTHCOM’s mission statement:

The command's mission is homeland defense and civil support, specifically: conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories, and interests *within the assigned area of responsibility*; and as directed by the President or Secretary of Defense, provide defense support of civil authorities including consequence management operations.⁴⁶ (*Emphasis added.*)

This powerful statement appears to begin to undo the seam by suggesting two things: first, with regards to military threats NORTHCOM intends to operate within its area of responsibility no differently than any other combatant command; and second, based on the “lead” language of the Strategy for Homeland Defense and Civil Support, NORTHCOM will not fight a war (regardless of how it manifests—state, non-state, or transnational) in support of any other federal agency or organization. The Department of Defense is in fact the lead agency for national defense and should not be confused with what is currently called “homeland security”—arguably a distinction without a real difference in the context of history.

The Gray Area

Although significant gray areas continue to exist, in part due to the recent publication of the Strategy for Homeland Defense and Civil Support, limited clarity now exists on the periphery of this problem. Some previously unaddressed areas are now dealt with, specifically the U.S. military’s domestic roles as a lead, support, or enabling agency. Although this was a laudable and necessary first step, new clarity only resides in the area where it was easiest to establish—in general terms at the strategic level. The more important task ahead is to provide comparable or greater clarity at the operational and tactical levels—where threats are actually dealt with. Some of the best examples of these gray areas come from the new strategy itself. This is not necessarily a criticism of the strategy. Rather, the new clarity at the strategic level serves as a means to better identify additional areas now requiring attention. Consider the following from the June 2005 Strategy for Homeland Defense and Civil Support:

DoD leads military missions to deter, prevent, and defeat attacks on the United States, its population, and its defense critical infrastructure. This includes defending the maritime and air approaches to the United States and protecting U.S. airspace, territorial seas, and territory from attacks. The Department is also responsible for protecting DoD personnel located in U.S. territory.⁴⁷

Page 16 includes the following statement, “Threat awareness includes the ability to obtain comprehensive, accurate, timely, and actionable intelligence and information; and making it available to the warfighters, policy makers and interagency partners responsible for identifying and responding to threats.”⁴⁸

Primarily in the context of deterrence and prevention, but also in the context of defeating attacks on the U.S., there are significant and relevant families of functions performed by the military that are controversial when domestic operations are discussed. Intelligence operations are perhaps the greatest example. The nature of the new threat suggests it is prudent for the federal government to deliberately and proactively address how intelligence collection and analysis will best serve in its role contributing to the common defense, especially when we face an enemy that does not respect our preferences or desires to define various activities as either law enforcement or defense problems. At best it is awkward to require defense assets (e.g., military combatant commands such as NORTHCOM, or related defense organizations within the intelligence community) to hand a known foreign threat off to federal law enforcement simply because of geography—usually driven by an enemy combatant’s physical entry into the United States. As suggested in the National Strategy for Homeland Defense and Civil Support, DoD should properly serve as lead in this general context. This should also hold true for related intelligence activities, although the requirement for coordination with law enforcement due to the shared defense and criminal nature of these threats absolutely remains. Today, however, the rhetorical solution revolves around statements that the implicitly simple fix is a mandate to establish or improve information sharing. As previously discussed, declaring the very real benefit of information sharing, then encouraging or mandating it to occur without abundantly clear and specific changes to law, policy, and

the associated definitions of the threat will result in the best intentions falling to the wayside as equally well intentioned and professional legal differences of opinion, and personalities, take the lead on stage. Just as dangerous as making a proper response dependent upon personality rather than clear command and control, is the danger associated with the necessary ad hoc interpretation of dated laws and policies in an effort to apply them to a new threat as that threat attacks. Simply trusting that the professionals involved will work it out is a recipe for failure at the worst of times.

This reinforces the validity of the new strategy and the concept of “layered defense,” and does not suggest only one federal activity (specifically the DoD) serve as a singular responder. It does reinforce the multi/inter-agency approach while illustrating the requirement to change the declared and/or assumed lead agency in areas that are currently gray. The intent here is to encourage needed reform for dated and perhaps obsolete laws or policies in a way that maintains a viable and credible capability against extant legacy threats while fully addressing the emerging/developing prime threats to the U.S.—threats that do not fit neatly into past security constructs.

Just the Beginning?

The U.S. has identified the enemy that perpetrated the September 11, 2001, attack as new in kind, and as the primary threat to U.S. national security. The National Security Strategy and other strategic documents bear this out. As catastrophic and barbaric as that attack was, it may only be one form of the emerging transnational threat. Although current policy reflects its emergence, we now run the risk of presuming all transnational threats manifest the same way—gathering outside the U.S. in order to strike us here. This may be an oversimplification.

Indeed, we may only be seeing the tip of a proverbial iceberg. The very real potential exists for a nexus to form between transnational terrorist organizations such as Al Qaeda, and transnational criminal elements or even certain traditionally domestic criminal elements such as urban street gangs and radical militia groups. Some argue these kinds of associations already exist and are currently maturing. Regardless, it is clear the capacity is there based on a number of factors ranging from

common tactics techniques and procedures, shared tactical and operational interests, and on occasion, a shared strategic view that includes a hatred of the U.S. and/or its federal government.

Dr. Phil Williams at the University of Pittsburgh has done some of the most extensive research into this phenomenon. His comments on networked criminal organizations are cause for pause, especially when considering the implications for national security and the networked nature of some terrorist organizations like Al Qaeda:

Unfortunately, there is still a tendency in law enforcement circles and among some academic analysts to treat centralized hierarchies as synonymous with organized crime and to treat networks as disorganized crime. This is a mistake. A network is, in fact, a highly sophisticated organizational form. [This] new form of organization did not replace the previous one but surpassed it in terms of effectiveness and efficiency. Ronfeldt argues that society is now in a fourth stage in which networks are emerging as the predominant organizational form and one that has significant advantages especially over more traditional bureaucratic hierarchies.⁴⁹

Later in the same article he states, “Two other points about markets and networks are worth adding. The first is that many illicit markets are now global in scope. The second point is that once a trafficking infrastructure is in place, the product line is virtually irrelevant.”⁵⁰ Considering the already robust network of routes for the movement of money, drugs, arms and humans into the United States, primarily across the U.S. – Mexican border, it is plausible that networked terrorist organizations with direct or indirect relationships with these various criminal elements would use already proven paths in support of their own interests.

Related to his perspective, Roy Godson writes:

Why is the PCN [Political-Criminal Nexus] a transstate security threat and not simply a local law enforcement or policy problem? Security threats interfere dramatically with the functioning of society. Conditions that threaten

the political, economic, social infrastructure of a system cannot be considered ordinary crime problems... Of the 192 states in the world today, approximately 35 have characteristics that maintain strong governability and rule of law—and weak PCNs. On the other hand, approximately 120 states can be classified as medium to weak to failed states (zones with very weak to nonexistent infrastructures). They have medium to strong PCNs. In these states PCNs threaten the security of their own people as well as the security of people in other regions.⁵¹

In the context of his discussion about vulnerable political structures, he then states, “Even in the United States, there are particular regions where this condition appears to be present.”⁵² Finally, when he turns the discussion toward solutions, he observes that:

The PCN itself has rarely been the focus, and when it has, governmental policy has addressed the political and institutional factors that facilitate organized crime, rather than the motivations of the establishment. So far, however, there have been only a few efforts to address the global challenge of the PCN. Moreover, in the main the problem has been viewed by governments and nongovernmental specialists from a criminal, law enforcement perspective, with supplementary assistance requested from diplomats and intelligence practitioners, and specialists in alternative developments.⁵³

It would not be difficult to argue that in essence, this has been the response of the U.S. to transnational crime and terrorism in general, and Al Qaeda specifically, in the context of the domestic environment and its threat to national security.

In his article “Urban Gangs Evolving as Criminal Netwar Actors” John Sullivan writes:

This article examines the potential for certain small actors, in particular gangs operating in big cities, to embrace network forms of organization and doctrine and utilize

technology to wage netwar. ***This potential involves the blurring of crime and warfare, and threatens to change the faces of gangsterism and terrorism.***⁵⁴ (*Emphasis added.*)

Later in this same article Mr. Sullivan states, “Police, military and security forces must learn to integrate network forms into their hierarchical structures to enable rapid, robust and flexible response across organizational and political boundaries. ***Otherwise, networked adversaries may exploit the gaps and seams between governmental organizations.***”⁵⁵ (*Emphasis added.*)

Finally, Dr. Max Manwaring, a faculty member at the U.S. Army War College has researched this kind of nexus in the context of the advent of what he calls the new urban insurgency, posed by street gangs. He begins by stating:

[T]he Western mainstream legally-oriented security dialog demonstrates that many political and military leaders and scholars of international relations have not yet adjusted to the reality that internal and transnational nonstate actors—such as criminal gangs—can be as important as traditional nation-states in determining political patterns and outcomes in global affairs. Similarly, many political leaders see nonstate actors as bit players on the international stage. At best, many leaders consider these nontraditional political actors to be low-level law enforcement problems, and, as a result, many argue that they do not require sustained national security policy attention. Yet more than half of the countries in the world are struggling to maintain their political, economic, and territorial integrity in the face of diverse direct and indirect nonstate—including criminal gangs—challenges.⁵⁶

Our government’s language and response to the specific threat of Al Qaeda makes it clear we generally do not simply and practically place transnational terrorist organizations into the category of a low-level law enforcement problem. We do, however, strive to continue to address Al

Qaeda as well as related and similar organizations as law enforcement problems when it comes to the U.S. domestic context. Furthermore, we do not address the implications of recent U.S. Government reform decisions and the preservation of the seam on the future, especially if transnational terrorist organizations do attempt to merge with more traditional domestic criminal elements inside our borders. This may be folly, especially if the threat proves to present itself inside our borders as violently as it does externally and as violently as Al Qaeda did on September 11, 2001. Dr. Manwaring warns:

As a result, nonstate conflict is too complex to allow a strictly military solution to a given national security problem. Likewise, it is too complicated to allow a strictly police solution to a law enforcement problem.... In this context, the harsh realities of the new world disorder are caused by myriad destabilizers. The causes include increasing poverty, human starvation, widespread disease, and lack of political and socio-economic justice. The consequences are seen in such forms as social violence, criminal anarchy, refugee flows, illegal drug trafficking and organized crime, extreme nationalism, irredentism, religious fundamentalism, insurgency, ethnic cleansing, and environmental devastation. These destabilizing conditions tend to be exploited by militant nationalists, militant reformers, militant religious fundamentalists, ideologues, civil and military bureaucrats, terrorists, insurgents, warlords, drug barons, and organized criminals working to achieve their own narrow purposes.⁵⁷

These observations are interesting not only in light of Al Qaeda, but also in other events, such as the massive Muslim-based rioting in France, which began in the suburbs of Paris and rapidly spread to over 300 towns and cities state-wide. Furthermore, to a lesser extent, the riots spread to at least five other countries, including Belgium, Denmark, Germany, Greece, Portugal, and Spain. At the time of this writing and depending on media sources, the riots continue and have resulted in the destruction of tens of

thousands of vehicles and hundreds of buildings with a yet-to-be-determined economic cost, and at least one death in France.⁵⁸

Interestingly, the violence in France is arguably a form of urban violence that has no direct ties to urban street gangs as described by Dr. Manwaring, nor are the violent apparently directly subject to the influence of a greater transnational threat like Al Qaeda, yet it validates some of his thoughts. If it is discovered later that in fact these influences were there and were a contributing factor to the violence, the implications are significant. Regardless, in light of the violence and destructiveness of these riots, and when applied specifically to organizations such as current transnational gangs like Mara Salvatrucha in the western hemisphere, or terrorist organizations like Al Qaeda globally, Dr. Manwaring's assessment regarding the scale of the problem is alarming and strongly suggests the U.S. Government place the military in the status of lead federal agency domestically.

To reiterate, this does not suggest this is a military problem alone. Instead, domestic law enforcement must participate, but must do so in a manner that supports the true nature, character, and significance of this threat to U.S. national security. If Dr. Manwaring and other scholars correctly identify the significance of this kind of new union of threats, we are responsible not only to construct a modern defense in depth against the transnational terrorist, but a defense that will also prove sufficient against the nexus of these kinds of new terrorist organizations and more traditional criminal elements. We must be on our guard, aware of the potential for the threat to manifest in this way. This adds weight to the argument supporting a controlled departure from our desire to fit the current threat into past legal and policy models. When addressing implications for his thoughts, Dr. Manwaring argues "because of their internal (intrastate) criminal activities and their international (transnational) commercial and political actions, they exacerbate the confusion regarding the traditional distinctions between police law enforcement functions and military national security or defense functions,"⁵⁹ then later states:

Thus, taking the activities of the gangs' phenomena to their logical (and actual) conclusion can be a mix of possibilities only limited by the imagination and willingness to use

“unethical” ways and means to disrupt, control, or destroy a targeted nation-state. In this type of nonstate war, the traditional lines between civilian and military, lethal and nonlethal, and direct and indirect attack on the state are eliminated, and the “battlespace” is extended well beyond traditional military-police dimensions to relatively uncharted political, psychological, socio-economic, and moral dimensions.⁶⁰ War or conflict, has changed.⁶¹

Scenarios

There are several general scenarios that illustrate in a limited way the extent and complexity of the problem. Other factors are introduced into the terrorist equation. First, a known member of an overseas terrorist organization attacks the U.S. within our borders while remaining overseas. In the middle of winter, he “hacks” into a regional power company’s computer system and unleashes a disabling virus. The counties served by this company go without power for the better part of four days. Several deaths are attributed to the power outage, primarily elderly people living alone and now without heat, and a small number due to automobile accidents caused when traffic signals malfunction. DoD knows who the individual is, as well as his location. Due to U.S. policy, however, the FBI has jurisdiction. The long process begins to attempt to document the individual’s “criminal” activity, issue an indictment and attempt extradition. The military can essentially take no action other than to share information. Beyond this already complex set of problems, two separate offices work terrorism and information attacks within the FBI. An internal disagreement begins over which set of agents/office has jurisdiction. Additionally, within the Department of Defense, the same organizational problem exists in that terrorism and information warfare are functionally viewed as separate and distinct entities. Second, the same scenario occurs, originating overseas, with the target being a U.S. military facility overseas. Again, the FBI has jurisdiction over the “crime” committed by an individual or his group against a military target.

Finally, consider two similar scenarios—one domestic and one foreign—where a known terrorist or group releases a biological agent into the water supply that feeds a military installation. Which federal agency

assumes lead agency responsibility? Regardless of policy, which is best suited? Against who or what was the attack actually directed: Is the military installation the primary target, part of a broad set of targets, or was it collateral damage? What were the intentions of the attackers? These are tough questions without simple answers that identify the gray area that will frustrate a credible response, and empower the enemy.

Terrorism has served as a vehicle through this paper to convey an emerging threat as it pertains to legacy law and policy. To better understand the threat, consider that technology has equipped potential enemies both inside and outside the U.S. with tools to wage a much more damaging war against us: weapons based on information technology, new generations of explosives, hybrid viruses and diseases, chemicals, etc. Add to this the strength of illicit finances behind organized criminal activities such as drug, weapons, or human trafficking, and a more ominous picture forms.

None of this suggests we are currently paralyzed or unable to respond to such threats. Rather, it appears we prefer to be reactive instead of proactive. The better organized we are, and therefore prepared for the inevitable, the better our response. With rare exception, the simpler solution is almost always the better solution. All federal agencies and organizations addressing the problem of terrorism are truly professional in their efforts, and no single organization, is fully equipped to address these new transnational threats alone across the political and geographic spectrum. It takes the entire toolset, and suggests the lead agency should be most capable of addressing the threat regardless of geography and level of violence.

A significant question remains: What happens when terrorists choose to strike the U.S. homeland while the federal government is encumbered with other domestic troubles—an effort comparable to or greater than providing relief for Hurricane Katrina—and also a significant expeditionary activity overseas, similar to today's commitments in Afghanistan and Iraq? Will the current system best facilitate a comprehensive federal response to defend the homeland, or will it actually further complicate a volatile and complex environment resulting in a less than sufficient response and an amplified effect benefiting the enemy? What happens when the overseas threat is tied to the domestic threat? Currently our policies appear to implicitly acknowledge we are a diverse

and busy government, while specifically addressing problems in a way that assumes the largest issue at hand is really the only issue in town. The assumptions continue based on hope that requisite coordination will come smoothly and willingly. Again, this is potentially folly. Experience shows a prepared enemy will strike at the worst possible time, and plan on taking full advantage of obvious and existing commitments and burdens. After all, we would do the same.

Context and Oversight

An historic debate revolves around the presence of a standing federal army: the security it provides versus the possibility of its improper activity or misuse. Often times today, this debate surfaces in discussions of the domestic use of federal troops in the context of national defense/security, and seems most often to revolve around Posse Comitatus and its associated amendments. Almost as often, the argument harkens back to the Federalist Papers⁶² to support maintaining modern arguments restraining or prohibiting the use of federal troops domestically for national defense or security missions, usually in the context of preserving civil liberties and freedoms.

The application of Federalist Papers' principles today presumes a military threat to civil liberties and freedoms, as well as the validity, accuracy, and indisputability of the current definition/characterization of threats like Al Qaeda as a law enforcement problem, and then proceeds forward from that point.

Although there are undoubtedly contemporary applications for the wisdom of the authors of the Federalist Papers, the context of their original arguments is critical when considering a proper modern application. Overall the context of the Federalist Papers with regards to threats to the then new United States is centered on the behavior of nation-states: nations ultimately become threats to one another due to either problems associated with treaties, or for other reasons resulting in direct, presumably bilateral state-on-state, violence. Federalist 2 through 5 address "dangers from foreign forces or influence" while 6 through 8 address the "dangers from dissension between states" and "the consequences of hostilities between the states." Later in the Federalist Papers, it becomes clear that the authors attribute some of these same behaviors and the associated risk of threat to the states within the new union. This leads ultimately to two important discussions regarding the strength of the federal government: how to ensure the preservation of the union from internal unrest—wars between member states, or between member states and the greater United States, and the federal requirement to provide for a common defense.

Related, and perhaps most interesting in the context of the modern threat, Federalist 24 and 25 further consider “the powers necessary to the common defense.” It is here that some of the most compelling arguments are made with regard to a comprehensive and contemporary application of the Federalist Papers’ principles, while preserving the context of the concerns the authors dealt with as they wrote. Consider the following excerpts from the debate on these issues:

Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers. It is well worthy of consideration therefore, whether it would conduce more to the interest of the people of America that they should, to all general purposes, be one nation, under one federal government, or that they should divide themselves into separate confederacies, and give to the head of each the same kind of powers which they are advised to place in one national government.⁶³

The JUST causes of war, for the most part, arise either from violation of treaties or from direct violence... It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies... *So far, therefore, as either designed or accidental violations of treaties and the laws of nations afford JUST causes of war, they are less to be apprehended under one general government than under several lesser ones, and in that respect the former most favors the SAFETY of the people... As to those just causes of war which proceed from direct and unlawful violence, it appears equally clear to me that one good national government affords vastly more security against*

dangers of that sort than can be derived from any other quarter.⁶⁴ (*Emphasis added.*)

It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans... But whatever may be our situation, whether firmly united under one national government, or split into a number of confederacies, certain it is, that foreign nations will know and view it exactly as it is; and they will act toward us accordingly. If they see that our national government is efficient and well administered, our trade prudently regulated, our militia properly organized and disciplined, our resources and finances discreetly managed, our credit re-established, our people free, contented, and united, they will be much more disposed to cultivate our friendship than provoke our resentment. If, on the other hand, they find us either destitute of an effectual government (each State doing right or wrong, as to its rulers may seem convenient), or split into three or four independent and probably discordant republics or confederacies, one inclining to Britain, another to France, and a third to Spain, and perhaps played off against each other by the three, what a poor, pitiful figure will America make in their eyes!⁶⁵

It is noteworthy, but not surprising, that transnational threats such as we see manifest today in Al Qaeda are not addressed either directly or indirectly in this body of writing. Nothing similar is suggested or implied. The specific concerns discussed fall into the context of a the post-Revolution formation of a new republic of sovereign states (the United States), one whose citizens were previously subject to an

oppressive and arguably immoral use and abuse of power through military force by the Crown of England. For this new United States of America, the discussion purposefully drove toward an agreed upon federal system of government that would best protect the citizenry against similar abuses by the new government, and yet establish a federal capability sufficient to stand against expected threats posed from outside the United States—a threat posed by other nations.

Significantly, the Federalist authors also address internal threats and discuss them in the context of the possibility of a post-union conflict between the republic's member states, either against each other, or in the form of a confederate aggression against the greater federal republic. Again, the discussion never presumes the kind of transnational threats we see today, especially a family of threats capable of emerging from within or without the state, and which are not states themselves. When domestic military operations are discussed (as in Federalist 8), they are referred to with phrases like “activity for interior defense.”⁶⁶ It is important to reemphasize the context of the discussion: the emergence of hostility between states within the new union.

The most interesting argument made in the context of Federalist 8 is not that the standing military force operating domestically poses a threat to civil liberties or freedoms. Instead, the concern is found in the following passage:

The perpetual menacings of danger oblige the government to be always prepared to repel it; its armies must be numerous enough for instant defense. The continual necessity for their services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. The military state becomes elevated above the civil. The inhabitants of the territories, often the theatre of war, are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees the people are brought to consider the soldiery not only as their protectors, but as their superiors.”⁶⁷

When Alexander Hamilton penned Federalist 8 this concern was, as stated by the author, “neither remote nor difficult.” His argument was vitally important and proper at that time as the various debates over the substance of the Constitution occurred. Students of history must also look at Hamilton’s other writings contained within the Federalist Papers, specifically Federalist 24 and 25. Here we find he provides a balance against his own argument made in Federalist 8 as he discusses the necessity to provide for the common defense of the entire union. It is noteworthy that these balancing thoughts were written only one month after Federalist 8.⁶⁸ His concerns expressed in Federalist 8 must have still been fresh in his mind.

The opening statement in Federalist 24 is remarkable:

To THE powers proposed to be conferred upon the federal government, in respect to the creation and direction of the national forces, I have met with but one specific objection, which, if I understand it right, is this, that proper provision has not been made against the existence of standing armies in time of peace; an objection which, I shall now endeavor to show, rests on weak and unsubstantial foundations.⁶⁹

The argument Hamilton is responding to is not simply one of finance: that standing armies are expensive. Rather, he responds to the premise that standing armies are dangerous and a threat to liberty and freedom. Hamilton counters the premise by stating it is “weak and unsubstantiated.” He explains his position based upon the fact that although the concern that standing armies can be such a danger, the proposed federal government is assembled in such a way as to prevent it. Later he writes, “...the whole power of raising armies was lodged in the LEGISLATURE, not in the EXECUTIVE; that this legislature was to be a popular body, consisting of the representatives of the people periodically elected.”⁷⁰ Furthermore, he seems to feed off of the strong point he made in Federalist 9:

The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. *The regular distribution of power into*

distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election; these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.⁷¹
(Emphasis added.)

As strong as Hamilton's argument was then, it is not unreasonable to offer that it is strengthened all the more today, after over 200 years of practicing the republican form of government he discussed and our Founding Fathers ultimately implemented. Although an important point of debate and discourse among this nation's Founding Fathers, Hamilton and his peers who crafted the Constitution did not fear the misuse of the federal military as it is often described or characterized today. They acknowledged and discussed it as a possibility, determined that the republican government as they assembled it sufficiently addressed the problem through the separation of powers, and then they moved on.

Furthermore, they directly addressed the argument that individual or collections of state militias (the National Guard today) should lead or serve as initial or primary responders led/directed by the Federal government when and if military force is called for. In the current context this would certainly fit the discussion on terrorism, and possibly even very unorthodox "threats" such as the need for a federal response to disasters such as Hurricane Katrina. In Federalist 25 Hamilton writes with incredibly strong language:

IT MAY perhaps be urged that the objects enumerated in the preceding number [Federalist Number 24] ought to be provided for by the State governments, under the direction of the Union. But this would be, in reality, an inversion of the primary principle of our political association, as it would in practice transfer the care of the common defense from the federal head to the individual members: a project

oppressive to some States, dangerous to all, and baneful to the Confederacy.⁷²

With equal strength of language and conviction, he continues his argument:

...the liberty of the people would be less safe in this state of things [a federal force in the hands of the States, or the States leading the fight] than in that which left the national forces in the hands of the national government. As far as an army may be considered as a dangerous weapon of power, it had better be in those hands of which the people are most likely to be jealous than in those of which they are least likely to be jealous. For it is a truth, which the experience of ages has attested, that the people are always most in danger when the means of injuring their rights are in the possession of those of whom they entertain the least suspicion. The framers of the existing Confederation, fully aware of the dangers to the Union from the separate possession of military forces by the States, have, in express terms, prohibited them from having either ships or troops, unless with the consent of Congress.⁷³

Note the remarkable assertion that the general populace is safer if federal forces are used for two reasons: first, the average citizen will trust his state government more than the federal, and will therefore handle the federal government more cautiously with regards to what it is allowed to do; and second, the mechanism to ensure that citizen's ability to affect the federal government is in fact his representation through his state, resident in the federal legislature. The republic was deliberately built to ensure checks and balances to serve the common good. What is most interesting in the greater context is the fact that the very existence of the Posse Comitatus law is a demonstration that the system works that the Founding Fathers put in place. Congress passed Posse Comitatus after it was determined the President was misusing federal forces during Civil War reconstruction in the South. Specifically, federal military forces were put under the effective command and control of law

enforcement officials—a very different scenario than the modern debate with regards to terrorism and other transnational threats.

The real issue and concern then was not standing armies in peacetime, nor was it concern the federal government would misuse federal forces domestically in the modern context. These were addressed and dealt with. Rather, the concern was ensuring the federal government had the ability to maintain preparedness and the ability to counter threats that emerged from outside or from within the United States. In the context of the common defense the response is presumed to be federal and the republic was designed accordingly. Likewise, this should not be the issue today—the debate should remain closed. In the genuine interest of national security, national leaders—political and military—should communicate in a way that facilitates public understanding of the robust and historically proven checks and balances provided in the Constitution regarding the improper use of military forces rather than continuing a hypothetical, historically inaccurate and alarmist debate. Today the debate is more properly whether or not the threat posed by transnational entities such as Al Qaeda is primarily criminal or martial in nature: whether acts of terror are merely significant or even catastrophic criminal acts, or are in fact acts of war against the United States. In this specific regard the Federalist Papers are silent. They do not address a role for federal law enforcement, nor did the Founding Fathers envision a federal law enforcement community, as it exists today. Those who desire to apply the cautions offered by the authors of the Federalist Papers beyond their original context should also be aware that a similar application of those writings can properly result in an argument made that there is an equally minimal and limited place for federal law enforcement in the context of providing for the common defense. Neither of these positions are proper or prudent.⁷⁴

In light of the Federalist Papers, it is not unreasonable to look at the emerging arrangement to respond to modern transnational threats to national security when those threats manifest domestically. Again, the federal response to Hurricane Katrina and the resultant discussions about that response serving as a model for future federal responses in the context of civil support and even consequence management may serve well. The blended and arguably bifurcated command and control structure which attempts to maintain distinctions between state and

federal forces while awkwardly pushing them together, based on legacy threats seems well outside the intent of the Federalist authors. As arguments are made today, with references to the Federalist Papers, it is prudent to consider the whole of the arguments made by the authors in the context they were made. Then, attempts to apply them to today should be done so comprehensively to all sides of the argument, acknowledging for the most part the context today is dramatically different—the Union is mature, and the specific emergent threat was previously unforeseen and now exists along side legacy threats posed by other states and the related potential entanglements of treaties.

Prior to discussing options it is prudent to state this paper does not suggest or recommend that any element of the federal government—law enforcement, defense, intelligence, etc.—should function without full and proper Constitutional oversight to ensure the preservation of the liberties that are truly central and precious to our nation. The argument is made, however, that the way we function to counter threats to the nation must change and if necessary, so must the mechanisms for oversight, in order to address the enemy of the state in the most refined and straightforward way; a way that is the most effective while being the least functionally and administratively complex. Those changes must rest on the foundation of the past but not tied to it, ensuring that threats today and tomorrow are viewed for what they are. We cannot afford to cling to a “comfortable” past hoping it will continue to serve us well against characteristically new threats. This argument applies the Federalist Papers to the other side of the current argument, to balance the usual one-sided application of this source and has hopefully successfully demonstrated that although they have value for today, even for this issue, they are ultimately limited in that value due to a dramatically different context. The warnings and cautions contained in the Federalist Papers highlight a proper tension. The government today must consider that wisdom as it pertains to protecting the rights of citizens, while balancing those rights against the related need for collective security and common defense, but only in order to ensure we continue to preserve that balance in the context of today’s threats.

Options and Recommendation

The discussion above has primarily focused on classic military operations and activities—the use of force, troops, etc.—in an effort to reduce the argument to a digestible form. As options are considered, however, the full spectrum of activities that enable such operations must also be considered. As previously mentioned, the most significant of these is the role of intelligence operations and analysis—activities that occur before, during, and after these classic operations in the greater context of national security. In terms of analysis, current efforts captured under the establishment of the Director of National Intelligence have placed a new and proper emphasis on information sharing across the participating members of the intelligence community. It is too early to determine the effectiveness of these changes, however, it is easy to argue that in the best of circumstances the mandate to share information does not eliminate the real problem—the seam—nor does it fully or effectively bridge it. What follows are several general options that may serve to better our position in this new war on terrorism and extremism, as well as posture the U.S. to address other similar/related transnational threats.

First, the government can maintain the current definition of terrorism as primarily a criminal act. Federal law enforcement always serves as the lead federal agency with other agencies serving in a supporting role—state and local law enforcement as well as the Department of Defense. This is similar to the current “Drug War” paradigm, with DoD providing support to the U.S. Coast Guard as a law enforcement activity. As a result, the federal government could/should to one of the following: First, modify national law enforcement doctrine and funding to allow the full organization, training, and equipping necessary to truly counter the modern threat, specifically transnational terrorism. In this context, the law enforcement community should truly lead the full effort globally, not just domestically as is currently the case. Second, create a new law enforcement agency/organization that specializes in counterterrorism policy, motives, strategy and tactics, etc., rather than continuing to have existing law enforcement activities assume these responsibilities in addition to their traditional tasks—this

includes but is not limited to the current responsibilities resident in the Federal Bureau of Investigation and Immigration and Customs Enforcement entities.

Second, the government can establish the Department of Defense as lead federal agency for the new class of transnational threats. This includes several changes to law policy based on the nature and character of the threat. As a result, the federal government should do the following: First, redefine or strengthen the definition of terrorism to state it is primarily a form of warfare, with the view that terrorists are in fact combatants engaged in a political fight. They are subject to the use of deadly force or capture, detainment, and prosecution for crimes domestically or internationally as is appropriate. This does not eliminate the option to take legal action against terrorists who commit crimes in the context of the combat they wage. Second, update the Posse Comitatus Act of 1878, and its related family of laws, PDDs, Secretariat-level policies, instructions, etc., that currently “prevent” the full operation of the U.S. military domestically in this regard. This must also eliminate the “jurisdictional” troubles encountered with the use of federal military within the United States. The Department of Defense would be charged as the lead federal agency, with an obligation to coordinate its activities to remain compliant with law, and to assure that the law enforcement community is able to fully benefit from DoD activities regardless of the level of law enforcement participation (e.g., access to captured/detained combatants to ensure they are not also wanted for related or unrelated criminal activities). The capability DoD brings in terms of domestic response to the threat would mirror the capability currently available outside the U.S. This will also preclude and possibly reduce accusations that the U.S. Government is willing to treat others differently than it does its own citizens.

Finally, the government can establish a new and unique hybrid organization, perhaps comparable to Israel’s Shin Bet. This organization would always hold simultaneous and limited military and law enforcement authority and jurisdiction. It would house all required capabilities to serve as lead federal agency for conducting anti- and counterterrorism campaigns and activities. It would have authority to identify and investigate suspects, activities and organizations, pursue them globally and either combat them or bring them to justice.

Recommendation

This paper recommends the U.S. Government implement option two. The U.S. military has a clear and unblemished record of professionalism, restraint, and submission to civil authority and is best equipped and trained to serve as lead federal agency for all counterterror activities and operations within the United States, overseas, and transnationally. This is consistent with the U.S. Government language used to describe the current terrorist threat and related operations as a war, as well as other similar transnational threats to the U.S. The U.S. military should lead but not operate alone. Once captured, the U.S. still needs the legal grounds to prosecute and punish terrorists whether that prosecution happens within a military tribunal or a civil court. If desired, the law could reflect that a captured terrorist is not a prisoner of war in the traditional sense, just as the modern transnational terrorist threat to the U.S. is not the same as the “traditional” war waged between states. The government should retain laws regarding the illegality of aspects of terrorism, primarily tactical practices. A more comprehensive set of laws and policies addressing the threat in the clearest of terms, as well as define the roles and missions of the participating agencies may be called for. The magnitude of change required within our government to establish the best and most streamlined system for responding to the threat of terrorism is significant, but so is the threat.

The Federal Government (through the Department of Defense) is constitutionally chartered to provide for the common defense.⁷⁵ This Constitutional charter was written without any explicit or implicit exception based on the geographic location of the threat, or in today’s context, the practical hostile effects a transnational threat may produce. The increasing level of violence and destruction of terrorist acts—real or effective—in combination with the emerging willingness of terrorists to use weapons of mass destruction⁷⁶ brings modern terrorism, especially transnational terrorism solidly into the category of threats that truly jeopardize national security.

Conclusion

The argument made here is ultimately about defining the threat. This paper does not argue the U.S. military should serve as a law enforcement entity, or that it should assume the practice of enforcing law within the U.S. Instead, the argument offered is that modern transnational terrorism—as well as facets of other transnational activities, alone or in combination with terrorism—is improperly defined. Although there are certainly criminal aspects to terrorism, it is not by nature or in its character primarily a criminal activity. It is modern combat, a martial activity and an act of war. The challenge is to reconsider this definition, change it accordingly, and then apply the most proper capabilities of the republic to the problem in the best combination. The point of emphasis is the modern enemy, not academic arguments based entirely on a legacy set of threats. That said, there is no advocacy for the reduction of the historic civil liberties, rights, and freedoms that were, and remain, the centerpiece of the foundation of the United States. A new enemy is manifest, calling for a new understanding and view of how to defeat it without losing sight of the precious things historically held most dear.

The picture painted in the Hollywood movie *The Siege* is undesirable. Although it is highly unlikely such a scenario would unfold as depicted in this film, the possibility of something similar occurring in terms of the government's struggle to respond is possible: The movie makes an important point about planning as well as practical preparation for eventual and significant situations. The government has a historic charter and obligation in the face of the new threat to provide for the common defense by empowering the military to counter this threat across the entire geographic playing field. This new threat clearly and reasonably calls for a common defense in the most historic of ways, and prepare to do so sooner rather than later. Although we will never enjoy perfect security living in an open society, the recommended option should proactively permit a robust and mature capability to be in place in advance—to be proactive rather than reactive again. When the regrettable does happen again, the U.S. will best posture itself to truly function on a playing field that favors providing for the common defense

by design—dealing with the modern threat while preserving what the Founding Fathers held dear. The U.S. should never be in the business of giving the enemy an advantage, or of setting the stage for a fair fight. The context should properly be justice, not a more relative standard of fairness. Instead, it should be clear to any enemy that to engage the U.S. is to engage in a fight that will not be fair, regardless of the means or location of the attack. At the same time we will clearly, confidently, and publicly demonstrate the advantage is ours as we continue to protect the liberty of all Americans, and our national interests at home and abroad. The risks associated with keeping the society open certainly outweigh the alternatives, but those risks should not include reducing the nation's ability to fight any threat, current or emerging.

Through consistent and uniform action domestically and abroad, the U.S. will also demonstrate to the world that we choose to hold dear for everyone those same things that we hold dear for ourselves. This ensures any potential enemy knows that there is no advantage to attacking the U.S. domestically or abroad. It makes no difference: The tools used to facilitate the response will be the same regardless of geography. The terrorist threat to the homeland will decrease as our preparedness to credibly counter that threat increases—perhaps a new form of deterrence for a non-state threat that is not deterred by traditional means.

Alternately, a strategy that prefers maintenance of the status quo by depending on a practical ability to react (even if that reaction is flawlessly planned and coordinated) gives the lead and advantage to the enemy, and places a greater chance of our own success on a healthy dose of luck. This is contrary to the premise the U.S. has always stated rests behind its strategy for defense in any other context—the best defense is in fact a good offense. The threat today is not deterred in the same way as a sovereign and belligerent state. We must be proactive, even preemptive at times as the National Security Strategy states⁷⁷ to ensure U.S. interests clearly remain the proactive focus of our efforts and actions in peace rather than primarily a set of real or perceived reactions in war. Furthermore, as we see the reality of the danger of the nexus of radicalism and technology,⁷⁸ especially as that enemy is arguably more rapidly and dramatically enabled by technological advances, we must assess whether or not we have the time to learn how to counter these

transnational threats in a reactive way, while we are rooted in a traditional/legacy mindset. In the meantime, expect the enemy to operate along the seam we have created and continue to maintain, with increased vigor and zeal. The U.S. should do all in its power to prevent the only option being the reactionary establishment of a national emergency, the need to invoke authority under the Insurrection Act⁷⁹ or a declaration of martial law, along with the associated curtailment of civil rights in order to counter a threat we are already all too aware of today.

Notes

1. James H. Anderson, James Madison University, William R. Nelson Institute for Public Affairs, *International Terrorism and Crime: Trends and Linkages*, <http://www.jmu.edu/orgs/wrni/it5.html>.

2. Andrew L. Ross, "The Theory & Practice of International Relations: Contending Analytical Perspectives," in *Strategy and Force Planning*, 3rd Ed., ed. Strategy and Force Planning Faculty (Newport: Naval War College, 2000), 67.

3. Terrorism is currently defined as crime and not warfare, yet the term is used liberally by the justice and defense communities to connote more than the "official" definition allows. For definitions, see the U.S. Department of State, *Patterns of Global Terrorism 2003*, April 2004, xii, <http://www.state.gov/s/ct/rls/pgtrpt/2003/>. The U.S. Government currently uses several definitions for terrorism, each demonstrating an organizational perspective (see also Dr. Thomas R. O'Connor, North Carolina Wesleyan College, Department of Justice Studies & Applied Criminology, <http://faculty.ncwc.edu/toconnor/429/429lect01.htm>). Additionally, although most governmental definitions for terrorism equate it to political violence, at times both the Department of Justice and the media use the term "terrorism" to describe criminal acts that are not political in nature (e.g., the killings at Columbine High School in Colorado).

4. Department of Defense Directive 5107.1, Enclosure 1, January 5, 2001, 7. Confusion exists with regards to the definition of what constitutes a weapon of mass destruction (WMD) between DoD (historically defining a WMD as a nuclear, chemical, biological or radiological weapon), and the Department of Justice (DoJ). DoJ indicted and convicted Timothy McVey for the use of a WMD in the bombing of the Murrah Federal Building in Oklahoma City, OK. The bomb was a large ammonium nitrate and fuel oil (ANFO) device—a crude and conventional weapon. (See <http://www.tkb.org/KeyLeader.jsp?memID=4099>)

5. MIPT Terrorism Knowledge Base, <http://www.tkb.org/KeyLeader.jsp?memID=4099>.

6. U.S. Department of Homeland Security, *Securing Our Homeland: U.S. Department of Homeland Security Strategic Plan*, 2004, inside front cover.

7. *The Siege*, 20th Century Fox, released November 1998.

8. U.S. Department of State. Office of the Coordinator for Counterterrorism. *Patterns of Global Terrorism: 1998*. Washington, D.C., 1999.

9. Ibid. Note that the term “noncombatant” includes in addition to civilians, military personnel who at the time of the incident are unarmed or not on duty.

10. Oxford American Dictionaries, resident within Mac OSX, version 1.0.1.

11. Phil Williams, “Organizing Transnational Crime: Networks, Markets and Hierarchies,” in *Combating Transnational Crime: Concepts, Activities and Responses*, eds. Phil Williams and Dimitri Vlassis (London: Frank Cass, 2001), 60. See also Robert O. Keohane and Joseph S. Nye Jr. (eds.), *Transnational Relations and World Politics*. (Cambridge, MA, Harvard University Press, 1972).

12. Ibid., 67. Mr. Williams quotes James Rosenau, *Turbulence in World Politics* (Princeton, NJ: Princeton University Press, 1989), 251.

13. Terrorism per se is not illegal in the United States. The Department of Justice uses existing laws to prosecute terrorists based upon specific actions or activities already deemed illegal. The indictments against domestic terrorist Timothy McVey serve as an example. The eleven indictments against him included Conspiracy to Use a Weapon of Mass Destruction, Use of a Weapon of Mass Destruction, Destruction by explosive, and eight counts of First-Degree Murder.

14. U.S. Department of State. Office of the Coordinator for Counterterrorism. *Patterns of Global Terrorism: 1998*. Washington, D.C., 1999.

15. Ibid.

16. Louis R. Mizell, *Target U.S.A.: The Inside Story of the New Terrorist War* (New York: John Wiley & Sons, Inc., 1998), flyleaf.

17. Ibid., 179.

18. Ibid., 12.

19. Ibid., 16.

20. The Domestic Operational Law (DOPLAW) Handbook states: “The primary statute restricting military support to civilian law enforcement is the Posse Comitatus Act (PCA).” See the Domestic Operational Law (DOPLAW) Handbook for Judge Advocates, Volume I, Center for Law and Military Operations, 17 February 2005, 12.

21. Ibid., 12-13.

22. Carl von Clausewitz, *On War*, trans. And ed. Michael Howard and Peter Paret (New Jersey: Princeton University Press, 1976), 75, 87.

23. AF Form 133, Mar 92 (EF), Oath of Office (Military Personnel).

24. Louis R. Mizell, *Target U.S.A.: The Inside Story of the New Terrorist War* (New York: John Wiley & Sons, Inc., 1998), 175.

25. President George W. Bush. Speech on board the U.S.S. *Abraham Lincoln*, 1 May 2003, <http://www.johnstonsarchive.net/terrorism/bushiraq4.html>.

26. SMSgt Jim Katzaman, "Secretary of Defense Issues Khobar Towers Findings", Air Force News Service, Aug 97, http://www.af.mil/news/Aug1997/n19970801_970946.html.

27. This is not to attribute the bombing to the government of Iraq. Rather, I am suggesting that there was no nation or assembly of nations with anti-American sentiment that could have conventionally countered us in the region.

28. Shoon Kathleen Murray and Christopher Spinosa, "The Post-9/11 Shift in Public Opinion: How Long Will It Last?" in Eugene R. Wittkoph and James M. McCormick, Eds., *The Domestic Sources of American Foreign Policy: Insights and Evidence*, (Oxford: Rowman & Littlefield, 2004), 108.

29. Dan Raviv and Yossi Melman, *Every Spy a Prince: The Complete History of Israel's Intelligence Community* (Boston: Houghton Mifflin Company), 385.

30. See note 12 above regarding the definition of "noncombatant."

31. Throughout the days I worked at the Bureau I often heard comments made in frustration to this effect. These comments came from senior leaders, a Supervisory Special Agent, as well a number of other Special Agents and analysts involved with the case.

32. Carl von Clausewitz, *On War*, trans. And ed. Michael Howard and Peter Paret (New Jersey: Princeton University Press), 89.

33. *Ibid.*, 88.

34. Martin van Creveld, *The Transformation of War* (New York: The Free Press, 1991), 36-37.

35. *Ibid.*, 41.

36. Ibid., 56-57.

37. Ibid., 59.

38. Ibid., 204.

39. This concept was discussed at length during the USAF JAG School's Homeland Defense Course, and primarily addressed during the briefing entitled "N/NC and the NG" on 24 January 2006.

40. Defense Link News, http://www.defenselink.mil/news/Sep2005/20050907_2633.html.

41. CRS Report for Congress, "Hurricane Katrina: DoD Disaster Response" (September 19, 2005), 10-11.

42. Anthony J. Rice, "Command and Control: The Essence of Coalition Warfare," *Parameters*, 27, no. 1 (Spring 1997), <http://carlisle-www.army.mil/usawc/Parameters/97spring/rice.htm>

43. USAF Air War College Lecture, 31 Jan 2006. AWC lectures are conducted in a not-for-attribution environment.

44. Hon. Paul McHale, Assistant Secretary of Defense, Homeland Defense. Speech on 16 September 2003, http://www.defenselink.mil/policy/sections/public_statements/speeches/asd/homeland_defense/mchale/sept_16_03.html.

45. National Security Strategy, September 2002, 6.

46. U.S. Northern Command webpage, http://www.northcom.mil/index.cfm?fuseaction=s.who_mission.

47. Strategy for Homeland Defense and Civil Support, June 2005, 14.

48. Ibid., 16.

49. Dr. Philip Williams, "Organizing Transnational Crime: Networks, Markets and Hierarchies," 73.

50. Ibid., 81.

51. Roy Godson, "The Political-Criminal Nexus and Global Security" in *Menace to Society: Political-Criminal Collaboration Around the World* (New Brunswick: Transaction Publishers, 2003), 6.

52. Ibid., 9.

53. Ibid., 18.

54. John P. Sullivan, "Urban Gangs Evolving As Criminal Netwar Actors," *Small Wars and Insurgencies* 11, no. 1 (Spring 2000), 82.

55. Ibid., 94.

56. Dr. Max G. Manwaring, "Street Gangs: The New Urban Insurgency" (March 2005), 1, <http://www.carlisle.army.mil/ssi>.

57. Ibid., 5-6.

58. See one set of summary statistics and charts provided by Wikipedia at: http://en.wikipedia.org/wiki/2005_Paris_suburb_riots#Summary_statistics. See also: The Guardian, <http://www.guardian.co.uk/france/story/0,11882,1636656,00.html>.

59. Dr. Max G. Manwaring, "Street Gangs: The New Urban Insurgency" (March 2005), 11, <http://www.carlisle.army.mil/ssi>.

60. Ibid., 17.

61. Ibid., 18.

62. The Federalist Papers are a collection of 85 essays written by three authors: Alexander Hamilton, James Madison, and John Jay (who authored 52, 28 and five of the papers respectively). The Federalist Papers were published in New York under the full title of *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed Upon by the Federal Convention, September 17, 1787, In Two Volumes*. Note that some of the individual papers are dated, while others are not. The Federalist Papers are available on line at <http://www.foundingfathers.info>.

63. Ibid.

64. John Jay, Federalist Number 3.

65. John Jay, Federalist Number 4.

66. Alexander Hamilton, Federalist Number 8, November 20, 1787.

67. Ibid.

68. Federalist 25 is dated December 21, 1787.

69. Alexander Hamilton, Federalist Number 24.

70. Ibid.

71. Alexander Hamilton, Federalist Number 9.

72. Alexander Hamilton, Federalist Number 25, December 21, 1787.

73. Ibid.

74. It is interesting that the Constitution is rarely mentioned in this debate today. Most arguments begin with the Posse Comitatus Act. Furthermore, although Congress identified the misuse of federal forces and remedied it through the PCA, contemporary arguments also never appear to address the related misuse of the U.S. Marshals under whose authority federal troops were placed. It can be argued that if the Marshals had sufficient resources, the election results would have been the same. Without keeping the argument properly tied to its historic context and misrepresent it is to suggest that the equally improper use of federal law enforcement was actually acceptable. It is implicit that PCA also protects against the misuse of an improperly empowered federal law enforcement capability as it existed in the U.S. Marshals office in 1876. PCA is a product of the Constitutional separation of powers and was designed to address the root of a problem—the Presidential abuse of power in a specific context. The law was not intended only to address only the symptoms of that problem—the abuse of federal military, or federal law enforcement. Arguments today must maintain intellectual integrity in this regard.

75. U.S. Constitution, Preamble.

76. Congress, Senate, Government Affairs Permanent Subcommittee on Investigation, Global Proliferation of Weapons of Mass Destruction: A Case Study on the Aum Shinrikyo (Introduction), 31 October 1995 Staff Statement, available from http://www.fas.org/irp/congress/1995_rpt/aum/part01.htm. The Aum Shinrikyo terrorist organization released Sarin gas in the Tokyo subway on 20 March 1995. This attack killed 12 and injured over 5,000 civilians.

77. National Security Strategy, September 2002, 12, 19, 20.

78. Ibid., 4, 17.

79. The Insurrection Act (Title 10 USC, Sections 331-335). This act allows the president to use U.S. military personnel at the request of a state legislature or governor to

suppress insurrections. It also allows the president to use federal troops to enforce federal laws when rebellion against the authority of the U.S. makes it impracticable to enforce the laws of the U.S. (<http://www.northcom.mil/index.cfm?fuseaction=news.factsheets&factsheet=5>). Wikipedia describes the Insurrection Act as “the set of laws that govern the President of the United States of America's ability to deploy troops within the U.S. to put down lawlessness, insurrection and rebellion. The laws are chiefly contained in 10USC331-335. The general aim is to limit Presidential power as much as possible, relying on state and local governments for initial response in the event of insurrection. Coupled with the Posse Comitatus Act Presidential powers for law enforcement are limited and delayed.” (See: http://en.wikipedia.org/wiki/Insurrection_Act.)

66 . . . *Not in Our Own Backyard*