

Chapter 29

Military Involvement In Domestic Terror Incidents*

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The use of military force in domestic situations is severely limited by constitutional and statutory law. These limitations and some attendant ambiguities are of considerable legal consequence not only to the policymaking level of government but to local commanders in defining, planning for, and implementing the military role in domestic terror incidents.

The possible employment of American military forces in a large-scale domestic terrorist incident is a matter worthy of consideration. Such use of forces would entail significant legal decisions made in light of the role played by the military in American society. Before discussing the actual capabilities of existing forces, it is necessary to examine other factors in some detail.

In the comparatively recent period since the beginning of World War II, the American Military Establishment has passed through several distinctive phases.¹ Before the war, the military forces constituted less than one percent of the male labor force and were strictly volunteers. The enlisted force was composed mainly of people from working-class or rural origins, while officers were drawn predominantly from southern, Protestant, middle-class families. Socially, the pre-World War II military was self-contained and markedly separated from civilian society.

By 1945 close to 12 million people were in uniform, a large majority of whom were assigned to combat and service units. While these forces were socially representative of American society, the military remained an institution whose organization contrasted starkly with existing civilian structures. A large demobilization took place after the conflict, only to reverse itself to a ceiling of 3.6 million men at the height of the Korean war. Organizationally and materially, the armed forces of that war closely resembled those of World War II.

The military of the cold war, which averaged 2.5 million men, was composed increasingly of those with some form of technical specialization. The proportion of people assigned to combat or service units declined markedly with the corresponding increase of electronic and technical specialists. The war in Vietnam illustrated yet another phase of the armed forces in American society. Not

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only was the war itself opposed by many, but the basic legitimacy of military service was brought into question. Coupled with the antiwar feeling were the revelations of “atrocities” and “ecological devastation” in Vietnam. Adding to these woes were the reports of widespread drug abuse, corruption in the operation of clubs, cost overruns and military spying on civilian political activists.

The contrast in ideological and public evaluation of the American military establishment over three wars is revealing. In World War II, the American military was almost universally held in high esteem in a popularly supported war. Conservative and isolationist sectors of American public opinion were quick to fall in line behind a liberal and interventionist national leadership. In the wake of the Korean war, defamatory images of the American serviceman were propagated by right-wing spokesmen. Liberal commentators, on the other hand, generally defended the qualities of the American armed forces. In the war in Southeast Asia a still different image emerged. Although initially an outcome of a liberal Administration, the war came to be primarily defended by political conservatives, while the severest attacks on both the behavior of American soldiers and the military establishment emanated from the left.²

As the above would indicate, the domestic employment of military force could well depend upon society's view of the military as an acceptable institution. A President would be loathe to call in the military to quell a domestic incident when the presence of men and women in uniform could greatly exacerbate the existing turmoil.

Coupled with the concern for the perceptual considerations of the military as an institution is yet another serious aspect. Having once accepted the military as a valid (needed) part of society, the role it would be allowed to play in maintaining domestic security had to be examined. Many of the founding fathers considered that the arbitrary use of military force by the British was a factor contributing to the Revolution. By the separation of powers and the use of constitutional checks and balances, the control of the military was divided between the Federal Government and the states on the one hand and between branches within the Government on the other.³ While many people have viewed these constitutional efforts as attempts to prevent the military from gaining too much political control, at least one author takes a different and very interesting view:

The Framers' concept of civilian control was to control the uses to which civilians might put military force rather than to control the military themselves. They were more afraid of military power in the hands of political officials than of political power in the hands of military officers.⁴

If there was a struggle for control of the military, it was not between the armed forces and civilians. Rather, it was a struggle between the Congress and the

President. The Chief Executive identified civilian control with presidential control, while Congress viewed it as congressional control.⁵

Whatever one's perspective, this congressional/executive power struggle had made political involvement with the military a matter of routine. While the executive branch has been generally in control since the end of World War II, Congress more recently has made vigorous efforts to regain some of that power (i.e., the 1973 War Powers Resolution) and reassert greater congressional control over the military. Such activity additionally provides the military an opportunity to take advantage of any political involvement.

As both parties to this struggle have maneuvered for an advantage, the military itself has been drawn into the controversy. Each side seeks to enlist the support and assistance of military leaders, the services, and even the entire profession. Executive Branch leaders call upon the Joint Chiefs of Staff and senior commanders to support Administration proposals for reorganizing the Defense Department, while congressional committees call upon the service chiefs and their deputies to oppose Defense Department efforts to increase centralized control over the services by the Office of the Secretary of Defense. As a result, the military is compelled to become involved in what is essentially a political power struggle—a power struggle that takes the form of disputes over policy decisions. In (Samuel) Huntington's words, "The separation of powers" between Congress and the President "is a perpetual invitation, if not an irresistible force, drawing military leaders into political conflicts."⁶

What we have, then, is a military that has been involved consistently in politics. The armed forces have not been an isolated segment of the population but, rather, an element very much subject to and a participant in our political system. Its role within our society has been the subject of much interpretation, both favorable and unfavorable. It is within these political and societal bounds that the President must make his choice for eventual employment in a domestic terrorist incident.

Legal Rationale. The current state of constitutional and statutory law severely limits the use of military forces in domestic situations. The authority to order the intervention of federal troops in domestic law enforcement generally centers on the office of the President.

The strongest legal prohibition against the use of military force to execute civil and criminal law is Title 18, Section 1385, of the U.S. Code, Use of Army and Air Force as *Posse Comitatus* (power of the county). This provides that whoever, except under circumstances expressly authorized by the Constitution or Congress, willfully uses any part of the above-stated forces as a *posse comitatus* or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than 2 years or both. The Act was originally passed in 1878 as the result of the use of U.S. troops by President Grant "to secure the better execution of the laws" during the election of 1876.⁷ During debates in Congress

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at the time it was argued that the Army had been used improperly to execute local laws, control strikes and collect taxes, and that these “improper” actions had been performed at the behest of U.S. attorneys and law enforcement agents.

Various Army reports were cited showing that in 1871 four companies helped collect revenue in New York, that from 1871 through 1875 there were more than 441 reported incidents in Kentucky in which soldiers were called out to aid federal and state law enforcement authorities, and that in 1876 at least 71 detachments of soldiers aided civil authorities.⁸

Originally, the *Posse Comitatus* legislation prohibited only the Army from aiding civil authorities. In 1956 the Act was added to Title 18 of the U.S. Code, and the Air Force was included to reflect earlier legislation separating the two services. There has been a good deal of controversy resulting from the fact that the Navy (to include the Marine Corps) has not been specifically included. While there was extensive debate for years on this issue, the Secretary of the Navy clarified the matter in 1974 when he issued a directive forbidding Navy and Marine Corps personnel from enforcing or executing local, state, or federal civil law in violation of the *Posse Comitatus Act*.⁹

The U.S. Coast Guard is under the jurisdiction of the Navy during war and therefore would be controlled by the Act. However, during times of peace it is not completely clear exactly how the Act would apply inasmuch as the Coast Guard is under the jurisdiction of the Department of Transportation.¹⁰

As indicated earlier, the President could call into federal service the militia of any state and such armed forces as he considers necessary to suppress “unlawful obstructions, combinations or assemblages, or rebellion” against the authority of the United States or any state in particular.¹¹

This authority is contained in the Constitution which states (*italics added*):

. . . He shall receive ambassadors and other public ministers; *he shall take care that the laws be faithfully executed*, and shall commission all the officers of the United States.¹²

The United States shall guarantee to every State in this Union a republican form of government and *shall protect each of them against invasion*; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.¹³

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.¹⁴

The following federal statutes allow the President to use federal troops under certain conditions (*italics added*):

Whenever there is an insurrection in any State against its government, the President may, upon request of its legislature or of its governor if the legislature cannot be

convened, call into federal service such of the militia of the other States, in the number requested by that State, and use such of the Armed Forces, as he considers necessary to *suppress the insurrection*.¹⁵

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into federal service such of the militia of any State, and use such of the Armed Forces, as he considers necessary to *enforce those laws or to suppress the rebellion*.¹⁶

The President, by using the militia or the Armed Forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, *any insurrection, domestic violence, unlawful combination, or conspiracy*, if it-

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.¹⁷

Although the *Posse Comitatus Act* prevents the use of federal troops to enforce federal or state laws without constitutional or statutory authorization, it does not forbid the loan of military material and equipment to federal law enforcement agencies in connection with a continuing civil disorder.

In *United States vs. Red Feather* (one of the “Wounded Knee” cases)¹⁸ the court ruled that the loan of military equipment was not a violation of the Act. The court went one step further, outlining the differences between the use of federal troops in an *active* role of executing the laws and the *passive* role in which they would indirectly aid civilian law enforcement by saying:

Based on the clear intent of Congress, this court holds that the clause “to execute the laws,” contained in 18 U.S.C. 1385 makes unlawful the use of federal military troops in an active role of direct law enforcement by civil law enforcement officers. Activities which constitute an active role in direct law enforcement are: arrest; seizure of evidence; search of a person; search of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities

However,

Activities which constitute a passive role which might indirectly aid law enforcement are: mere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of

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military personnel to deliver military material, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such material or equipment; aerial photographic reconnaissance flights and other like activities.¹⁹

Legal Difficulties. While certain aspects of the law are clear, there are others that are undergoing close examination to remove ambiguities. Both the Department of Justice and the Department of Defense continue attempts to come to grips with this uncertainty in efforts to coordinate their preparations for and response to domestic terrorism.²⁰ The actions considered center on the use of military force with their civilian counterparts before actual use of the armed forces has been authorized under the provisions outlined above, inasmuch as, prior to their being invoked, the *Posse Comitatus* Act forbids civilian authorities from using the military to carry out their own responsibilities.

One aspect of concern for the military is to determine at what point military observers could be sent to the location of an event without violating the law. The Department of Justice appears to endorse the finding of the *United States vs. Red Feather* case while indicating that some disagreement exists about what additional activities the military observer could engage in (e.g., maintenance of equipment as it is being used by civilian authorities) without going beyond the limits of the law. Mere presence at the scene would not be viewed as a violation of the *Posse Comitatus* Act. It was also noted that in the court's review of the cases resulting from the Wounded Knee incident,²¹ it was not explicitly set forth that the impending use of military force was needed as a justification for the presence of military observers. Concern had also been voiced about the propriety of liaison for the purpose of sharing intelligence concerning a terrorist incident. The prevailing thought is that the prohibition of use of the military by civilian authorities to execute laws does not bar contact for the sole purpose of enabling the military to obtain knowledge relating to a situation. If it appears that it may be necessary to preposition troops in anticipation of their actual employment, such prepositioning is not determined to involve actual enforcement and, therefore, would not be considered illegal. Likewise, reconnaissance by the military, independent of civilian law enforcement, would be considered legal in the sense that it was done with the expectation that forces would be needed to augment local authorities.

The foregoing discussion indicates that the use of military force must be an option taken after due consideration of the social, legal and political context of an incident. The President, satisfied that the employment of military force is needed, would issue the necessary orders through the Secretary of the Army who is the Executive Agent for the use of military forces in civil disturbances. These forces are assigned or committed to him through the Chief of Staff, U.S. Army (CSA).²²

The concept of operations involved is detailed in the Department of the Army Civil Disturbance Plan, "Garden Plot," which provides for the employment of military forces in times of civil disturbance within the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and U.S. territories or possessions.²³ The definition of a "terrorist" incident as defined in the plan is extremely broad, providing considerable latitude for interpretation.²⁴ Military commanders who have been delegated the authority to supply equipment, in those cases in which it may be difficult to determine whether an incident falls into the terrorist category, are "authorized to accept the judgement of the FBI official making the request if it is supported by available facts." The FBI official does not have to be the Director but may well be the senior agent on the scene.²⁵

As a matter of policy, the FBI has been given overall jurisdictional responsibility at the locus of a terrorist incident wherever it occurs, including military installations.

Department of Defense components are authorized to respond to "reasonable" requests of the FBI for military resources. The form of assistance may include material, facilities, and technical personnel acting in an advisory capacity. As noted above, military personnel could not be used in a law enforcement role outside a military installation without Presidential authorization. While troops can be made available to the FBI with approval of the President, command and operational control would remain with the military.

Requests for training, long-term loans of equipment and other requests not based on imminent threats or ongoing incidents would be forwarded through FBI and Department of Justice (DOJ) channels for submission by DOJ to the Secretary of the Army.

Procedurally, the secretaries of the military departments, commanders of military installations or organizations with delegated authority, and the commanders in chief of unified and specified commands outside the United States could grant requests for riot control agents, concertina wire, firefighting resources, protective equipment, clothing, communications gear, searchlights, explosive ordnance disposal and detector dog teams. Other items not prohibited could be provided.

Although circumstances will determine the order in which various forces are employed, it is envisioned that first local and state police would be used, followed by Army and Air National Guard under state control and, finally, federal military forces.²⁶

The commitment of federal military forces as set forth in "Garden Plot" has been viewed as a drastic last resort and their role should never be greater than absolutely necessary under the particular circumstances that prevail. Firepower is to be limited, with only semi-automatic weapons used. Where automatic weapons must be employed, they will not be fired automatically, except on order of competent authority as delegated by the task force commander.²⁷

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Because the use of deadly force invokes the power of summary execution it can be justified only in extreme necessity. Its use is not authorized for the purpose of preventing activities that do not pose a significant risk of death or serious bodily harm.²⁸

Having set forth the prohibition on the use of force under *Posse Comitatus*, two significant exceptions must also be addressed. Under certain circumstances, readily conceivable, military force can be employed domestically without Presidential proclamation.

As a result of the Organization of American States "Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance" and the U.N. "Convention on the Prevention of Crimes Against Internationally Protected Persons," the U.S. Congress had to pass effecting legislation. It is standing policy of the State Department not to deposit an instrument of ratification unless it is assured that federal law would permit the United States to discharge fully its treaty obligations. The safeguards of this legislation not only pertain to Heads of State but also to:

Any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodations or his means of transport, it committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.²⁹

Additionally, the legislation authorized "The Attorney General, in the course of enforcing the provisions of the statute relating to internationally protected persons to request assistance from any federal, state, or local agency."³⁰ Specifically, the law reads:

In the course of enforcement of this and any other sections prohibiting a conspiracy or attempt to violate this section, the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy and the Air Force, any statute, rule, or regulation to the contrary notwithstanding.³¹

This particular piece of legislation's provisions parallel part of Public Law 91-644 passed in 1971 dealing with Congressional assassination, kidnapping and assault. That law stated that whoever kills or kidnaps (or attempts same) of any individual who is a member of Congress or a member of Congress-elect shall be punished and

Violations of this section shall be investigated by the Federal Bureau of Investigation. Assistance may be requested from any Federal, State, or local agency,

including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.³²

In their concern to protect foreign dignitaries and themselves, members of Congress enacted two laws that provide a basis for overriding the letter and intent of *Posse Comitatus*. It is interesting to note that the implications of this were not completely realized by members of the Executive Committee on Terrorism until 1980, when a legal advisor in the Department of State brought it to their attention. As one participant at the meeting described the effect on those present, it was profound.³³

While it is not expected that the military would, in fact, be called up without the President being informed, it is a vastly different situation than the need for Presidential authority for such action. It is interesting to speculate about the stand of the Department of Defense in such a situation. Two strong tides would be drawing on the decision makers: the continuance of the longstanding tradition of abstaining from civil affairs versus the opportunity to prove successfully (it is hoped), in the wake of the Iranian mission, that a true counterterror capability exists within the armed forces.

Military Capabilities. "Garden Plot" provides the basis for planning the use of military personnel and equipment to respond to terrorist acts. What the plan does not indicate is the full complement of military capability. This issue of capability, not only as it pertains to the military, has been the subject of intense discussion. "Specialists in the field" and "high-ranking officers familiar with the activities" have repeatedly contended that the U.S. antiterrorist competence is relatively weak.³⁴

In response to questions raised by the Committee on Government Affairs of the U.S. Senate, Assistant Secretary of Defense for International Security Affairs, David E. McGiffert, gave testimony relative to United States' capability for dealing with terrorists. At these hearings on the Omnibus Antiterrorist Act, Senator John Glenn asked about United States' capabilities similar to those displayed by Israel's *Saiyaret* at Entebbe, the West German *Grenzschutzgruppe-9* at Mogadishu and the Egyptian commando force at Cyprus. The reply was that, although never activated as of that time to counter a terrorist threat or act, U.S. forces consisted of Army, Navy and Air Force units trained in counterterrorism. Further, the emphasis on training was for employment abroad because use of Army personnel domestically "would require waiver by the President of the *Posse Comitatus* Act."³⁵ These forces were described as "specially trained military" which are among the resources of the Department of Defense available as "may be appropriate in a terrorist situation."³⁶

Such testimony could have been interpreted as the United States having available a strike force that is comparable to the West German Border Protection

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Group Nine (G.S.G.-9), which was formed as a result of the Munich Olympic massacre. Under the leadership of Ulrich Wegener, G.S.G.-9 might be one of the most formidable antiterrorist groups in the world. Each member of the group must be a volunteer, capable of maintaining calmness under the most severe stress, and possess a minimum I.Q. of 110. Rigorous training in martial arts, hand combat, scuba diving and special weapons use has built a team capable of quick, decisive action as exemplified by the success at Mogadishu.

Other countries have also formed specialist antiterrorist teams, such as the British Special Air Service (SAS) that was created during World War II and used successfully in London in 1980. The French have a highly respected 30-man team, the *Gigene*, and the Italians formed a 50-man *Squadra Anti-Commando*.³⁷

Compared to these “lean and mean” units, the United States identified the following U.S. military forces as having counterterrorist capabilities:³⁸

1. U.S. Army Ranger Battalions
 - 588 men
 - Located at Fort Stewart, Ga, and Fort Lewis, Wash.
2. USMC Battalion Landing Team
 - 1200 men
 - Located at Camp Lejeune, N.C., Camp Pendleton, Calif., and on Okinawa
 - Can be air-landed
3. USMC Marine Amphibious Unit
 - 1800 men
 - Located in WESTPAC and Mediterranean (afloat)
 - Immediately available but location varies
 - Can be landed by helicopters
4. U.S. Army Special Forces
 - Nine battalions of 242 men
 - Located at Fort Bragg, N.C. (5), Fort Devens, Mass (2), Canal Zone (1), and FRG (1)
 - Response time varies depending on current operations/training missions underway
 - Parachute qualified
 - Language qualified for many areas
5. U.S. Marine Force Reconnaissance Company
 - One company of 190 men
 - Located at Camp Lejeune, N.C.
 - Parachute, scuba qualified
 - Extensive training suitable for counterterrorist operations
6. U.S. Navy, Sea, Air, Land (SEAL) Platoons
 - Nineteen platoons of 14 men each

- Located at Little Creek, Va. (7), Coronada, Calif. (10), and Subic bay, Phil. (2)
 - Capable of infiltration/exfiltration by submarine, boat, ship, aircraft, and parachute
7. Air Force Support
- Special mission aircraft
 - Combat Talon—nap-of-the-earth penetration methods. Located in Florida, Okinawa, and Germany
 - Combat specter gunships located in Florida

It is obvious from this listing that the U.S. Forces that have been designated are heavy in terms of men, equipment and firepower when compared to their European counterparts.

McGiffert's testimony to the Senate subcommittee further stated that:

- Depending on the nature of the mission, the size of U.S. military forces may range from a small element to a larger task force.
- Force size is scenario-dependent and the division of labor between units is tailored to specific circumstances and technical requirements.
- Counterterrorist exercises have been conducted.³⁹

In terms of planning:

- The JCS has developed plans to provide for U.S. military operations to counter terrorist activities overseas.
- There are a number of terrorist acts that might trigger a U.S. military response. Possible military missions range from the rescue of hostages from a hijacked U.S. aircraft to recovery/neutralization/destruction of stolen nuclear weapons.⁴⁰

Yet one analysis of the degree of U.S. preparations led its authors to contend that:

Today, the United States has no single unit equivalent to the West German Border Group Nine (Grenzschutzgruppe Neun or G.S.G.-9 for short), successful at Mogadishu, which is authorized to act outside of our borders in response to terrorist action aimed at American interests or citizens abroad. Domestically, we have three degrees of antiterrorist capabilities: First, some local police departments have developed and fielded antiterrorist units. At the second level of slightly higher response, we find a few state and Federal special teams and armed forces elements with limited special training. Whether the state units could operate internationally or the military could perform domestically is questionable, but at least the raw resource is recognized and present to some degree. At the highest tier, that of transnational terrorism, however, there is a cloud.⁴¹

Both the authors of this study and other have made reference to "Blue Light." The term possibly came from the flash of the stun grenades that were used at

Mogadishu. Other authors assigned the name "Operation Blue Light" to a combined force of Army, Navy, Air Force and Marine personnel. It has been written that the force called "Blue Light" was one established by order of President Carter in March 1978. The force, under command of Col. Charles Beckwith, is 200 men strong, given special weapons and training, and is retained as a specialized force.⁴² Newsweek magazine also reported in 1977 that the Pentagon maintained two special 600-man "Black Beret" Army Ranger battalions at Fort Stewart, Georgia, and Fort Lewis, Washington.⁴³

The true nature of the U.S. military counterterrorism capability began to unfold in 1980 in the wake of the aborted Iranian rescue mission. The impression created by the testimony of McGiffert was shattered like the wreckage of the aircraft left behind in the desert. The review report presented by Adm. (Ret.) James L. Holloway III, provided a narrative of the events leading up to the mission and a clear indictment of many aspects of the operation.⁴⁴

Immediately following the hostage seizure, a small planning cell working at the Pentagon and augmented by two officers from the ground rescue force (described above under the command of Col. Beckwith) began to formulate concepts for military operations as directed by the Chairman, Joint Chiefs of Staff (JCS). During the early stages, existing JCS contingency plans were employed only relating to the use of intelligence assets and the selection of the ground rescue force. Other significant areas, such as organization planning, integration of concurrent planning by subordinate units and the determination of support requirements were compartmentalized and based upon *ad hoc* arrangements.

Training was quickly undertaken and the helicopter option was recommended as having the best chances of success. An Air Force general was appointed as a special advisor to the task force based upon his recent experience in Iran. The senior Marine officer involved in the operation was assigned to the Office of the Chairman JCS and while not officially designated a member of the rescue task force, became actively involved in mission planning especially relating to helicopter training.

It was implied that this officer was in charge of the helicopter force during the preparation phase, and he believed this to be so. However, COMJTF (Commander Joint Task Force) may have thought differently, and it was evident the first two months of training that much (if not all) of the COMJTF effort concerning helicopter preparation and special mission capability was done through the general officer who was thought to be the consultant on Iran. In mid-January 1980, the role of senior Marine had evolved into that of overall helicopter force leader, and since no other designation had been made, and at his request, he began to attend the COMJTF planning meetings.⁴⁵

The officer who served as the Deputy Commander of the Air Force component was “just prior to (mission) execution” designated “on scene” commander at the desert site:

... implying a command, control and communications (C³) capability to exercise command. This was not fully provided. A general officer served primarily as a consultant on Iran from late November 1979 to mid-February 1980. He spent considerable time during this period at the western training site in the western United States monitoring helicopter and other air training. On 12 April 1980, he was designated the Deputy COMJTF.⁴⁶

Additionally, the Holloway group faulted the operation’s security as being too stringent, causing excessive compartmentalization and planning review by those who had actually drawn up the original plans.⁴⁷ The available existing intelligence assets were seen as being deficiently managed and integrated.⁴⁸ Training activity was faulted as being too decentralized,⁴⁹ and lacking overall management.⁵⁰ Communications between the helicopters and transport aircraft at the desert rendezvous were all seen as deficient in some respects.⁵¹ Finally, the size of the helicopter force and the accuracy of weather data were criticized by the review group.⁵²

On the positive side the report noted:

We are, nevertheless, apprehensive that the critical tone of our discussion could be misinterpreted as an indictment of the able and brave men who planned and executed this operation. We encountered not a shred of evidence of culpable neglect or incompetence.

The facts are that, in the conduct of this review, we have seen infinitely more to be proud of than to complain about. The American servicemen who participated in this mission—the planner, crewman, or trooper—deserved to have a successful outcome. It was the ability, dedication, and enthusiasm of these people who made what everyone thought was an impossibility into what should have been a success.

Finally, we were often reminded that only the United States military, alone in the world, had the ability to accomplish what the United States planned to do. It was risky and we knew it, but it had a good chance of success and America had the courage to try.⁵³

In the late summer of 1980 the Department of Defense announced that it would establish a counterterrorist task force with specialists from the Army, Navy, Air Force and Marines. The unit is to be responsible for gathering information concerning the tactics and operations from other special groups such as the British SAS and the West German G.S.G.-9. Should an incident take place the unit would allegedly put together a strike force from the military services according to the needs of a specific mission.⁵⁴ The core of this counterterror capability is said to be the “few hundred commandos” of the Army’s Delta Team headquartered at Fort Bragg, North Carolina.⁵⁵

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The Joint Chiefs of Staff also has organized a panel of senior officers, both active and retired, to oversee training and operational plans.⁵⁶ Further information concerning the size, scope and capabilities of this entire effort is not available because of security considerations.

The United States in the early 1980s finds itself on the horns of a dilemma. President Reagan has pledged "swift and effective retribution" against acts of international terrorism directed against the United States. However, the ability of this nation to conduct a military response has been attempted only once and the effort was unsuccessful. Though some have argued that the failure centered on a logistical problem not likely to occur again, the result remains the same. Secretary of Defense Caspar W. Weinberger enunciated his difficulty in testimony before Congress when he advised that "describing the country's antiterrorist capabilities might compromise a future operation, but that keeping them secret was preventing him from sending a strong message to potential terrorists."⁵⁷

Deterrence is one of the four main blocks of the U.S. strategy to counter terrorism. Integral to deterrence strategy are capability, credibility, and communication. This requires that those seeking to employ this concept need to communicate their capability to insure its credibility to the adversary.⁵⁸ Thus, the decision faced by Secretary Weinberger is indeed a difficult one.

This paper was written as part of a larger study of the U.S. Government's response to transnational terrorism.

Notes

1. Moskos, *The Emergent Military: Civil, Traditional, or Pluralistic?* in ENDICOTT & STAFFORD, *AMERICAN DEFENSE POLICY* 527-537 (1977).

2. *Id.* at 528-529.

3. Garrison, *The Political Dimension of Military Professionalism*, in ENDICOTT & STAFFORD, *supra* n. 1 at 582.

4. *Id.*

5. *Id.*

6. *Id.* at 583.

7. Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, Mil. L. Rev. 83, 91-92 (Fall 1975).

8. *Id.* at 92. It should be noted that the vote to pass the act was fairly close: 130 to 117 with 44 abstentions.

9. *Id.* at 103.

10. Rabe, *Crisis Management of Terrorist Incidents: Legal Aspects and Issues*, 14 (Unpublished paper, copyright 1979 by author).

11. *Id.*

12. *U.S. Constitution*, Article 2, Section 3.

13. *Id.*, Article 4, Section 4.

14. *Id.*, Article 14, Section 1.

15. U.S. Laws, Statutes, etc., "General Military Law," *U.S. Code, Title 10 sec. 331—Armed Forces*, 1973 ed. (1974).

16. *Id.*, sec. 332.

17. *Id.*, sec. 333.

18. These cases stemmed from the takeover of the hamlet of Wounded Knee on the Oglala Sioux reservation in South Dakota by armed supporters of the American Indian Movement (AIM), February 1973. They sought a review of the 371 treaties between the U.S. Government and the Sioux Indians. Additionally, there was also concern for alleged corruption within the Bureau of Indian Affairs. The 70-day confrontation ended in May of that year with the Government promising an intensive investigation into the complaints. Several people were killed and wounded during the incident.

19. *Supra* n. 10 at 17.

20. The content of this and the next several paragraphs is based upon interviews of personnel assigned to the Department of Defense's Office of International Security Affairs and the Department of Justice's Emergency Programs Center.

21. *Supra* n. 7 at 83-136. During the civil disturbances at Wounded Knee, South Dakota (March 1973), the Department of Defense sent an Army colonel to observe the disorders instigated by the members of the American Indian Movement. As an observer he was not violating the *Posse Comitatus* Act; however, the officer actually became an advisor to the civil law enforcement agents, giving advice on rules of engagement, negotiation and placement of equipment. He also obtained another active-duty Army colonel to assist with logistical support. The judge in the Red Feather case concluded that the colonels' advice (as well as the aid given by the vehicle mechanics and pilots) was passive involvement. He reasoned that only active involvement such as participation in arrest, search of persons and places, seizure of evidence and the pursuit of escaped prisoners violates the Act. However, both the DOJ and DOD in policy statements tend to back away from the Red Feather case and state that the use of equipment loaned to civil authorities would be authorized but the operators "employed in connection with loaned equipment may not be used in a direct law enforcement role." This matter is still not clearly resolved and may yet require further judicial review.

22. U.S. Department of the Army, *DA Civil Disturbance Plan (Garden Plot)* (Washington: 3 August 1978), p. 1.

23. *Id.* at C-2.

24. *Id.* at 0-1. A Terrorist incident "is defined as a distinct criminal act committed or threatened to be committed by a group or single individual in order to advance a political objective, and greatly endangering safety or property."

25. *Id.* at 0-2.

26. *Id.* at C-1.

27. *Id.* at C-10-1.

28. *Id.*

29. *United States Code, 4 Congressional and Administrative News, 4481 94th Congress, Second Session (1976).*

30. *Id.* at 4483.

31. *United States Code, 2 Congressional and Administrative News, 1998 94th Congress, Second Session Public Laws 94-456 to 94-588 (1976).*

32. *United States Code, Annotated, Title 18, Crimes and Criminal Procedure, Unannotated Text (1970)* p. 16.

33. Interview with a member of the Executive Committee on Terrorism (14 November 1980).

34. *The New York Times*, 23 April 1978, p. 14.

35. McGiffert, "Testimony," U.S. Congress, Senate, Committee on Governmental Affairs, *An Act to Combat International Terrorism*, Hearings at 192 (1978).

36. *Id.* at 191-192.

37. *Newsweek*, 31 October 1977, p. 51.

38. *Supra* n. 35 at 195.

39. *Id.*, at 197.

40. *Id.*

41. Del Grosso & Short, *A Concept for Antiterrorist Operations*, *Marine Corps Gazette* 54 (June 1979).

42. DOBSON & RAYNE, *THE TERRORISTS* 144-145 (1979).

43. *Newsweek*, 31 October 1977, p. 51.

44. Holloway, *Rescue Mission Report*, 15-16 (Unpublished paper for Joint Chiefs of Staff, Washington, D.C.: August 1980).

45. *Id.* at 16.

46. *Id.* at 16-17.

47. *Id.* at 13.

48. *Id.* at 20.

49. *Id.* at 23.

50. *Id.* at 25.

51. *Id.* at 29.

52. *Id.* at 34, 41.

53. *Id.*, Forwarding statement, page unnumbered.

54. *The New York Times*, 3 February 1981, p. B-13.

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55. *The Washington Post*, 7 February 1981, p. 10.
56. *The New York Times*, 3 February 1981, p. B-13.
57. *Id.*
58. EVANS, *CALLING A TRUCE TO TERRORISM* 63-67 (1979). This book provides an excellent discussion of deterrence theory in relation to terrorism.