



TRANSITIONAL LAW ENFORCEMENT PROJECT

United States Government Authorities Relevant to Transitional Law Enforcement

Noetic Corporation

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Noetic Corporation (Noetic) was contracted by the Emerging Capabilities Division within the Rapid Reaction Technology Office of the United States Office of the Secretary of Defense to prepare this paper as a part of a project that aims to inform United States Government (USG) agencies about issues relevant to Transitional Law Enforcement (TLE).

The information and concepts presented in this paper are the products of research and liaison with relevant agencies conducted by Noetic over the period March-July 2008. The major themes have been presented to representatives of the relevant agencies at workshops held in June and July. Representatives of the following U.S. Government stakeholder agencies contributed to and were consulted in this project:

- **Department of State.** Office of the Coordinator for Reconstruction and Stabilization (S/CRS); Bureau of Political-Military Affairs; and Bureau of International Narcotics and Law Enforcement Affairs (INL).
- **United States Agency for International Development (USAID).**
- **Department of Justice.** International Criminal Investigative Training Assistance Program (ICITAP); and the United States Marshals Service (USMS).
- **Department of Defense.** Office of the Secretary of Defense – Policy (Special Operations/Low-Intensity Conflict and Interdependent Capabilities) (SO/LIC&IC); Headquarters Department of the Army, Office of the Provost Marshal General (OPMG); U.S. Army Peacekeeping and Stability Operations Institute (PKSOI) and the Institute for Defense Analyses (IDA).
- **Department of Homeland Security (DHS).** Office for State and Local Law Enforcement (OSLLE).

Input obtained from these representatives has been critical in the preparation of this document; however, the views expressed here are Noetic's, are not official government statements and are not the official views of the USG. Any errors in this paper are the responsibility of the authors and not any representative of the USG.

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INTRODUCTION

Background

The conduct of Transitional Law Enforcement (TLE) will be influenced and determined by the realities of the operating environment and the requirements of the specific reconstruction and stabilization mission¹. At the same time, the nature of the involvement in TLE by individual United States Government (USG) agencies will be shaped by certain domestic realities. These include the mission, organization and specific capabilities of each agency, as well as the wider objectives being pursued through involvement in reconstruction and stabilization or through more routine relationships with foreign agencies.

A key determinant of how each agency can participate in TLE is the series of USG decisions that give them the authority to act and set limitations on their actions. These authorities can be issued from Congress, the President or within respective departments or agencies. The purpose of these authorities is to ensure that USG resources and personnel are being used effectively, efficiently, legally, and in accordance with USG priorities. Considering the prominence of both capacity building and adherence to the rule of law as objectives in a reconstruction and stabilization mission, it is important that the conduct and organization of TLE adheres to the network of authorities which allow it to occur and permit the existence of any TLE-specific capabilities.

“Authorities”, in the context of this paper, refers to organic laws, specific legislation, executive directives, policies or doctrine that set the constraints and limitations on the ability for departments and agencies to operate in regards to a TLE effort. There are a number of sources for these authorities.

The most fundamental level of authority is that of legislation, particularly that compiled in the United States Code (the compilation and codification of general and permanent Federal law). The various Titles of the United States Code (USC) are where specific Acts (of an enduring nature) are enacted (formally incorporated into the system of existing legislation on a similar topic); for example, the “Foreign Assistance Act of 1961” when enacted became incorporated into the United States Code in Chapter 32 of United States Code Title 22 §2420. While other Acts, Statutes at Large, Executive Directives and Appropriations², remain outside of the US Code due to their specific or temporary nature, the authority for each of these is granted to the respective government departments and agencies by the US Code.

Executive authority is issued in the form of directives. These outline the direction on how the President or a department head intends to utilize resources (within the parameters set by legislation) to address a particular issue. Most prominent amongst these are the National Security Presidential Directives that have been issued by the current administration and are relevant to all USG agencies. Other directives are applicable to their respective departments and/or subordinate agencies.

¹ Noetic Corporation, *International Transitional Law Enforcement Environment: TLE Capabilities for International Operations(DRAFT)*, Prepared for Emerging Capabilities Division (OSD), August 2008.

² Specific appropriations (being limited in time and/or application) are not considered in detail in this paper.

TLE is a relatively new endeavor for the USG and one that necessitates considering Whole of Government (WoG) approach.³ Hence the authorities relevant to it are not compiled in one location. The range of activities relevant to TLE is vast and includes: inter-agency cooperation/coordination for reconstruction and stabilization operations; the use of law enforcement personnel or capabilities to support military, inter-agency, international or host nation forces on deployed stabilization operations; training and other assistance to foreign police personnel; possible use of military personnel (including Reserves and National Guard) in a law enforcement role; and building post-conflict relationships with host nation security forces. TLE is thus subject to authorities that are from law enforcement, foreign relations, defense and numerous other fields and it is important to understand comprehensively how these authorities operate and interact.

Aim

The aim of this paper is to inform the reader, in as broad a spectrum as is possible, of current authorities which may directly or indirectly impact upon TLE capabilities, activities and future efforts to develop TLE capabilities. This paper is not intended to support an argument that such a TLE should reside in whole or in part in any one agency, whether it should be used strictly outside of the Continental United States, or any other particular point of view. This paper is intended to inform all decision makers of many of the authorities which currently exist which may support or impact upon these decisions.

Scope

This paper is intended to support other elements of the TLE Project by providing a framework for understanding the responsibilities, restrictions/constraints, opportunities, and/or contradictions contained in the relevant authorities, as well as identifying opportunities that may not be taken advantage of under current arrangements. The term authorities, as used in this paper, refers to organic laws, specific legislation, executive directives, policies or doctrine and can be issued by Congress, the Federal Government, individual Government Departments or Agencies. It will specifically provide the following:

- + a review of all authorities applicable to TLE,
- + a thematic overview of the relationships between the various authorities and how they constrain various activities and agencies, and
- + a review of the framework of authorities relevant to the various agencies with involvement in TLE.

³ NSPD-44 states that, "to achieve maximum effect, a focal point is needed to coordinate and strengthen efforts of the USG to prepare, plan for and conduct reconstruction and stabilization assistance and related activities....(ii) to harmonize such efforts with U.S. military plans and operations...." It does not state that all the assets of the USG deploy in each and every instance, just that an overall whole of governance approach must be taken for the effort to be effective and efficient.

Note that this paper will only look at the authorities themselves. Although there is potential value in expanding this analysis to look at the interpretations taken by various agencies, this has not been possible within the time available for this project.

RELEVANT AUTHORITIES

National Security Presidential Directives

National Security Presidential Directive (NSPD) 1 is the first in a series of NSPDs. In the current Administration, NSPDs have replaced both Presidential Decision Directives and Presidential Review Directives as instruments for communicating presidential decisions about the national security policies of the US.⁴ NSPD 1 sets forth the Organization of the National Security Council (NSC). The NSC was originally established by the National Security Act of 1947 with the stated purpose of advising, “the President with respect to the integration of domestic, foreign, and military policies relating to national security”. That remains its purpose.”⁵ NSPD 1 also restated that the NSC Principals Committee (NSC/PC) will continue to serve as the senior inter-agency forum for consideration of policy issues affecting national security. A US TLE effort crosses across multiple agencies of the USG and requires a coordinated effort of all agencies having a stake in this matter. NSPD 1 also tasks the NSC/PC with managing “the development and implementation of national security policies by multiple agencies of the US Government [that] shall usually be accomplished by the NSC Policy Coordination Committees (NSC/PCCs).”⁶

The purpose of **NSPD 44** is to promote the security of the US through improved coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife.⁷ TLE will be a key element in USG goals and policies for reconstruction and stabilization. As noted in the above paragraph, multiple agencies of the USG will be stakeholders in a US TLE effort. NSPD 44 sets forth the supporting and supported relationships amongst those various agencies involved in reconstruction and stabilization efforts. This directive gives the Secretary of State the authority to direct the Coordinator for Reconstruction and Stabilization (S/CRS) to act as the lead for the USG in development of a strong civilian response capability as well as to recommend additional resources needed for reconstruction and stabilization efforts. S/CRS is also empowered to make determinations in relation to the relevant policy, program and funding disputes among USG agencies and departments and when necessary to identify appropriate issues for resolution or action through the NSC inter-agency process, including whether to form a PCC-level group.

⁴ National Security Presidential Directive/NSPD-1, subject: Organization of the National Security Council System.

⁵ National Security Presidential Directive/NSPD-1, subject: Organization of the National Security Council System.

⁶ National Security Presidential Directive/NSPD-1, subject: Organization of the National Security Council System.

⁷ National Security Presidential Directive/NSPD-44, subject: Management of Interagency Efforts Concerning Reconstruction and Stabilization, signed by President Bush and dated December 7, 2005, p 1.

United States Code

Title 10 – Armed Forces

Title 10 of the USC outlines the roles of the US Armed Forces. As such, it serves as the statutory authority detailing the roles, missions and organization of each Service and of the Department of Defense. Title 10 is subdivided into the five subtitles of:

- A. General Military Law;
- B. Army;
- C. Navy and Marine Corps;
- D. Air Force; and
- E. Reserve Components.

There are several subsections of Title 10 that have significant impact upon TLE.

USC Title 10, Subtitle A, Part 1, Chapter 15, Subsections 331–335 contains those laws comprising what was formerly known as the Insurrection Act. In recent years, Congress has modified these laws in an effort to broaden the President's ability to deploy the US military within the US to enforce federal laws. Most of the major changes to this Act were enacted as a part of the 2007 Defense Authorization Bill. This Bill also changed the statute's name from "The Insurrection Act" to "Enforcement of the Laws to Restore Public Order." Not only does this indicate that Congress has foreseen circumstances where Federal law enforcement forces may be needed for use within the continental United States (CONUS), it also shows their willingness to pass legislation necessary to support this effort.

USC Title 10 Subtitle A, Part I, Chapter 15, § 332. This is a key subsection of those subsections that comprise the "Enforcement of the Laws to Restore Public Order Act". This subsection provides that, "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 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."⁸

USC Title 10, Subtitle A, Part III, Chapter 101, § 2011, "Special operations forces: training with friendly forces". Subparagraph (a) of § 2011 states, "Authority to pay Training Expenses. – Under regulations prescribed pursuant to subsection (c), the commander of the special operations command established pursuant to section 167 of this title and the commander of any other unified or specified combatant command may pay, or authorize payment for, any of the following expenses: (1) Expenses of training special operations forces assigned to that command in conjunction with training, and training

⁸ 10 U.S.C. § 332.

with, armed forces and other security forces of a friendly foreign country.”⁹ It is important to note that, historically, the training of foreign security forces, both military and civilian, by the Department of Defense, was predominantly conducted by Special Operation Forces¹⁰, as opposed to conventional forces.¹¹ The current situation in regards to the prosecution of the Global War on Terror has not only led to conventional forces being more involved in this process, the Department of Defense is taking actions to formalize this change, as evidenced in the new DoD Directive 3000.05 (see the discussion on DoD Directive 3000.05 below for details).

USC Title 10, Subtitle A, Part I, Chapter 18 § 375 provides that, “The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.” Key to the reading of this statute are the words “unless” and “otherwise authorized”, as there are many statutes and regulations that already set forth such authorizations.

Title 14 – Coast Guard

USC Title 14 provides the statutory basis for the US Coast Guard. Part I of this subsection provides that, “the Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy.”¹² Pub. L. 107–296 amended Part I of Title 14 when it substituted the “Department of Homeland Security” for that of the “Department of Transportation”. Title 14 is important to a US TLE discussion in that provides a legal platform (or perhaps an example of a legal platform) whereby an organization may have civilian law enforcement powers and responsibilities along with a military role and mission.

In accordance with 14 USC § 2, the Coast Guard is authorized to enforce federal law. Under 14 USC § 3 as amended by section 211 of the Coast Guard and Maritime Transportation Act of 2006, upon the declaration of war and when Congress or the President so directs, the Coast Guard operates under the Department of Defense as a Service in the Department of the Navy.

USC Title 14, Part I, Chapter 5, § 89 grants the Coast Guard its law enforcement powers. Subparagraph (a) of § 89 states, “The Coast Guard may make inquiries, examinations, inspections,

⁹ 10 U.S.C. § 2011.

¹⁰ “Special Forces units perform seven doctrinal missions: Unconventional Warfare, **Foreign Internal Defense**...” as stated on the missions page of the US Special Forces web page (<http://www.soc.mil/SF/mission.htm>)(emphasis added).

¹¹ This statement was made in lieu of explaining 10 U.S.C. § 2011. A review of 10 USC Subtitle A—General Military Law PART III—TRAINING AND EDUCATION, Chapter 101 TRAINING GENERALLY, contains 15 separate subsections (one of which has been repealed) Not one of them is entitled specifically mentions the training of Foreign Forces by conventional US Forces; however, § 2011 is specifically entitled, “Special Operations Forces: training with friendly foreign forces.” This supposes that Congress itself thought that such training was predominantly being conducted by SOF and that it needed to be specifically addressed.

¹² 14 U.S.C., Part I, Section 1.

searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suspension of violations of laws of the United States.”¹³

USC Title 14, Part I, Chapter 7, § 142 grants members of the Coast Guard the authority to act as Customs Officers, stating, “Commissioned, warrant, and petty officers of the Coast Guard are deemed to be officers of the customs and when so acting shall, insofar as performance of the duties relating to customs laws are concerned, be subject to regulations issued by the Secretary of the Treasury governing officers of the customs.”

Title 18 – Crimes and Criminal Procedure

USC Title 18 serves as the codification of the general federal law of the US. No discussion of a USG TLE effort would be complete without identifying and discussing § 1385 of Title 18, which is commonly referred to as the Posse Comitatus Act. This subsection provides that, “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”¹⁴ The Posse Comitatus Act, as it was originally passed in 1878, pertained only to the US Army. The Air Force was added to the statute in 1956, while the Navy and the Marine Corps have been included by Department of Defense Directive No. 5525.5.

USC Title 18, Part I, Chapter 39, § 831 provides one of the many exceptions to the Posse Comitatus Act. This section states that, “The Attorney General may request that the Secretary of Defense provide emergency assistance if civilian law enforcement is inadequate to address certain types of threat involving the release of nuclear materials, such as potential use of a Nuclear or Radiological weapon.”¹⁵

Title 22 – Foreign Relations and Intercourse

USC Title 22 codifies the roles and responsibilities of the USG as they relate to foreign relations and intercourse. Chapter 32, subchapter III, part III, § 2420 serves as the codification in the US Code of the Act, which is commonly referred to as the Foreign Assistance Act. Subparagraph (a) of this Act¹⁶ states that, “On and after July 1, 1975, none of the funds made available to carry out this chapter, and none of the local currencies generated under this chapter, shall be used to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government or any program of internal intelligence or surveillance on behalf of any foreign government within the United States or abroad.”¹⁷ Of more relevance to the discussion of US TLE efforts are the multiple exceptions to subparagraph (a) that are listed in subparagraph (b) of that same Act. Particular attention should be drawn to subparagraph (b) (6), which grants an exception “with respect to assistance provided to reconstitute civilian police authority and capability in the post-conflict restoration of host nation infrastructure for the purposes of supporting a nation emerging from instability, and the provision of

¹³ 14 U.S.C. § 89.

¹⁴ 18 U.S.C § 1385.

¹⁵ 18 U.S.C § 831.

¹⁶ The *Foreign Assistance Act* is synonymous with subsection 2420 of Title 22; subsection 2420 enacted the Foreign Assistance Act, word for word, into the US Code.

¹⁷ 22 U.S.C § 2420.

professional public safety training, to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy.”

Title 28 – Judiciary and Judicial Procedure

USC Title 28, Part IV, Chapter 85, subsection 1346 and Part VI, Chapter 171, subchapters 2671–2680 codify what is commonly referred to as the Federal Tort Claims Act (FTCA). These subsections/subchapters are important to any discussion of USG liability for the actions of personnel deployed in a TLE role. USG liability expressly exists or does not exist based upon the status of the TLE and of the individuals comprising it, whether they are members of the military, agents of the USG or independent contractors. Under original US law, the US Government could only be sued in tort if it had waived its sovereign immunity, that is to say it could only be a defendant in a civil suit if it agreed to be. Following the passage of the FTCA, the USG waived its sovereign immunity for a wide variety of torts.¹⁸ Several exceptions to this waiver of sovereign immunity are provided in § 2680. Subparagraph (h) of this section specifically sets forth exceptions, “with regard to acts or omissions of investigative or law enforcement officers of the United States Government.” Subparagraph (j) provides an exception for, “Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” Finally, it is also important to note the exception as stated in subparagraph (k) for, “Any claim arising in a foreign country.”

Other Relevant Laws

Federal law enforcement agencies, such as the Federal Bureau of Investigation, the Bureau of Alcohol Tobacco, Firearms and Explosives, and the United States Marshals Service play a critical role in law enforcement. These are federal agencies, not normally uniformed, that enforce specific federal laws. Despite some perceptions that the creation of a uniformed, federal police force enforcing US law is an impossible task, it is no more impossible than USG leaders wish it to be. As an example, in an effort to address a need perceived a few generations ago, Congress passed United States **Statutes at Large 21:229**. This law created a Federal, uniformed force in the US Park Police. Under this statute, “US Park Police officers granted the same authority and powers and officers of the Metropolitan Police Force”.¹⁹ In brief, this one sentence provided the statutory basis for federal uniformed officers of the USG to have the same civilian law enforcement responsibilities and powers as a municipal police agency.

The **Leahy Law** is a human rights stipulation to any USG foreign assistance.²⁰ This law prohibits the US military from providing assistance to foreign units that violate human rights with impunity. Because of the near impossibility of tracking human rights violations to a specific individual, the Act chose rather to examine the human rights violations (or lack thereof) by unit. The Leahy Law states that, “None of the funds made available by this Act may be provided to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights, unless the Secretary determines and reports to the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of the

¹⁸ 28 U.S.C § 1346.

¹⁹ United States Statutes at Large 21:229.

²⁰ Pub.L. 106-429, Section 563.

security forces unit to justice.” This law could potentially impact on future TLE missions in that if the supported host nation law enforcement agency existed prior to US reconstruction and stabilization efforts it may have violated human rights, as prohibited by this Act.

Directives

Department of Defense Directive 3000.05: Military Support for Stability, Security, Transition, and Reconstruction Operations²¹

This directive provides guidance concerning Department of Defense (DoD) stability operations and establishes DoD policy and responsibilities for the planning, training, preparation and conduct of stability operations. It establishes stability operations as a core US military mission that the DoD shall be prepared to conduct and support. The directive states that such missions shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DoD activities including doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning. In paragraph 4.3.1 it specifically states that stability operations tasks include helping to rebuild indigenous institutions, including various types of security forces, correctional facilities, and judicial systems necessary to secure and stabilize the environment.

Policies

Global Peace Operations Initiative

The USG and the President have already realized the importance of stability policing units in supporting reconstruction and stabilization efforts. Growing out of the Sea Island Summit of 2004 and the Global Peace Operations Initiative, the G-8 set a goal of training 7,500 stability police by 2010. The USG is supporting that effort through a partnership with the Italian Government to support the Center for Excellence for Stability Police Units in Vicenza, Italy in its mission to develop common international training, standards and doctrine for stability police units.²²

²¹ Department of Defense Directive Number 3000.05, dated November 28, 2005.

²² G8 Action Plan: Expanding Global Capacity for Peace Support Operations, Sea Island Summit

RELATIONSHIPS BETWEEN AUTHORITIES

Use of US Active Military Personnel in Domestic and Foreign Law Enforcement

Any discussion of the authorities pertaining to the use of US Active Military personnel in a law enforcement role needs to account for the Posse Comitatus Act. Paragraph (a) of the act²³ appears to serve as a complete bar to the use of US military forces in law enforcement. However, such a view is both incomplete and incorrect. A different approach to interpreting the Posse Comitatus Act is to view it as a statute that delineates those cases and conditions under which US military forces *can* be used to enforce civilian law. In fact, a finding by the US Congress codified this point by stating, “The Posse Comitatus Act was not intended to be a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions.”²⁴ This finding is reinforced by several other statutes, acts and regulations that further define those existing areas where such use of US military forces is permitted, as described below:

- + It is permissible to use US military personnel and equipment in response to requests from civilian law enforcement agencies to assist with drug interdiction and with terrorist incidents involving weapons of mass destruction.²⁵
- + In 2007 Chapter 15, Part I, Subtitle A of Title 10 was renamed from the “Insurrection Act” to “Enforcement of the Laws to Restore Public Order”.²⁶ This law permits the President to use federal forces, including the military, to restore public order and to enforce the laws of the US under defined circumstances. These circumstances include but are not limited to natural disasters, terrorist attack or incident, epidemic or “other condition”.²⁷
- + In 1971, Deputy Secretary of Defense, David Packard wrote the *Packard Memo on Employment of Military Resources in the Event of Civil Disturbances*. Its codification into law seems to impact upon *The Posse Comitatus Act* in that it provides for “exceptions” to the Act “to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situation” and “to protect Federal government functions when the need for protection exists”. Packard’s directive stated that turning over law enforcement responsibilities will “normally” require a Presidential Executive Order, but that this requirement can be waived in “cases of sudden and unexpected emergencies ... which require that immediate military action be taken.”²⁸

²³ 18 U.S.C § 1385.

²⁴ 6 U.S.C § 466.

²⁵ 10 U.S.C § 375.

²⁶ 10 U.S.C § 332.

²⁷ 10 U.S.C § 333.

²⁸ 32 U.S.C § 6..

It is also worth noting that the Posse Comitatus Act does not apply to National Guard forces when they are acting under color of state authority. Additionally, the President may also call the forces of the National Guard to federal service to enforce federal law in those instances of unlawful obstruction, assemblages or rebellion against the authority of the US.²⁹ The US Coast Guard also falls outside of the realm of the Posse Comitatus Act. Although the Coast Guard is a military service, the statute which created the modern Coast Guard is written in such a manner to give it dual missions and authority with both the Department of the Navy and the Department of Homeland Security.³⁰

Use of Law Enforcement Personnel and Equipment to Support Reconstruction and Stabilization

While there are no specific statutes directly bearing on the use of US civilian law enforcement officers in support of USG reconstruction and stabilization efforts on foreign soil, there are several statutes and legal notes that have indirect impact on this subject.

As a part of the USG policy to support the emergence of stable democracies, the USG supports the International Civilian Policing (CIVPOL) mission. "...CIVPOL have become a vital tool of the US foreign policy ... more than 7,000 experienced law enforcement officers have participated in CIVPOL missions..."³¹ These law enforcement officers basically serve as independent contractors of the USG. As stated earlier, under those statutes comprising the FTCA, the USG has waived its sovereign immunity as a defense for a wide variety of torts.³² The fact that these civilian police officers are independent contractors of the USG and not her agents is a critical distinction because the FTCA states the government does not waive immunity in a suit for torts committed by independent contractors that it has hired.³³ This means that the USG has agreed to be liable for torts committed by USG agents and employees (i.e. a full time federal TLE unit) but not for the actions committed by individual contractors (e.g. a contracted unit for TLE or CIVPOL officers).

Training of Foreign Police Personnel

The training of foreign security forces, both military and civilian, was long viewed as being a special forces mission, not a mission for conventional forces. This viewpoint is codified in the USC Title 10, Subtitle A, Part III, Chapter 101, § 2011 which authorizes US special operation forces to train the armed forces and other security forces of a friendly foreign country. Such training is not the sole purview of special forces; the rebuilding of indigenous institutions, such as security forces, correctional facilities and judicial systems, is viewed as being a mission for conventional military forces as well.³⁴ This policy interpretation, however, is not currently reflected in any legislation.

²⁹ 10 U.S.C § 332.

³⁰ 14 U.S.C § Part I, Section 1.

³¹ US Department of State web page, <http://www.state.gov/p/inl/rls/fs/91396.htm>.

³² 28 U.S.C § 1346.

³³ 28 U.S.C § 2671.

³⁴ Depart of Defense Directive 3000.05, dated 28 November 2005.

The Foreign Assistance Act³⁵ applies to both military and non-military aid. Through its very language it also impacts upon any USG programs to train the police and other law enforcement forces of foreign nations. That is to say that it must be considered in any discussions concerning US military and civilian law enforcement support to reconstruction and stabilization efforts and the training of foreign law enforcement agencies.

As noted, the Act states that, “On and after July 1, 1975, none of the funds made available to carry out this chapter, and none of the local currencies generated under this chapter, shall be used to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government or any program of internal intelligence or surveillance on behalf of any foreign government with the United States or abroad.”³⁶ However, one of the subsequent subparagraphs of this paragraph makes an exception that is directly relevant to reconstruction and stabilization efforts: “Subsection (a) of this section shall not apply ... (6) with respect to assistance provided to reconstitute civilian police authority and capability in the post-conflict restoration of host nation infrastructure for the purposes of supporting a nation emerging from instability, and the provision of professional public safety training, to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy.”³⁷

There is a degree of ambiguity in the Foreign Assistance Act in relation to its effect on USG efforts directed towards the development of police and other law enforcement agencies in support of reconstruction and stabilization efforts. Indeed, subsection (a) of The “Foreign Assistance Act” states that neither military or non-military funds shall be used to provide training, advice or financial support to police or other law enforcement force for any foreign government. It would seem that subparagraph (b) can be read to permit such support to those foreign nations where the US is conducting reconstruction and stabilization efforts.

³⁵ Pub. L. 87 – 195, 75 Stat. 424 and United States Code, Title 22, Subsection 2420.

³⁶ 22 U.S.C § 2420.

³⁷ 22 U.S.C § 2420.

REVIEW OF AUTHORITIES AFFECTING STAKEHOLDER AGENCIES

The previous section has covered the key statutes, authorities and directives that may impact upon TLE efforts and how many of these statutes interoperate with each other and within different TLE areas of consideration. This section will review the mission statements and the authorities for a number of major USG agencies to provide information about the rationale and legislative authorities behind each agency's involvement in various aspects of TLE.

Department of Justice and Subordinate Agencies

Department of Justice

Mission Statement. To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.³⁸

Statutory Authority.³⁹ The Judiciary Act of 1789, ch. 20, sec. 35, 1 Stat. 73, 92-93 (1789) created the Office of the Attorney General. Originally a one-person, part-time position, the Attorney General was to be "learned in the law" with the duty "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments."

In 1870, after the post-Civil War increase in the amount of litigation involving the USG necessitated the very expensive retention of a large number of private attorneys to handle the workload, a concerned Congress passed the Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870), setting it up as "an executive department of the government of the United States" with the Attorney General as its head. Officially coming into existence on July 1, 1870, the Department of Justice, pursuant to the 1870 Act, was to handle the legal business of the US. The Act gave the department control over all criminal prosecutions and civil suits in which the US had an interest. In addition, the Act gave the Attorney General and the department control over federal law enforcement. These authorities give the Department of Justice interest in all the legal business of the US to include the legalities involved in reconstruction and stabilization efforts with specific attention to those areas of interest identified in the Department of Justice's mission statement, as quoted above.

³⁸ US Department of Justice Website, <http://www.usdoj.gov/02organizations/>.

³⁹ US Department of Justice Website, <http://www.usdoj.gov/02organizations/>.

Federal Bureau of Investigation

Mission Statement. To protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners.⁴⁰

Statutory Authority. The FBI's investigative authority can be found in USC Title 28, Section 533. Additionally, there are other statutes, such as the Congressional Assassination, Kidnapping, and Assault Act (USC Title 18, Section 351), that give the FBI the responsibility to investigate specific crimes.⁴¹ These authorities give the FBI an interest in reconstruction and stabilization efforts, as such efforts may serve to protect the US against terrorist and foreign intelligence threats and involve upholding and enforcing the criminal laws of the US domestically and abroad. The FBI may also provide criminal justice services to federal, state and international agencies and partners in support of those agency's reconstruction and stabilization efforts.

Bureau of Alcohol, Tobacco, Firearms and Explosives

Mission Statement. To conduct criminal investigations, regulate the firearms and explosives industries, and assist other law enforcement agencies. This work is undertaken to prevent terrorism, reduce violent crime, and protect the public in a manner that is faithful to the Constitution and the laws of the United States.⁴²

Statutory Authority.⁴³ By Act of July 1, 1862, Congress created an Office of Internal Revenue within the Treasury Department, charging the commissioner with collection, among others, of taxes on distilled spirits and tobacco products that continue, with amendments, today. Other relevant authorities include:

- + Federal Alcohol Administration (FAA);
- + Federal Firearms Act;
- + Gun Control Act;
- + Title XI of the Organized Crime Control Act;
- + Treasury Department Order No. 120-1 (originally No. 221), effective 1 July 1972, which transferred to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) from the Internal Revenue Service those functions, powers and duties related to alcohol, tobacco, firearms, and explosives; and
- + Anti-Arson Act of 1982.

⁴⁰ FBI Website, <http://www.fbi.gov/quickfacts.htm>.

⁴¹ FBI Website, <http://www.fbi.gov/priorities/priorities.htm>.

⁴² Department of Justice website, <http://www.usdoj.gov/jmd/mps/manual/atf.htm>.

⁴³ ATF Website, <http://www.atf.gov/about/atfhistory.htm>.

These statutes provide the ATF with the authority to conduct investigations concerning the criminal use of firearms and explosives and to assist other law enforcement agencies. This authority is not only domestic and can be seen as extending outside of CONUS⁴⁴ and may allow the ATF to assist in reconstruction and stabilization efforts, particularly as they relate to preventing terrorism, reducing violent crime, and to protect the American public from incidents related to the illegal use of firearms and explosives.

Drug Enforcement Administration

Mission Statement. To enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system of the United States, or any other competent jurisdiction, those organizations and principal members of organizations, involved in the growing, manufacture, or distribution of controlled substances appearing in or destined for illicit traffic in the United States; and to recommend and support non-enforcement programs aimed at reducing the availability of illicit controlled substances on the domestic and international markets.⁴⁵

Statutory Authority. The Drug Enforcement Administration (DEA) was created by President Nixon through an Executive Order in July 1973 in order to establish a single unified command to combat "an all-out global war on the drug menace."⁴⁶ This authority gives the DEA interest in reconstruction and stabilization efforts as they may apply to enforcing the controlled substances laws and regulations of the US and reducing the availability of illicit controlled substances on the domestic and international markets. Although the DEA effort may be focused upon eliminating the availability of illicit drugs, thereby stemming their flow into the US, such an effort may have a significant impact on restoring stability to a foreign nation, as the money gained from illegal drug trafficking is often used to support subversive/terrorist efforts.

United States Marshals Service

Mission Statement.⁴⁷ To protect the federal courts and ensure the effective operation of the judicial system. In addition to this primary responsibility, the United States Marshals Service (USMS) assumes custody of individuals arrested by all federal agencies and is responsible for the housing and transportation of prisoners from the time they are brought into federal custody until they are either acquitted or incarcerated. Finally, the USMS has primary jurisdiction nationwide in conducting and investigating fugitive matters involving escaped federal prisoners; probation, parole, and bond default violators; and executing warrants generated by DEA investigations and certain other related felony cases.

Statutory Authority. The Judiciary Act of 1789 and USC Title 28, Part II, Chapter 7. The USMS is authorized to provide for the protection of federal jurists, court officers, witnesses and other threatened persons in the interest of justice where criminal intimidation impedes on the functioning of judicial

⁴⁴ The legislation does not explicitly grant international jurisdiction to ATF, but it also does not specifically limit the jurisdiction to domestic investigations and related matters. Most of the other statutes do make this distinction/limitation/allowance where the legislators meant to do so.

⁴⁵ Department of Justice website, <http://www.usdoj.gov/dea/agency/mission.htm>.

⁴⁶ Department of Justice website, <http://www.usdoj.gov/dea/history.htm>.

⁴⁷ <http://www.justice.gov/ag/annualreports/pr2001/Section07.htm>

proceedings or any other official proceeding. The authority to investigate such fugitive matters is not limited to the US.⁴⁸

Department of Homeland Security and Subordinate Agencies

Department of Homeland Security

Mission Statement. The Department of Homeland Security will lead the unified national effort to secure America. We will prevent and deter terrorist attacks and protect against and respond to threats and hazards to the nation. We will ensure safe and secure borders, welcome lawful immigrants and visitors, and promote the free-flow of commerce.⁴⁹

Statutory Authority. Homeland Security Act of 2002, Pub. L. No. 107-296 (Nov. 25, 2002) and USC Title 6 § 111 gives the Department of Homeland Security responsibility to reduce the vulnerability of the US to terrorism. While the Department of Homeland Security is not specifically granted powers to conduct its mission outside of CONUS, it is granted the responsibility for the investigation and prosecution of terrorists by those entities transferred to the department by the Homeland Security Act.⁵⁰ Several of those entities (i.e. the Coast Guard and the US Customs Service) have statutory authority that explicitly extends beyond CONUS.

Transportation Security Administration

Mission Statement. The Transportation Security Administration protects the Nation's transportation systems to ensure freedom of movement for people and commerce.⁵¹

Statutory Authority. The Aviation and Transportation Security Act of 2001 and USC Title 49, Subtitle I, Chapter 1, § 114. The Transportation Security Administration is to serve as the primary liaison for transportation security to the intelligence and law enforcement communities⁵²; and, to work with the International Civil Aviation Organization and appropriate aeronautic authorities of foreign governments under § 44907 to address security concerns on passenger flights by foreign air carriers.⁵³

Coast Guard

Mission Statement.⁵⁴ To protect the public, the environment, and US economic interests — in the nation's ports and waterways, along the coast, on international waters, or in any maritime region as required to support national security.

Statutory Authority. USC Title 14. The implications of TLE efforts for the USCG have been addressed in a previous section.

⁴⁸ 28 U.S.C § 566.

⁴⁹ Department of Homeland Security website, <http://www.dhs.gov/xabout/strategicplan/index.shtm>.

⁵⁰ 6 U.S.C § 111.

⁵¹ TSA website, http://www.tsa.gov/who_we_are/mission.shtm.

⁵² 49 U.S.C § 114.

⁵³ 49 U.S.C § 114.

⁵⁴ <http://www.afdw.af.mil/news/story.asp?id=123028406>

Customs and Border Patrol

Mission Statement. The Customs and Border Patrol's (CBP) priority mission is preventing terrorists and terrorist weapons from entering the United States, while also facilitating the flow of legitimate trade and travel.⁵⁵

Statutory Authority. USC Title 6, Chapter 1, Subchapter XII, Part A, §542 and USC, Title 19, Chapter 10 § 2071. Under these authorities, the CBP is to protect the borders of CONUS. The CBP management strategy has been to extend the US's zone of security overseas, beyond US ports of entry. As countries around the world adopt border security best practices, incoming threats to the US are lessened. Therefore, the CBP's Training and Assistance Division in the Office of International Affairs and Trade Relations provides a wide array of training and technical assistance to other nations. Following the outbreak of war in Iraq in 2003, the Department of Defense requested CBP's assistance to train the Iraqi Department of Border Enforcement officers to perform customs and immigration activities. Beginning in January 2005, CBP deployed teams of personnel to a limited number of high-threat land, sea and air ports of entry in Iraq to provide training and advisory assistance to Iraqi border control officials.

Department of State

Mission Statement. Create a more secure, democratic, and prosperous world for the benefit of the American people and the international community.⁵⁶

Statutory Authority. The House of Representatives and Senate approved legislation to establish a Department of Foreign Affairs on July 21, 1789, and President Washington signed it into law on July 27, making the Department of Foreign Affairs the first federal agency to be created under the new Constitution. This legislation remains the basic law of the Department of State.

Under USC Title 22 , Chapter 38 § 2651, the Department of State is authorized to create an Under Secretary for Arms Control and International Security, who shall assist the secretary and the deputy secretary in matters related to international security policy, arms control, and nonproliferation.⁵⁷ The State Department is also authorized to create a coordinator for counterterrorism who shall be the principal advisor to the Secretary of State on matters of international counterterrorism⁵⁸ and to establish an officer having primary responsibility assisting the Secretary of State with respect to international narcotics and law enforcement.⁵⁹

United States Agency for International Development

Mission Statement. Advance freedom for the benefit of the American people and the international community by helping to build and sustain a more democratic, secure, and prosperous world composed

⁵⁵ CBP website, <http://www.cbp.gov/xp/cgov/about/mission/cbp.xml>.

⁵⁶ US State Department website, <http://www.state.gov/s/d/rm/rls/dosstrat/2004/23503.htm>.

⁵⁷ 28 U.S.C § 2651(a).

⁵⁸ 28 U.S.C § 2651(a).

⁵⁹ 28 U.S.C § 2651(a).

of well-governed states that respond to the needs of their people, reduce widespread poverty, and act responsibly within the international system.⁶⁰

Statutory Authority. Foreign Assistance Act of 1961.⁶¹ The USAID has been the principal US agency to extend assistance to countries recovering from disaster, trying to escape poverty, and engaging in democratic reforms. The USAID is an independent Federal Government agency that receives overall foreign policy guidance from the Secretary of State. As part of a commitment to reform corrupt police forces, the USAID has partnered with the US departments of Justice and State to support the International Criminal Investigative Training Assistance Program.

Department of Defense

Mission Statement. To provide the military forces needed to deter war and to protect the security of our country.⁶²

Statutory Authority. Key authorities are the:

- + National Security Act of 1947,
- + Department of Defense Reorganization Act PL 85-899,
- + Department of Defense Appropriations Act PL 88-149, and
- + Goldwater-Nichols Act of 1986 or Department of Defense Reorganization Act PL 99-433.

Summary

While S/CRS has been given the lead in the effort to develop the additional resources needed for reconstruction and stabilization efforts, as well as the authority to orchestrate this effort by and amongst the multiple USG agencies involved, which agency will host specific TLE capabilities has not been determined, nor is it an obvious decision. This decision is difficult at this point for several reasons. Decisions have yet to be made about what TLE capabilities are needed. Decisions would also need to be made to address issues such as whether an executive agency (enforcing the law and restoring order in difficult situations) would be needed and what role should be played in conducting training. Also there are issues about whether a specific TLE agency should exclusively be used overseas, or if it should have a domestic role as well.

Potential answers to these questions bring different statutes and authorities into play. These same statutes and authorities will help determine where to place various TLE responsibilities within the USG. Of course there are other things to be considered as well, such as the ability of the chosen agency to

⁶⁰ USAID website, http://www.usaid.gov/policy/highlights07/highlights_03.html.

⁶¹ Originally enacted as (Pub.L. 87-195, 75 Stat. 424, enacted on September 9, 1961, subsequently enacted into the 22 U.S.C § 2420.

⁶² Department of Defense website, <http://www.defenselink.mil/admin/about.html>.

absorb such a unit, to train it and support it. However, any such decision needs to cognizant of the relevant laws.

If TLE is to conduct law enforcement operations it may encroach upon the authorities or mission statements of several of the agencies listed above. It is obvious that if TLE is conducting law enforcement missions it will have some role in investigations. If in the course of a TLE mission, there is a need to conduct high-level investigations, this may infringe upon the investigative purview of agencies such as the FBI, the ATF or the DEA as set forth in their authorities and missions statements cited above. A relationship between these agencies and the TLE operation, which may be similar to that of a patrol officer and an investigator in a large metropolitan police department, is foreseeable. If a TLE element receives information from a foreign national concerning possible terrorist activity, the TLE element may only be responsible to pass that information to the proper agency, not to actually conduct the investigation. In a State Department led effort, the agency to receive and to act upon that information from the law enforcement perspective would be the FBI. It is also foreseeable that officers deployed with a TLE mission could be the first US law enforcement agency on a crime scene. Much like a US police patrol, the TLE would need to secure the crime scene and conduct a preliminary investigation. If this crime scene preliminary investigation uncovered illegal weapons or firearms being used to support terrorist activity, this information would need to be passed to the ATF as it may fall within their purview. It is also feasible that TLE could be used to support USMS operations by providing security for judges or for courts or to secure/transport a prisoner. It is certainly foreseeable that the DEA may call upon the TLE to support its efforts in a foreign area of operations.

While those TLE tasks discussed in the previous paragraphs described TLE in a supporting role, TLE elements could be called upon to actually conduct missions falling within the purview of the CBP. TLE resources may be utilized to conduct a CBP mission in a foreign nation. While this mission has a direct relationship to the reconstruction and stabilization effort in that nation, it may also uncover and prevent terrorists and/or terrorist weapons from entering the US. For these purposes, TLE members could potentially be granted the authority to act as Customs Officers, similar to the arrangements for the Coast Guard under USC Title 14, Part I, Chapter 7, §142.

If TLE is used to train foreign police and security services it crosses in the purview of many of the other agencies listed in this paper. The USAID, the US Department of State, the Department of Homeland Security, the USMS, the FBI and the Department of Defense all are currently conducting or supporting the conduct of the training of various foreign security and/or law enforcement agencies. TLE may certainly be utilized to assist in both the conduct and the evaluation of such training. TLE may even be used to conduct on-the-job training for these foreign law enforcement agencies.

It is worth noting that the reporting chain and chain of command of TLE elements will be significantly impacted upon by their placement within the USG apparatus, for example if placed under the department of State, Justice or Defense or, such as with the US Coast Guard, a combination of more than one major USG department.

This is not a simple or an easy task. As things currently stand, each and every agency listed in this section is involved in conducting current missions, foreign and domestic, which may be conducted by or supported by TLE. S/CRS has been given the responsibility for coordinating all elements of

reconstruction and stabilization, but each of these agencies has a stake in this effort. Not only may TLE impact upon each of these stakeholders it may impact upon each of them in a multiple of ways depending on the task. The USG reconstruction and stabilization efforts will be best served through a more focused and coordinated approach to law enforcement missions and training. A coordinated approach to TLE will not only make such efforts more efficient, it will also make them more cost effective.

CONCLUSION

A comprehensive understanding of the network of authorities relevant to TLE efforts is paramount to determining effective inter-agency cooperation on TLE. None of the statutes and authorities cited in this review are “bright line rules”. The interplay between the statutes themselves is critical. For example, a cursory reading of USC Title 18 § 1385 (commonly referred to as the Posse Comitatus Act) may lead the reader to believe that it is a clear prohibition against the use of US military personnel and equipment to enforce civilian law, but it is not. An example of a statute and authority that has impact upon the Posse Comitatus Act is USC Title 10 Subtitle A, Part I, Chapter 15, § 332, a part of those statutes named the “Enforcement of the Laws to Restore Public Order Act”, which gives the President the authority to call upon the armed forces to enforce civil law in cases of unlawful obstructions, assemblages or rebellion against the authority of the US. USC Title 18, Part I, Chapter 39, § 831 provides another statutory exception to the Posse Comitatus Act. This statute authorizes the Attorney General of the United States to request support from the Secretary of Defense in emergency situations where civilian law enforcement is inadequate to address terrorist threats involving the potential use of a nuclear or radiological weapon. There are numerous other statutes and authorities that relate to the interpretation of just this one statute.

The interplay between these various statutes and authorities is very dynamic and impacts upon TLE in different ways depending on which missions are to be assigned to it. For example, if TLE includes the conduct of law enforcement tasks, those statutes granting and limiting the use of federal, military or civilian forces to conduct law enforcement missions outside the US must be considered. Where TLE includes training foreign law enforcement and security units there are existing statutes that grant and limit the ability to conduct those missions as well. Furthermore, the US legal system places almost as much weight on the interpretation of a statute as on the statute itself. As this paper shows there are many and various statutes affecting TLE efforts. These statutes not only impact upon these efforts as individual statutes, but many of them also augment, supplement and complement each other as well. A new concept like TLE, operating in such a dynamic environment, may run into more challenges from these many interpretations rather than the actual statutes themselves.

A US TLE effort traverses multiple agencies of the USG and requires a coordinated approach by all agencies having a stake in the matter. NSPD 1 tasks the NSC/PC with managing the development and implementation of national security policies by multiple agencies of the USG. NSPD 44 gives the Secretary of State the authority to direct the S/CRS to act as the lead for the USG in the development of a strong civilian response capability as well as to recommend additional resources needed for stabilization and reconstruction efforts.

The involvement in and responsibilities of agencies involved in TLE efforts is complex and varied. They each are currently involved in reconstruction and stabilization efforts and in the support and training of foreign law enforcement and security units. These existing efforts and agencies are guided by their respective various statutes and authorities. There are also authorities that set forth a hierarchy and a framework for how these various agencies are to work together in the development of a TLE proposal.

The effort to establish an effective and efficient TLE capability within the USG will not be an easy one. There are many complex and moving parts. This review has not identified any statutes or authorities that will prevent the development or the use of TLE.