

Statement by

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Chairman Kean, Vice Chairman Hamilton, Members of the Commission, thank you for the opportunity to appear before you to discuss the Department of Defense's (DoD) role in relation to civilian border authorities.

I am the Principal Deputy Assistant Secretary of Defense for Homeland Defense, serving under Assistant Secretary Paul McHale in the Office of the Secretary of Defense. At the time of the terrorist attacks of September 11, 2001, I was serving as Deputy Under Secretary of Defense for Policy Integration in the Office of the Under Secretary of Defense for Policy. Soon after the attacks, Secretary of Defense Rumsfeld designated Secretary of the Army White as the interim executive agent for homeland security to manage day-to-day execution of homeland security and defense activities in DoD on a temporary basis. I followed these issues closely, and in January 2002 I was appointed as Secretary White's special assistant for homeland security, managing a newly created Homeland Security Task Force. The Task Force served as a temporary bridge between the immediate post-9/11 aftermath and the establishment of new homeland defense and civil support entities in DoD.

To provide necessary context for my remarks, it is important to make the distinction between homeland security and homeland defense, and the very different, but complementary, roles of the Department of Defense and the Department of Homeland Security in those activities.

As articulated in the 2001 Quadrennial Defense Review, "the highest priority of the U.S. military is to defend the Nation from all enemies." The Department of Defense focuses on and is responsible for homeland defense, which is the protection of United States territory, domestic population, and critical defense infrastructure against external threats and aggression. It also includes routine, steady-state activities designed to deter aggressors and to prepare U.S. military forces for action if deterrence fails.

The Department of Homeland Security is responsible for homeland security, which is defined in the 2002 National Strategy for Homeland Security as

a concerted national effort to prevent terrorist attacks within the United States, reduce the vulnerability of the United States to terrorism, and minimize the damage and assist in the recovery from terrorist attacks.

In simpler terms, the Defense Department provides the military defense of our nation from all attacks that originate from abroad, while the Department of Homeland Security aims to protect the nation against, and prepare for, acts of terrorism. The Department of Defense is organized and prepared, however, at the direction of the President and the Secretary of Defense, to play a vital role in support of the Department of Homeland Security's mission.

### **New DoD Organizations**

Following the tragic events of 9/11, at the direction of the President and with Congressional support, DoD moved quickly to establish new organizations focused on homeland defense and civil support: U.S. Northern Command (NORTHCOM) and the Office of the Assistant Secretary of Defense for Homeland Defense (ASD(HD)).

Established in October 2002, NORTHCOM is a geographic combatant command with the mission to conduct operations within its assigned area of responsibility to deter, prevent, and defeat threats and aggression aimed at the United States, its territories and interests. As directed by the President or Secretary of Defense, NORTHCOM would direct any military operation within its area of responsibility, including combat operations. NORTHCOM would also provide military assistance to civil authorities, including consequence management operations, to mitigate the results of disasters and catastrophes, including those resulting from a WMD attack. NORTHCOM's area of responsibility includes the continental United States, Alaska, Canada, Mexico, and the surrounding water out to approximately 500 nautical miles. The defense of Hawaii and U.S. territories and possessions in the Pacific remains the responsibility of U.S. Pacific Command. The commander of NORTHCOM is also the commander of the bi-national U.S.-Canada North American Aerospace Defense Command (NORAD).

At the request of the Secretary of Defense, the Office of the Assistant Secretary of Defense for Homeland Defense was established by Congress in the Bob Stump National Defense Authorization Act for Fiscal Year 2003. The office was established in recognition of the need to have a focal point to assist the Secretary to improve policy and provide guidance to combatant commanders regarding air, ground, and maritime defense of U.S. territory and the conduct of military support to civilian authorities. As provided in the establishing statutory language, the ASD(HD) provides overall supervision of the homeland defense activities of DoD. In addition, the ASD(HD) supervises DoD support that is provided to civilian authorities.

### **DoD's Role of Support in Border Security**

The Commission's focus for today's hearing is on immigration, non-immigrant visas, and border control. Clearly these are significant subjects given the length of our borders and volume of traffic into the United States on a daily basis. The United States shares a 5,525-mile border with Canada, and one of almost 2,000 miles with Mexico. Perhaps more daunting is our 95,000 miles of shoreline. Unprecedented vigilance and new ways of thinking are required to ensure that those who would do us harm and their means to do so do not penetrate U.S. borders. However our efforts to prevent and deter terrorist attacks should not impede the free flow of legitimate business and travelers.

In understanding DoD's activities in relation to the border, it is important to understand there is a nexus with DoD's support in the counternarcotics arena and to recall a tragic incident in 1997 that had ramifications for how that support is executed. DoD Active and Reserve Component forces and the National Guard have provided a wide variety of counternarcotics support to drug law enforcement agencies along the southwest border of the United States since 1989. That support included activities such as surface and aerial reconnaissance, minor construction, establishing tactical observation posts, training, intelligence analysis, linguist support, transportation, and conducting training exercises along the border to provide terrain denial. All such support was in response to requests from law enforcement agencies and was strictly for counternarcotics purposes.

On May 20, 1997, near the border in the vicinity of Redford, Texas, an active duty Marine, performing a detection, monitoring, and communication mission from a tactical observation post, tragically shot and killed a U.S. citizen in self-defense. Subsequently, DoD conducted an assessment of its support to law enforcement on the southwest border, and concluded that it would no longer provide support that would place Active and Reserve Component forces in situations in which confrontations with U.S. citizens might occur. National Guard personnel acting in state status were permitted to continue to perform ground missions. DoD support is thus provided in a manner that is specifically designed to insulate DoD military personnel from potential confrontations with U.S. citizens.

It is also important to underscore that the Homeland Security Act of 2002 now gives the Secretary of Homeland Security the responsibility for the security of the nation's borders. That responsibility includes preventing terrorists and instruments of terrorism from penetrating our borders, protecting our ports of entry, immigration enforcement, and ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce. DoD's role in that border security mission is to provide support to civil authorities, principally the Department of Homeland Security, when appropriate.

I would like to respond directly to the four areas of interest related to border security identified by the Commission.

### **Area of Interest #1: DoD action to secure borders immediately after the 9/11 attacks**

The first area focuses on DoD's role in the immediate response to secure the nation's borders after the September 11, 2001 terrorist attacks. DoD engaged in a number of actions to improve homeland defense and provide interim support to border authorities immediately following and in the months after the attacks. These included:

- DoD launched Operation NOBLE EAGLE, which is an air surveillance and air defense mission. Operation NOBLE EAGLE includes air patrols over

- key domestic locations, U.S. Navy ships deployed off U.S. coasts with anti-aircraft systems, and integrated air defense assets located in the National Capital Region. Operation NOBLE EAGLE continues today under the direction of the Commander of NORAD and NORTHCOM. To date there have been over 33,000 sorties and more than 1,600 requests from the Federal Aviation Administration to intercept potential air threats.
- Shortly after the terrorist attacks, the President requested that state Governors supplement the nation's airport security with National Guard personnel. This mission initially encompassed 421 airports, 52 states and territories, and over 7,000 National Guard personnel in Title 32 status (state control, federal funding). Additional airports and personnel were added subsequently. In February 2002, the newly-established Transportation Security Administration assumed legal responsibility for baggage screening and checkpoint security, enabling the National Guard personnel to end their support by the end of May 2002. Of note, the State of New York retained 80 National Guard personnel in State Active Duty status (state control, state funding) at LaGuardia Airport until September 2002.
  - The U.S. Navy supported the U.S. Coast Guard immediately following 9/11 by providing thirteen PC170 coastal patrol ships for homeland security patrols and for anti-terrorism/force protection of high-value Navy assets. In response to a Coast Guard request, the Navy also mobilized Naval Coastal Warfare reserve units (including command and control, maritime surveillance, and armed patrol boat capabilities) on the U.S. west coast to perform homeland security duties.
  - Additionally, between March and August 2002, DoD mobilized some 1,600 National Guard troops along the northern and southern borders to support the U.S. Customs Service, the Immigration and Naturalization Service, and the Border Patrol, in their heightened post-9/11 security posture. The tasks of military members included providing a security presence, vehicle inspection, traffic management, tactical operations advice, air operations, cargo inspection, and administrative support until the requesting agencies could hire and train new employees.

As DoD considers all requests for assistance, we are mindful of the limitations that the Posse Comitatus Act places on certain actions by the Army and the Air Force (section 1385 of title 18, U.S. Code). The Act generally proscribes use of the Army and the Air Force to execute civilian laws, and reflects the American tradition of civilian law enforcement being primarily a civilian, not military, mission. The prohibition on having the Army and Air Force execute civilian laws includes arrests, searches, seizures, and similar activities. As a matter of DoD policy, the Secretary of Defense extends those limitations to the Navy and the Marine Corps.

There are several statutory exceptions to the Posse Comitatus Act, including chapter 15 of title 10, U.S. Code (the Insurrection Act), section 831 of title 18, U.S. Code (authorizing DoD to assist the Department of Justice in responding to nuclear/radiological events), section 382 of title 10, U.S. Code (authorizing DoD to respond to requests by the Department of Justice to respond to chemical/biological events), and Public Law 107-40 (authorizing the President to use military force to prevent future terrorist acts against the nation). The President also has Constitutional authority to use the military as he determines necessary to respond to domestic crises.

Following a lengthy DoD assessment of the Posse Comitatus Act, the Department determined that the Act continues to reflect the proper balance between civilian and military involvement in executing civilian laws, and does not unduly restrict the President's discretion to use the military as he deems necessary to respond to exceptional circumstances. Finally, we are also mindful of one critical caveat that appears throughout the body of law authorizing military support to civil authorities: the military may provide support only if that support does not adversely affect U.S. military preparedness and ability to conduct missions in defense of our nation at home or abroad.

**Area of Interest #2: Strategic role of the military in anti-terrorism, including protecting against infiltration of the United States by terrorist groups such as al-Qaeda**

DoD defines anti-terrorism as defensive measures to reduce vulnerabilities and protect U.S. forces and assets worldwide. Anti-terrorism thus represents one element of a broader approach to combating terrorism that also includes counterterrorism, terrorism consequence management, and intelligence support.

The principal focus of DoD's efforts to combat terrorism is on bringing the fight to the terrorists abroad through the prosecution of the global war on terrorism. Thus, our first line of defense against terrorism is abroad -- to confront the enemy where he lives, trains, and recruits, as military forces are doing today in Afghanistan and Iraq. The United States cannot beat terrorism on the defensive. The next line of defense also lies beyond the borders of the nation, where we are patrolling the air and maritime avenues of approach to engage terrorists before they reach our borders. In this effort, NORAD guards, patrols, and monitors the skies over Canada and the United States. Similarly, the U.S. Navy mans the sea approaches in international waters and works with the U.S. Coast Guard to patrol our territorial waters. Within U.S. borders, the Department of Homeland Security, the FBI, and the rest of the domestic law enforcement community is responsible for countering terrorist threats; the Department of Defense stands ready to provide assets and capabilities in support of civil authorities, consistent with U.S. law.

**Area of Interest #3: The military's role in sharing intelligence with border inspection services.**

DoD policies and directives emphasize protection of the constitutional rights and privacy of U.S. citizens. In the absence of foreign involvement, military intelligence organizations are limited to performing non-intelligence functions in domestic support operations. If authorized by law to collect foreign intelligence or counterintelligence information within the United States, military intelligence organizations must do so only in support of the Federal Bureau of Investigation (FBI), the lead federal agency responsible for intelligence collection within the United States.

DoD is a full partner in the Terrorist Threat Integration Center, which began operations in May 2003 and whose function is to integrate and analyze

terrorist-related information collected domestically and abroad in order to form the most comprehensive possible threat information. Additionally, NORTHCOM has well-established links for information and intelligence sharing on border activities, primarily through Joint Task Force Six (JTF-6), NORAD, and the National Guard. JTF-6, for example, has partnered with the Drug Enforcement Administration's El Paso Intelligence Center, the Border Patrol Special Coordination Center, the Air and Maritime Operations Center, and various field elements of the Border Patrol. JTF-6 also interacts with Joint Interagency Task Force South (JIATF-South) and JIATF-West to share relevant information and intelligence. Similarly, the National Guard, in most of the 54 states and territories, supports intelligence analysis efforts of the Drug Enforcement Administration, FBI, the DHS Bureau of Customs and Border Protection, and various federal, state, and local task forces. DoD is now installing secure internet systems in many of the High Intensity Drug Trafficking Area (HIDTA) intelligence centers to facilitate the sharing of information that has national security and homeland security value.

**Area of Interest #4: The role of the military in civil support and emergency preparedness in conjunction with U.S. land and sea border inspection and enforcement authorities.**

As noted earlier, DoD's role vis-à-vis border security is to support civil authorities, primarily the Department of Homeland Security, when requested. If directed by the President or the Secretary of Defense, NORTHCOM will direct DoD's response to requests for assistance from lead federal agencies for border security operations.

The issue specifically highlights the land and maritime domains. On land, the Department of Homeland Security has the lead for securing the U.S. border, as do civil authorities in Canada and Mexico from their sides of the borders. DoD plays a supporting role through developing and maintaining good bilateral defense relationships with our neighbors. To the south, the U.S. has a positive high-level relationship with the Mexican military, and U.S.-Mexican civil cooperation along our shared border is well established.

To the north, we enjoy a close cooperative relationship with Canada across-the-board, to include the areas of counterterrorism, consequence management, and aerospace warning and defense. At the strategic level, the Permanent Joint Board on Defense epitomizes our close bilateral ties. At the operational level, the long-standing success of NORAD is a clear illustration of our bi-national commitment to counter aerospace threats to North America. In addition, a new Bi-National Planning Group was established in Colorado Springs in December 2002. The Bi-National Planning Group is working to improve current U.S.-Canada arrangements to defend against maritime threats to the North American continent and land-based attacks, as well as to coordinate civil support operations.

Primary responsibility for maritime homeland security is assigned to the Department of Homeland Security as the lead federal agency, and is executed by the U.S. Coast Guard. When directed by the President or the Secretary of Defense, NORTHCOM will respond to requests for assistance to augment Coast Guard maritime security operations. The Department of Defense, the Department of Homeland Security, the Coast Guard, and the U.S. Navy are working together to establish a layered approach to maritime defense and security. In that same vein, DoD remains involved in supporting the Coast Guard in port security and marine domain awareness efforts. For example, the Office of Naval Intelligence hosts the National Maritime Intelligence Center at Suitland, Maryland with participation by the Coast Guard, U.S. Navy, the Bureau of Customs and Border Protection, and the Drug Enforcement Administration. The center provides expanded analysis of merchant ship activity linked to the maritime aspects of counterproliferation and counternarcotics efforts.

Counternarcotics is another area in which DoD has longstanding relationships with civil authorities, including U.S. border and law enforcement authorities. By statute, DoD is the lead federal agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. DoD works with civil authorities to transmit information to enable law enforcement authorities to interdict such trafficking. DoD also supports requests from the Department of Justice, Department of Homeland Security, and HIDTA Task Force Headquarters for unique military assistance, such as reconnaissance

(ground-based, aviation-based, and maritime), logistics, transportation, engineer support along the southwest border, as well as intelligence programs and training.

Since 9/11, several policy and operational changes in DoD have improved the alignment of resources and efforts where there is a link between terrorism and narcotics trafficking. NORTHCOM is charged with counternarcotics activities in its area of responsibility, including counternarcotics support to domestic law enforcement authorities.

As stated in the 2003 National Strategy for Combating Terrorism, “breaking the nexus between drugs and terror is a key objective in the war on terrorism.” Congress recognized the link between drug trafficking and terrorism with the passage of the National Defense Authorization Act for Fiscal Year 2004, which addressed the authority of the Secretary of Defense to expand the mission of DoD joint task forces from counternarcotics to include counterterrorism activities.

To leverage the presence of DoD assets on counternarcotics detection and monitoring missions, the Coast Guard embarks Law Enforcement Detachments (LEDETs) on U.S. Navy vessels. LEDETs also embark and operate similarly from British, Dutch, and Belgian warships. With a LEDET aboard, a Navy warship can effectively double as a Coast Guard platform fully empowered under U.S. law to search, seize, and arrest. While on board, the LEDET performs the roles as primary boarding team, law enforcement flight observer on embarked helicopters, law enforcement training team, and principal law enforcement advisor to the commanding officer.

The vast majority of these counternarcotics deployments take place in the Eastern Pacific Ocean (between Mexico and Peru) and the Caribbean Sea, usually under the tactical control of JIATF-South. Since September 11, 2001, LEDETs have deployed on PC170 patrol ships for homeland security duties. During FY 02-03, LEDETS have averaged more than 200 days per year deployed away from homeport, seized more than 165,000 pounds of cocaine worth nearly \$5.5 billion from 42 vessels, and arrested 286 smugglers.

Finally, technology transfer represents another important avenue by which DoD provides support to border authorities and other civilian agencies and entities. Guided by the National Strategy for Homeland Security, the National Strategy for Combating Terrorism, and other key guidance documents, DoD is helping civil authorities recognize opportunities to leverage our considerable investment in research, development, test, and evaluation to address critical homeland security technology needs.

Some examples of technology transfer specific to the areas of border and transportation security include:

- Operation SAFEGUARD (October-November 2003) provided an opportunity for DoD to demonstrate unmanned aerial vehicle technology to border authorities. Operation SAFEGUARD was a humanitarian and law enforcement initiative of the Department of Homeland Security's Bureau of Immigration and Customs Enforcement to help locate individuals crossing the southwest border in remote locations and bring them to safety. DoD arranged for a Predator-B unmanned aerial vehicle (UAV) scheduled for future delivery to DoD to be operated by a private contractor to conduct aerial surveillance over the area, demonstrating the potential value of UAV-quality imagery in such missions. Operation SAFEGUARD also served to highlight the policy, legal, and infrastructure issues that must be examined in tandem with technology explorations. These include challenges associated with the use of UAVs in controlled domestic airspace as well as the extensive infrastructure (communications, exploitation tools, imagery analysts) required to process and exploit information collected by UAVs.
- DoD maintains a collaborative relationship with immigration, border, and customs entities within the Department of Homeland Security with regard to ground sensors and their application in border security. DoD agencies and military departments have developed numerous technologies for the detection of humans, vehicles, nuclear material, and other contraband in relation to assigned missions. Knowledge of these technologies is made available to other organizations through venues such as the Technical Support Working Group, the Physical Security Equipment Action Group,

and through the efforts of the Defense Threat Reduction Agency and the Defense Advanced Research Projects Agency.

- DoD is working with the Transportation Security Administration to apply nuclear quadrupole resonance technology developed by the Naval Research Laboratory to cargo screening.
- The DoD Biometrics Office is working with the Department of Homeland Security Science and Technology Directorate and the Biometrics Interagency Working Group of the National Science and Technology Council to improve identification technologies.
- Three new Advanced Concept Technology Demonstration (ACTD) efforts are underway that have the potential to deliver capabilities supporting both DoD missions abroad and Department of Homeland Security missions at home:
  - The Protected Landing and Takeoff ACTD to identify technologies to defeat aircraft attacks from Man Portable Air Defense Systems (MANPADS)
  - The High Altitude Airship, a prototype untethered platform that could provide wide area surveillance and communications capabilities; and
  - The Air Transportable Cargo screening ACTD, designed to detect explosive threats in pallet cargo loads moving through military transportation systems.

More generally, DoD invests nearly \$100 million yearly in the Technical Support Working Group (TSWG), a U.S. national forum that brings together over 85 federal agencies to identify, prioritize, and coordinate interagency and international research and development requirements for combating terrorism. The TSWG rapidly develops technologies and equipment to meet the high-priority needs of the combating terrorism community. These technologies typically are also applicable to first responders and other homeland security missions. The Department of Homeland Security is now a partner in the TSWG. Further, DoD continues to work closely with the Department of Homeland Security and the White House Office of Science and Technology Policy to identify opportunities

for technology transfer, collaborative development, and leveraging of DoD research, development, testing, and evaluation expertise and infrastructure.

## **Conclusion**

Throughout our history, U.S. military forces – active duty and reserves -- have defended our nation against its enemies on land, at sea, and in the air. From defending against and defeating adversaries on America's territories and frontiers in the early years, to deterring adversaries armed with weapons of global reach and mass destruction in more recent years, the military has adapted continuously to engage threats to our nation.

Today we face a challenge that is equal to or greater than any we have ever faced before. Once we could readily identify and defeat our enemy in conventional warfare. Today, we must cope not only with the threats produced by the proliferation of weapons of mass destruction and missile technology among nation-states, but also with threats posed by individual terrorists and terrorist organizations with global reach.

The Department of Defense has a long tradition of support to civil authorities, including border authorities, while maintaining its primary mission of fighting and winning the nation's wars. As long as terrorist networks continue to recruit new members, plan and execute attacks against U.S. national interests and seek out weapons of mass destruction, U.S. military forces and other DoD assets will remain engaged. Our goals are to thwart terrorist operations, disrupt their plans, destroy their networks, and deter others who might consider such attacks on our nation. U.S. military forces stand ready to defend and protect our homeland in overseas and domestic operations.