



# **CONTEMPORARY TACTICAL REALIGNMENT:**

**Preparing a Military Force to Work with  
Department of Justice Prosecutors to  
Fight Terrorism, Cyberhacking, and  
Other National Security Issues**

*Anthony DeStefano, CDR, USCG*

A sepia-toned historical photograph of the Wright Flyer, a biplane, in flight over a rural landscape. The plane is positioned in the upper center of the frame, with its wings spread wide. Below it, a small, dark, single-story building is visible on the left side of the horizon. The foreground is a field of tall, dry grass or brush. The sky is a pale, hazy blue.

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*Preparing a Military Force to Work with Department of  
Justice Prosecutors to Fight Terrorism, Cyberhacking, and  
Other National Security Issues*

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## Foreword

It is my great pleasure to present another issue of The Wright Flyer Papers. Through this series, Air Command and Staff College presents a sampling of exemplary research produced by our resident and distance-learning students. This series has long showcased the kind of visionary thinking that drove the aspirations and activities of the earliest aviation pioneers. This year's selection of essays admirably extends that tradition. As the series title indicates, these papers aim to present cutting-edge, actionable knowledge—research that addresses some of the most complex security and defense challenges facing us today.

Recently, The Wright Flyer Papers transitioned to an exclusively electronic publication format. It is our hope that our migration from print editions to an electronic-only format will foster even greater intellectual debate among Airmen and fellow members of the profession of arms as the series reaches a growing global audience. By publishing these papers via the Air University Press website, ACSC hopes not only to reach more readers, but also to support Air Force-wide efforts to conserve resources. In this spirit, we invite you to peruse past and current issues of The Wright Flyer Papers at <https://www.airuniversity.af.edu/AUPress/Wright-Flyers/>.

Thank you for supporting The Wright Flyer Papers and our efforts to disseminate outstanding ACSC student research for the benefit of our Air Force and war fighters everywhere. We trust that what follows will stimulate thinking, invite debate, and further encourage today's air, space, and cyber war fighters in their continuing search for innovative and improved ways to defend our nation and way of life.



EVAN L. PETTUS  
Brigadier General, USAF  
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## **Abstract**

National security strategies increasingly contemplate US military operations resulting in the criminal prosecution of terrorists, cyber hackers, transnational organized criminals, and other bad actors who seek harm to the United States, its citizens, and international norms. A successful merger between military and law enforcement requires the military to have a flexible, informed working relationship with the Department of Justice (DOJ), the sole agency with authority to prosecute such crimes. Joint publications and other official resources have called for close collaboration between the military and the DOJ but without meaningful, practical guidance. Operational commanders, preoccupied with warfighting and dramatic upheavals, tend to be wary of involvement with civilian affairs and the Posse Comitatus Act's complexities. Typically, the military is less comfortable with collaborating with law enforcement agencies, including the DOJ. Consequently, they can be unprepared to recognize mutual objectives, to competently gather evidence, or to preserve high-value prosecutions.

This article introduces military commanders to DOJ capabilities and the potential for military-DOJ collaboration. It proposes a five-part framework for working with federal prosecutors. First, military and DOJ authorities should agree upon the types of wrongdoing which warrant military authorities sending cases to DOJ for prosecution. Second, they should identify the operational event which triggers referral to DOJ. Third, they should determine the level of military command, which authorizes the referral. Fourth, they should identify supporting and supported roles during both operational and investigative phases. Fifth, they should establish joint training and information-exchange programs to provide end-to-end feedback. This article suggests a practical framework that aspires to facilitate synergy between military and DOJ apparatuses.

## **Introduction**

### **Overview of the Paper**

Today's national security challenges often lend themselves to the "whole of government," using all instruments of power, including law enforcement (LE).<sup>1</sup> Military operations increasingly involve scenarios that could involve the prosecution of offenders, including terrorism, transnational organized crime, and cyber incursions. Critical to success in this arena is a military partnership with the Department of Justice (DOJ), the sole US agency able to bring charges in US federal court and the lead agency for cybersecurity response, counterterrorism operations, and domestic response to weapons of mass destruction (WMD). The Department of Defense's (DOD) involvement must be applied consistently with the principles of Posse Comitatus Act (PCA), which generally restricts the DOD's ability to directly enforce US laws in US territory, and its authorized assistance authorities recognized in Chapter 15 of Title 10 of U.S. Code.

This paper introduces the DOJ's mission and organization and reviews presidential directives and joint doctrines where mission success necessitates Armed Forces–DOJ cooperation. In search of examples to bridge the gap between official policies and practical applications, the paper explores contemporary problems, including cyber and terrorism cases, naval interdiction of piracy off the Horn of Africa, coordinating counterdrug operations by the Joint Interagency Task Force–South (JIATF–S), and the US Coast Guard's (USCG) well-established working relationship with the DOJ. Unique among the Armed Forces, PCA restrictions do not apply to the USCG, which has broad LE authorities per Title 14 of U.S. Code.<sup>2</sup> The USCG's practices, therefore, yield valuable practical insights on military–DOJ collaboration, particularly how to identify the types of wrongdoing warranting prosecution by the DOJ and when and how specific cases should be sent to the DOJ.

### **Nature of the Problem**

Notwithstanding the importance of Armed Forces–DOJ cooperation, military commanders typically accrue little experience or training regarding interaction with the DOJ. Thus, commanders can find themselves thrust into unfamiliar situations where they must apprehend domestic or international wrongdoers for prosecution by US or foreign authorities. This lack of preparation tends to frustrate the joint doctrine concept of "Unity of Effort," where different entities are expected to form mutual objectives and utilize

each other's capabilities. In contradistinction, the Air Command and Staff College curriculum for conventional challenges has training modules for each branch of the Armed Forces, the Departments of State and Homeland Security (hereinafter DOS and DHS, respectively), as well as other agencies—but not the DOJ. The training-gap is significant since the DOJ is one of the four main agencies of the national security apparatus (along with the DOD, DOS, and DHS).

At strategic levels, lack of understanding risks failing to recognize or formulate combined military–LE instruments of power. On operational levels, military commanders could fail to identify criminal actors (even terrorists) wanted by LE officials. One study states that 90 percent of pirates interdicted by military forces at sea were summarily released, undermining expensive international prosecution efforts.<sup>3</sup> Military commanders may also fail to gather critical evidence. A USCG officer involved in counterpiracy operations recounted how the US Navy, after interdicting pirates, was unprepared to gather evidence, handle detainees, or arrange for disposition.<sup>4</sup> Conversely, military operations have demonstrated successful mergers of the military and LE in capturing or gathering evidence about internationally wanted terrorists, combating the scourge of Somali piracy, and stemming the flow of illegal drugs.<sup>5</sup>

The need for combined military/LE operations may expand with increasingly complex national security strategies. DOD cyberoperations contemplate cooperation with LE agencies in election security and providing information about cyberattackers being transferred to LE agencies for investigation and prosecution.<sup>6</sup> Reflecting recent developments, in July 2020, US Cyber Command publicly acknowledged its aid to the DOJ, which brought criminal and civil actions against North Korean cyberhackers who stole \$250 million in cryptocurrency.<sup>7</sup> Military and LE synergies may also emerge in unexpected scenarios such as Chinese fishing vessels encroaching upon other nations' exclusive economic zones to normalize adverse maritime claims; a response could involve LE action against illegal fishing.<sup>8</sup>

### **Purpose of the Paper**

This paper aims to identify a general framework for military commanders to work with DOJ prosecutors, including identifying cases to send to the latter. This framework emphasizes flexibility, given the breadth of missions and strictures of federal law.

## **Research Question**

Joint doctrine states that “long-term strategic competition requires the seamless integration of multiple elements of national power—diplomacy, information, military, economic, financial, intelligence, and law enforcement.”<sup>9</sup> Integrating military and LE elements may become increasingly important with emerging threats in terrorism, cyberspace, espionage, and other areas. The research question is thus: how should military commanders prepare their units to work with DOJ prosecutors when operations may involve apprehension and prosecution of offenders?

## **Limitations and Assumptions**

Criminal, international, and national security law is complex. Several topics are beyond this paper’s scope. This paper is not intended as a legal reference, particularly concerning the restrictions of the PCA and related Title 10 provisions. Any examples of combined military and LE operations are illustrative and not intended as a complete account of the referenced situation. Also, this paper cannot establish definite rules guiding when criminal prosecution should be applied to national security problems. Instead, it will discuss how military and DOJ leaders should work together to identify mutual objectives and accomplish them. It also steers clear of debates about LE and military solutions to national security problems. For example,, this paper does not address the strenuous debate between those supporting trying terrorists in court and those proposing drone strikes to eliminate such individuals. Similarly, it does not discuss the debate between trying terrorists before military tribunals rather than federal court.

## **Definition of Terms**

*Chain of custody*: The movement and location of real evidence and the history of persons who had it in their custody from the time it is obtained to the time it is presented in court.<sup>10</sup>

*Evidence*: Something that tends to prove or disprove the existence of an alleged fact; evidence includes eyewitness accounts, documents, and tangible objects.<sup>11</sup>

*Judge advocate (JAG)*: A military attorney who is a commissioned officer and provides legal advice to his or her assigned branch of the Armed Forces.<sup>12</sup>

*Military criminal investigative organization (MCIO)*: Organizations charged with conducting complete and accurate criminal investigations involving military personnel and operations; each military department has its own MCIO,

e.g., Naval Criminal Investigative Service (NCIS), Air Force Office of Special Investigations (AFOSI), and Coast Guard Investigative Services (CGIS).<sup>13</sup>

*Probable cause:* A brief by a reasonable and prudent person, in the totality of the circumstances, that someone has committed a crime or that a place contains certain evidence; generally, the threshold for seizing property or arresting persons.<sup>14</sup>

*Proof beyond a reasonable doubt:* The standard used to determine whether a criminal defendant is guilty in court; usually proof of a “convincing character that a reasonable person would not hesitate to rely and act upon in the most important of his or her own affairs.”<sup>15</sup>

*Prosecute:* To institute and pursue criminal action against a person.<sup>16</sup>

*Referral:* The act or an instance of sending or directing an offense to the DOJ for further investigation and possible criminal proceedings.<sup>17</sup>

*Special agent:* An investigator for a federal LE agency, including an MCIO.<sup>18</sup>

### **Anticipated Significance of this Paper**

This paper aspires to promote military commanders’ understanding of the DOJ’s authorities and capabilities and to present basic ideas of how to integrate military operations with DOJ prosecutors. This paper could be informative in how combatant commanders and subordinate joint force commanders integrate military—LE operations and the needs of DOJ prosecutors into the Joint Operation Planning Processes. The Armed Force’s war colleges and JAG training centers could develop training modules using this paper and subsequent research. Armed Forces JAG programs could develop training programs for currently serving JAGs, especially those slated for Special Assistant US Attorney or “operational law” billets. This paper’s recommended framework could assist US Joint Operations Command’s desired research into how DOJ can assist police operations in Afghanistan.<sup>19</sup>

### **Research Methodology**

This paper uses a problem/solution approach (discovering and revising knowledge about an issue). For practical insights, it will explore case studies, namely the US Navy’s counterpiracy mission, the success of JIATF–S, and the USCG’s relations with the DOJ. The lattermost should be particularly valuable given the USCG is the only Armed Force that is also a federal LE agency and thus is unencumbered by PCA and other federal laws and regulations restricting the military to engage in LE missions.

## **Literature Review**

### **US Department of Justice**

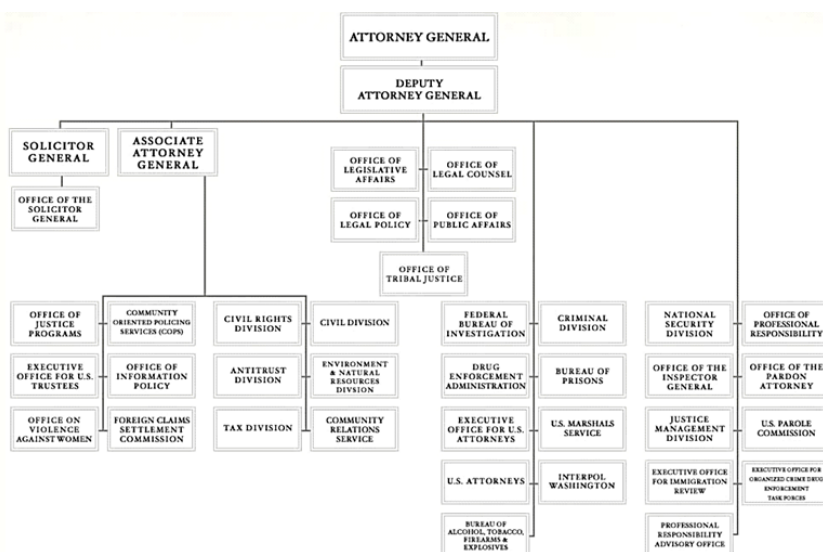
The *Justice Manual* consolidates the DOJ's organization, missions, and nonsensitive policies in one online source.<sup>20</sup> This paper reflects two interviews with DOJ prosecutors and one interview with a USCG officer to gather practical insights into how DOJ and military personnel can best cooperate. The first interview was with Joseph Poux, a member of the Senior Executive Service for the DOJ in Washington, DC, with more than 18 years of experience developing cases with the USCG. Whereas some senior DOJ officials would be restricted from divulging sensitive national security issues, Poux could be relatively open given his focus on environmental crimes that involve business entities and processes aired in court. The second was with CDR Ben Gullo, a former Assistant US Attorney with the Northern District of Ohio. The third was Scott Herman, a GS-15 and retired commander, with experience as a Special Assistant US Attorney and as a USCG officer who has worked extensively with DOJ.

### **Structure, General Authorities**

The DOJ is the sole agency with the authority to represent the United States in court and to bring charges or legal actions on behalf of the United States.<sup>21</sup> Its mission statement is: "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."<sup>22</sup>

A military officer should be familiar with the DOJ components relating to national security. These are, especially, the Criminal Division (supervises enforcement of all federal criminal laws),<sup>23</sup> the Drug Enforcement Agency,<sup>24</sup> the Federal Bureau of Investigation (FBI; lead operational agency for investigating and responding to terrorism, hostage incidents, cyberattacks, and domestic WMD),<sup>25</sup> and the National Security Division (counterterrorism and counterespionage).<sup>26</sup>

The attorney general is the head of the DOJ and oversees 38 components and 93 US Attorney Offices. The DOJ's organizational chart is in figure 1.



(Source: "Organizational Chart," US Department of Justice, accessed 21 September 2019, <https://www.justice.gov/agencies/chart>.)

**Figure 1. DOJ organization chart**

## **Main Justice and US Attorney Offices**

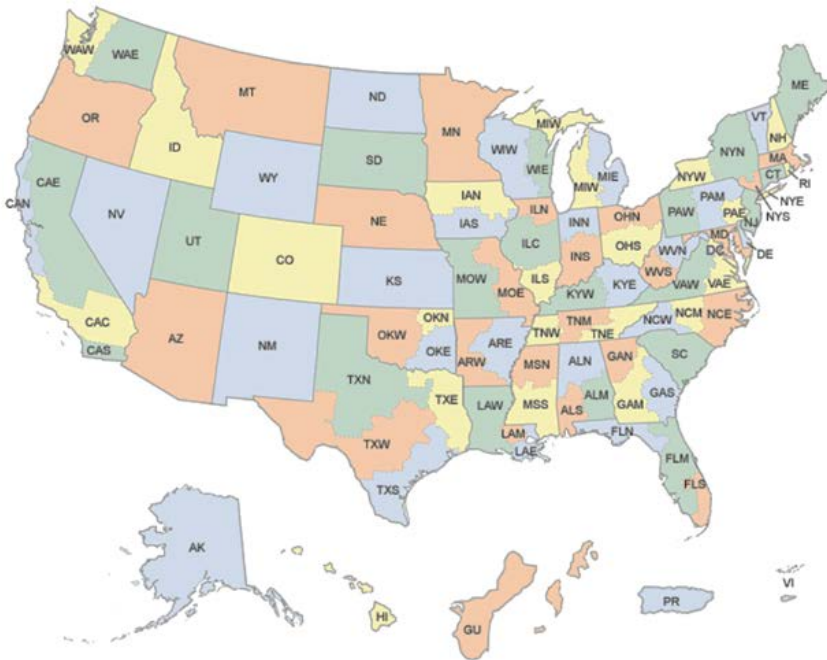
The litigation components overseen by the US attorney general (e.g., the Criminal Division) are often referred to as "Main Justice" or the "Justice Department."<sup>27</sup> These have the authority to bring charges anywhere in the United States.<sup>28</sup> Each of the 93 US Attorney's Office (USAO), however, are considered the principal litigation units; they have the authority to bring charges in their districts.<sup>29</sup> A map of the USAOs is provided in figure 2.

Poux and Gullo emphasized military officers need to understand that Main Justice and the USAO operate concurrently but separately. Each USAO "acts with significant autonomy," said Gullo.

A US Attorney, appointed by the president with the advice and consent of the Senate, oversees each USAO.<sup>30</sup> While the US attorney general is the nominal supervisor for each US Attorney, only the president may remove a US Attorney.<sup>31</sup> US Attorneys are considered the chief federal LE officer in their respective districts, with plenary authority to investigate and bring or decline prosecutions.<sup>32</sup> This framework gives each USAO great independence, reflective of the need for justice to be free of political constraints.



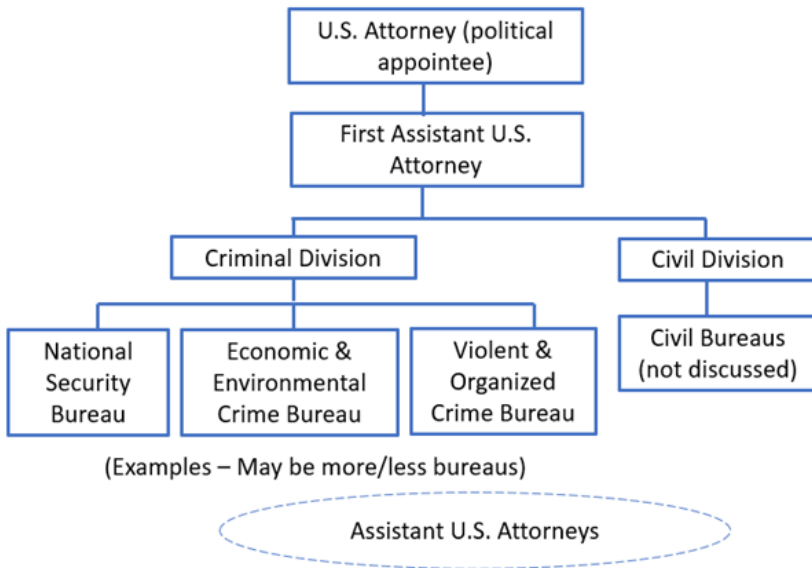
Both Main Justice and the USAOs may bring cases independently and maintain divergent policies. In rare circumstances, one may bring charges against a defendant when another refuses.



(Source: “Find Your US Attorney,” US Department of Justice, accessed 21 September 2019, <https://justice.gov/usao/find-your-united-states-attorney>.)

## **Figure 2. Map of US Attorney Offices**

USAOs vary in size ranging from 300 or more Assistant US Attorneys (AUSA) to 30–40 AUSAs in more remote ones.<sup>33</sup> The US Attorney’s deputy is the “First Assistant US Attorney,” a career public servant.<sup>34</sup> Each USAO has a Criminal and Civil Division overseen by a “chief.”<sup>35</sup> Each division has “bureaus,” which vary from USAO to USAO. The AUSAs will be assigned to one of the bureaus. An AUSA may have an agency or agencies as a “portfolio.” For consistency, cases referred by that agency will come to him or her. There is no standard USAO organization chart. The organization chart in figure 3 was adapted from interviews.



**Figure 3. Typical USAO organization<sup>36</sup>**

Some USAOs are considered more influential than others, depending on their physical venue. The Southern District of New York (S.D.N.Y.), located in New York City, is regarded as one of the most potent entities in government, given its LE powers over Wall Street and international trade.<sup>37</sup> After the September 11th attacks, the S.D.N.Y. invigorated its national security and counterterrorism strategies, becoming a national leader.<sup>38</sup> The S.D.N.Y. often drives national practices in high-profile areas such as terrorism, white-collar, and mafia cases.<sup>39</sup>

### **Authorities Specific to National Security**

DOJ prosecutors are critical players in national security because they can prosecute violations of laws where Congress has created a framework to combat terrorism, foreign espionage, and other issues.<sup>40</sup> These prosecutors alone can effectuate these laws in federal court, subpoena records, and effectuate search and arrest warrants.

Such laws usually apply to conduct outside as well as inside US territory.<sup>41</sup> The DOJ can either indict or charge persons located overseas and seek extradition.<sup>42</sup> Alternatively, and more commonly, LE can arrest and bring persons

to the United States, where they are generally charged in the district court to which they are first brought.<sup>43</sup> The breadth of jurisdiction led former US Attorney Preet Bharara to deadpan, “Are you familiar with Earth?” when asked as to the limits of the DOJ’s reach.<sup>44</sup> As one DOJ prosecutor told the *New Yorker*, “I think military investigators see us as finishers. They may have a lot of evidence on somebody. We’ve got the machinery, and the credibility, to charge and try that person.”<sup>45</sup> DOJ prosecutors are the only persons authorized to appear in court, subpoena records, and effectuate federal search and arrest warrants. Examples of DOJ involvement in national security include:

*Terrorism:* Presidential directives designate the DOJ as the lead agency for apprehending and trying foreign and domestic terrorists wherever located, including cyber and WMD events.<sup>46</sup> The DOJ has the power to prosecute domestic terrorists, any US citizen engaged in or assisting terrorists overseas, foreign terrorists who attack US citizens, and those engaged in terrorist acts transcending national boundaries.<sup>47</sup> General statutes also enable the DOJ to prosecute those who commit other acts related to terrorism such as assault on federal officials.<sup>48</sup> The 2018 *National Strategy for Counterterrorism* recognizes using the DOJ stating, “[DOD counterterrorism] capability, in certain circumstances, also permits detention of terrorists for transfer to the United States for criminal prosecution.”<sup>49</sup>

*Insurrection and civil disturbance:* The US attorney general is tasked with restoring law and order in the aftermath of insurrection or civil disturbance in the United States.<sup>50</sup> The president would deploy the Armed Forces to support the DOJ in restoring public order.

*Cybersecurity:* The DOJ, acting through the FBI and Cyber-Digital Task Forces, is the lead federal agency for responding to cybersecurity threats.<sup>51</sup> Joint doctrine recognizes cyberoperations by the Armed Forces could support these efforts.<sup>52</sup>

*Transnational organized crime:* The DOJ would ultimately prosecute transnational organized crime threatening the United States and its citizens.<sup>53</sup> Such crimes include drug trafficking, cyberattacks, and intellectual property theft.

*Espionage and foreign agents:* The DOJ would prosecute treason, espionage, unlawful activities involving classified material, unauthorized activities by foreign entities, and violations of export laws involving national security matters.<sup>54</sup>

*Sanctions and arms embargos:* The DOJ uses criminal and civil forfeiture proceedings to hold persons and companies accountable for circumventing US sanctions against foreign countries. For example, the DOJ brought civil forfeiture proceedings to seize a North Korean vessel that bypassed US sanctions using unwitting US banks to finance ship maintenance.<sup>55</sup>

## **LE Task Forces**

The DOJ develops and leads LE task forces, which include federal, state, and local LE agencies, to coordinate efforts against certain categories of crimes.<sup>56</sup> LE task forces operate at the national level (at the direction of the deputy attorney general) and at the regional level (led by USAOs).<sup>57</sup> LE task forces include the Organized Crime Enforcement Task Force Program,<sup>58</sup> Joint Terrorism Task Forces (JTTF),<sup>59</sup> Intellectual Property Task Forces,<sup>60</sup> and the Cyber-Digital Task Force.<sup>61</sup> MCIOs typically embed special agents in relevant LE task forces to coordinate efforts.

## **DOJ Principles of Prosecution and Case Intake**

The *Principles of Federal Prosecution* guides DOJ prosecutors in bringing or declining charges.<sup>62</sup> Charging a person or organization has profound impacts on targets and victims regardless of whether a conviction prevails.<sup>63</sup> The DOJ recognizes that appropriate charging decisions ensure “the fair and effective exercise of prosecutorial resources” and promote “confidence on the part of the public and individual defendants” that charges are brought “rationally and objectively on the merits of each case.”<sup>64</sup> Every military officer should read the *Principles of Federal Prosecution*. Demonstrating its influence, the *Manual for Courts-Martial* adapts it to guide military commanders considering court-martial proceedings.

The *Principles of Federal Prosecution* instructs DOJ prosecutors to commence or recommend federal prosecution if he or she “believes that the person’s conduct constitutes a federal offense, and the admissible evidence will probably be sufficient to obtain or sustain a conviction.”<sup>65</sup> However, it instructs DOJ not to commence such action if “(1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction, or (3) there exists an adequate non-criminal alternative to prosecution.”<sup>66</sup> Whether a prosecution serves a “substantial federal interest” is guided by nine criteria including (1) federal LE priorities, (2) nature and seriousness of the offense, (3) deterrent effect, (4) culpability, (5) criminal history, (6) person’s willingness to cooperate, (7) personal circumstances, (8) interest of victims, and (9) probable sentence/consequences upon conviction.<sup>67</sup>

The need to preserve resources and public confidence means DOJ prosecutors carefully analyze when to bring charges. As Gullo relates, DOJ prosecutors need to be personally convinced the target committed the offense and the evidence is sufficient to sustain a conviction.<sup>68</sup>

## **DOJ Prosecutors—Roles, Training, and Culture**

Military officers should be introduced to DOJ prosecutors' prestige, background, and independence. DOJ prosecutors are both criminal investigators and trial attorneys. They frequently coordinate efforts of multiple federal agencies to investigate alleged offenses.<sup>69</sup> Federal investigators report to their own agencies; however, in practice, DOJ prosecutors take control once they decide to pursue a case.<sup>70</sup>

DOJ prosecutors take pride in their independence and commitment to justice. One explained to the *New Yorker*, "Your job as the U.S. Attorney is to do the right thing. You go after bad guys. You're doing something for society every day."<sup>71</sup> They see criminal prosecution as a way to solve societal problems. As Preet Bharara put it, "Prosecutors alone are not going to solve the problem. But . . . we can give these issues a sense of urgency. A lot of people wake up to the possibility of better government when you start putting people into prison."<sup>72</sup> Prosecutors aim to compel compliance in three principal ways: lawfully incapacitating criminals via imprisonment, deterring others through the threat of imprisonment, and restructuring corporations and business organizations through remedial tools (criminal and/or civil).

Becoming a DOJ prosecutor is highly selective. A single DOJ trial attorney<sup>73</sup> or AUSA position has upward of 600 applicants.<sup>74</sup> Most applications require a minimum of five years of litigation experience. Selectees are typically high-performers from elite law schools or have special qualifications such as extensive trial experience or outstanding military service.<sup>75</sup> Many national leaders start their careers in the DOJ (e.g., Senator Mitch McConnell (R-KY),<sup>76</sup> former director of the FBI James Comey, former mayor of New York City Rudolf Giuliani, and former director of the FBI Robert Mueller).<sup>77</sup> Some have called DOJ prosecutors the "special ops" of the LE profession.<sup>78</sup> While the supervising US Attorney may remove an AUSA from a particular case, the law states the attorney general himself decides to terminate an AUSA's employment, giving AUSAs great independence.<sup>79</sup>

In their interviews, Poux and Gullo provided insight into prosecutor training, since there are no publicly available sources addressing the topic. Prosecutors do not receive a standard "onboarding" like military personnel.<sup>80</sup> Their training is typically specific to assigned duties. After hiring, they are sent to the National Advocacy Center for instruction on law, evidence, and trial advocacy.<sup>81</sup> Instructors report back to their supervisors as to trainees' level of preparation. The newly minted prosecutors then spend a year or more under close supervision.<sup>82</sup> By the time a DOJ prosecutor makes his or her first in-court argument, he or she has appeared in court about 50 times in an assist role.<sup>83</sup>

Top performers are often assigned to high-profile matters such as national security, incentivizing many prosecutors.<sup>84</sup> Augmenting standard pay scales, some AUSAs are on a performance-based pay scale called an “Administratively Determined Pay Chart” to further incentivize high performance.<sup>85</sup>

## **US Military Guidance on Working with the DOJ**

### **Joint Doctrine and DOD Instructions**

Joint Doctrine and DOD Instructions recognize the need for military–DOJ collaboration without a recommended structure. Joint Publication 3.08, *Intergovernmental Coordination* expects joint force commanders (JFC) to collaborate with the DOJ and intertwine it in the Unified Command Plan.<sup>86</sup> Appendix J outlines DOJ authorities in a few pages.<sup>87</sup> This publication recognizes the DOJ is one of the three main security apparatuses other than the DOD with which a JFC must collaborate—the other two being the DOS and DHS. However, appendix neglects critical information such as the breadth of the DOJ’s authorities and the differences between Main Justice and USAOs. It also appears to limit DOJ authority to domestic situations, neglecting extra-territorial roles.<sup>88</sup>

Other joint publications call upon JFCs to cooperate with the DOJ in specific missions, including counterdrug operations and support of civil authorities in counterterrorism, transnational organized crime, and insurrection efforts. Joint Publication 3-12 (R), *Cyberspace Operations* calls for close support and coordination with the DOJ to respond to “national security incidents of national consequences.”<sup>89</sup> While recognizing the DOJ and FBI’s leading roles, JP 3-12 does not expressly contemplate those cases could be sent to the DOJ for prosecution.<sup>90</sup>

### **Posse Comitatus Act Restrictions and Assistance Authorities of Title 10 Forces**

Military commanders need a basic understanding of the PCA and related provisions of Title 10, Chapter 15 of U.S. Code. These laws are complex and bear controversy; a full discussion is beyond this paper’s scope. Legal complexities mean JAGs and DOJ prosecutors must resolve problematic PCA issues.

The PCA and DOD regulations mandated by 10 USC § 275 at DOD Instruction (DODI) 3025.21, *Defense Support to Civilian Law Enforcement* restrict members of the Army, Navy, Air Force, Marine Corps, and National Guard members operating under DOD authority (“Title 10 forces”) from directly enforcing federal law through arrests, searches, seizures, or similar

activities.<sup>91</sup> Nevertheless, federal laws and DOD regulations permit a “significant amount of direct and indirect support” to civilian LE agencies, such as sharing information and making personnel, equipment, and facilities available for assistance.<sup>92</sup>

The PCA is a criminal statute prohibiting anyone who “willfully uses the Army or the Air Force as a posse comitatus or otherwise to execute the laws,” except where authorized by the Constitution or Congress. The PCA implements the longstanding American principles of freedom and democracy, which presupposes the military not be domestic police.<sup>93</sup> The DOD extends the restrictions of the PCA to the Navy and Marine Corps through DODI 3025.21.<sup>94</sup> The PCA and DODI 3025.21 do not apply to the National Guard operating under the authority of its respective governor per Title 32 of U.S. Code; however, they apply to National Guard troops acting under Title 10 authority.<sup>95</sup> The PCA does not apply to the USCG because Congress granted that service broad maritime law enforcement authorities at Title 14 of U.S. Code.<sup>96</sup>

The war on drugs renewed debate on the PCA. Whereas the Reagan administration saw the military’s intelligence, aircraft, and vessels as essential, the military saw its involvement as a drain of critical resources and overinvolvement in civilian affairs.<sup>97</sup> Congress passed legislation at Title 10, Chapter 15 (now codified at 10 USC §§ 271–284) expressly authorizing the DOD to provide direct and indirect assistance to civilian LE agencies and tied DOD funding to said support.<sup>98</sup> Congress mandated that assistance cannot degrade from military readiness.<sup>99</sup> It also instructed the DOD to promulgate regulations (now at DODI 3025.21) so that authorized assistance activities do not include or permit “direct participation” in LE activities by a member of the Army, Navy, Air Force, or Marine Corps unless authorized by law.<sup>100</sup>

Notably, the restrictions in the PCA and related Title 10 provisions do not apply beyond US territory,<sup>101</sup> thus permitting the president to project combined military–LE power as needed for national security.<sup>102</sup> US territory extends no further than 12 nautical miles off its coast.<sup>103</sup> DODI 3025.21 applies the restrictions to DOD personnel worldwide by default; however, the DOD secretary or deputy secretary may grant exceptions for “compelling and extraordinary circumstances” in overseas operations.<sup>104</sup>

Congress provides exceptions to the PCA through general assistance authority found at Title 10, Chapter 15 and through specific legislation aimed at particular problems (e.g., insurrection). These will be discussed in turn.

Military commanders should be aware of the following provisions of Title 10, Chapter 15. Section 271 mandates that the DOD “take into account” the “needs of civilian LE officials for information . . . to the maximum extent possible.” The DOD may provide information collected “during the normal

course of military training or operations” and must promptly offer information relevant to drug interdiction and other civilian LE matters. Section 274 generally permits the DOD to make personnel available to maintain and operate equipment in support of civilian LE. It also permits the DOD to transport terrorists captured overseas to the United States and to transport LE agents to support or conduct a joint counterterrorism operation, subject to the joint approval of the US attorney general and secretary of state (in the event of an overseas operation). Section 277 requires LE agencies generally to reimburse the DOD unless the support benefits military objectives. Section 279 commands the DOD to include USCG members onboard surface naval vessels in drug-interdiction areas for LE. Finally, Section 282 permits the DOD to assist the US attorney general for incidents involving WMD.

DODI 3025.21 provides regulations to ensure Title 10 forces do not engage in direct LE action. Enclosure (3) of DODI 3025.21 provides the heart of the restrictions, precluding Title 10 forces from making searches, seizures, searches for evidence, interdictions, pursuits, or other physical, direct LE actions. The instruction also includes guidance for Title 10 forces in civil disturbance operations (Enclosure 4), domestic explosive ordnance disposal (Enclosure 5), domestic terrorism (Enclosure 6), military intelligence support to LE (Enclosure 7), and assisting via DOD equipment and facilities (Enclosure 8). Notably, DODI 3025.21 does not apply to DOD support to counterdrug operations, which is instead governed by Chairman of the Joint Chief of Staff Instruction (CJCSI) 3710.02B, *DOD Counterdrug Support*. That instruction contains similar but less expansive restrictions than DODI 3025.21; for instance, it contemplates that US military ships serving as LE agency “operating bases” for USCG personnel.<sup>105</sup>

Enclosure (3) of DODI 3025.21 provides a nonexhaustive list of statutory and constitutional exemptions. Important statutory exceptions include the Armed Forces assisting the attorney general in quelling insurrection and domestic disturbances (10 USC. § 271–284), which generally require a presidential declaration. Other numerous, varied exceptions combat a host of extraterritorial ills, where military assets may be needed to project US power—examples include piracy,<sup>106</sup> enforcing arms embargos,<sup>107</sup> and even fisheries.<sup>108</sup> Citing constitutional authority, the DOD recognizes “immediate response authority” to save lives and property and “emergency authority” to restore order where prior presidential authorization is impossible and local authorities are unable to control the situation.<sup>109</sup>

Federal courts generally look to whether involvement with LE activities is “active” or “passive,” with the latter not implicating the PCA.<sup>110</sup> Salient examples of passive involvement come from the counterdrug context. The Navy



may provide its ships to LE operations, use them to interdict drug-running vessels, provide the location of vessels to LE agents, and provide backup support (e.g., logistics and security) to USCG boarding teams or other LE agents who conduct the interrogation and ensuing investigation of criminal matters.<sup>111</sup> Courts find that Navy ships and personnel acting at the command of the USCG as convincing to show the military's role was passive.<sup>112</sup> Under this theory, the US Navy helicopters may interdict drug-running vessels, carrying a USCG marksman who employs disabling fire.<sup>113</sup>

The legal consequences of PCA violations generally go unrealized. As a criminal statute, the PCA attaches liability for Army and Air Force personnel who commit violations that are "willful," generally accepted as the highest criminal standard requiring proof that a defendant knew he was violating the law and deliberately did so.<sup>114</sup> Only two criminal prosecutions of the PCA are recorded.<sup>115</sup> Courts decline to dismiss cases for lack of jurisdiction for violations of the PCA.<sup>116</sup> Courts do not apply the exclusionary rule to evidence seized in violation of the PCA.<sup>117</sup> The more likely consequences are latent in nature, such as degrading public confidence in or harming the foreign affairs of the United States.

### **USCG Regulations**

The USCG has promulgated federal regulations for referring cases to the DOJ, reflecting its status as both an Armed Force and a federal LE agency. Not only are USCG processes subject to public scrutiny but also the service must have a degree of public transparency. 33 C.F.R. § 1.07-90 guides how the USCG refers cases to the DOJ. The regulation provides a skeletal chain of command but does suggest how military commanders should refer cases maximizing individual commanders' flexibility. The phrase "refer a case" to the DOJ is found throughout federal regulations (including other agencies) and DOJ guidance but goes without definition. In the legal context, it broadly means the "act or an instance of sending or directing to another for information, service, consideration, or decision."<sup>118</sup> The lack of a specific definition may generate confusion, as reflected in interviews with Poux and Gullo. This leads to different opinions regarding what constitutes a referral and to what results. The analysis section of this paper will propose a working definition.

The regulation recognizes that the DOJ ultimately decides whether and how to prosecute a case in federal court.<sup>119</sup> It may therefore decide to bring a case without a "referral."<sup>120</sup> Thus, a "referral" is best seen as the USCG's way of informing the DOJ about a case that the USCG thinks should be prosecuted, thus promoting interagency cooperation.

The regulations specify that “District Commanders are authorized to refer cases to the U.S. Attorney” except where the commander must give “approval.”<sup>121</sup> Those circumstances include accidents resulting in death and marine casualties. The district commander is a two-star admiral who is the chief maritime LE officer in his or her district.<sup>122</sup> The regulations skip the Atlantic and Pacific area commanders. The regulations thus reflect an intent to grant discretion to the echelon of command that has appropriate control over key military authorities while avoiding an unproductive bottleneck at higher levels. The district commander has control over units performing LE operations and staff elements needed to effectuate referrals. The need to have his or her approval necessitates operational units feeding information to LE staff, working with special agents to enhance evidence collection, and getting JAG advice.

33 C.F.R. § 1.07-90 does not say that *only* the district commander is authorized to refer cases, implying that he or she could delegate this function.<sup>123</sup> Gullo confirms some delegate a senior officer to refer misdemeanors (e.g., simple assault on federal LE), permitting appropriate efficiency. However, the requirement for commander approval in some situations typically reflects that some complex cases may warrant higher-level collaboration. For example, cases involving accidents resulting in death include casualty investigations aimed to correct nationwide safety issues with a host of industry and government experts.<sup>124</sup>

## **Real-Life Examples of Military–DOJ Involvement**

The first two examples discussed—cyber and terrorism—are topical. Their sensitivities, however, do not lend to an open discussion of the subjects or people involved. This paper derives practical pointers from missions conducive to open sources, namely counterdrug, piracy, and day-to-day USCG practices.

### **Cybersecurity**

National security strategies recognize that cyberattacks increasingly pose asymmetric challenges to the conventional might of the United States and its allies.<sup>125</sup> A myriad of state and nonstate actors, coupled with low-entry costs, exacerbate risks. Accordingly, in 2020, Gen Paul Nakasone, US Army, commander, US Cyber Command (USCYBERCOM), announced a “persistent engagement” strategy where USCYBERCOM would operate outside US cyberspace to deter and prevent cyberattacks, which includes working with LE agencies.<sup>126</sup>

USCYBERCOM has worked with the DOJ and FBI to protect the 2018 and 2020 elections (it was sidelined for the 2016 elections).<sup>127</sup> In July 2020, a press

release acknowledged USCYBERCOM sharing information in a case where the DOJ brought criminal and civil actions against North Korean actors who stole \$250 million in cryptocurrency.<sup>128</sup> USCYBERCOM's conduit to the DOJ/FBI appears to be via the Cyber-Digital Task Force, which acknowledges working closely with "military" partners against cyberthreats.<sup>129</sup>

## **Terrorism**

The DOJ aims not only to bring terrorists to justice but also to assist in the intelligence-gathering process.<sup>130</sup> In exchange for lesser sentences for lower-end terrorists, the DOJ will seek the cooperation of defendants who divulge inside information or even transform into informants. Two examples are the prosecutions of terrorists during the opening phases of Operating Enduring Freedom,<sup>131</sup> who provided invaluable intelligence about al-Qaeda tactics, training camps, and targets. The intelligence was particularly helpful as the United States traditionally has difficulties obtaining reliable human intelligence from Middle East terror groups.<sup>132</sup>

One prosecutor, Zainab Ahmad, gave valuable insights to the *New Yorker* about how DOJ prosecutors work with military persons. She stated she works closely with the Pentagon, deferring to the military when it has jurisdiction and has no conflict with military justice systems.<sup>133</sup> For example, she pursued an Iraqi-Canadian citizen living in Canada who had orchestrated a suicide bombing targeting US soldiers in Iraq. To gather evidence, the military flew Ahmad and an FBI agent out in a helicopter and housed her in a base in Mosul, Iraq, which took daily rocket attacks. Soldiers would bring witnesses to the perimeter for interviews.

Military and DOJ cooperation apparently continues with renewed vigor. In October 2020, the DOJ announced the extradition for trial of two terrorists captured by Syrian Democratic Forces and turned over to US military forces who held them in Iraq for roughly a year.<sup>134</sup>

## **Counterpiracy Mission**

The US Navy's involvement in counterpiracy operations provides an unclassified glimpse into challenges in dealing with DOJ prosecutions. Navy operations were critical in stemming Somali pirate attacks upon international shipping. Operations principally occurred from 2009 to 2011 with more than 1,000 pirates being prosecuted by various nations.<sup>135</sup> Prosecutions, combined with encouraging private vessels to hire armed guards, led to a precipitous drop in attacks.<sup>136</sup> An interview with LCDR David Ratner, an Officer in

Charge of a participating USCG Law Enforcement Detachments (LEDET) that captured 40 pirates, augmented print sources.

Navy commanders had to work with a variety of different actors. An individual Navy ship would employ its vessel board search and seizure (VBSS) team and work with FBI agents for hostage negotiations; US Special Forces for rescue operations; USCG LEDETs for advice during boarding operations and training on evidence procedures and maritime law; and special agents of the NCIS for crime scene preservation.<sup>137</sup>



(Photo by PO1 Eric Beauregard, US Navy, 13 May 2009, <https://www.dvidshub.net/image/171890/combined-task-force-151-makes-first-suspected-pirate-capture>.)

**Figure 4. “We caught them, now what?” A LEDET member leads a “take-down” of a pirate ship” with a VBSS member**

While Combined Task Force 151 exercised tactical control over ships, the Maritime Operational Threat Response (MOTR) process dictated final disposition and involved the highest levels of government.<sup>138</sup> MOTR is mandated by presidential directives to ensure interagency consultation and timely, deliberate responses to noncombat maritime threats. Key MOTR partners are the DOS (foreign affairs), DOD (military matters), USCG (maritime LE), and DOJ (prosecution decisions).<sup>139</sup> Ratner believed the key entities deciding to prosecute cases were the Joint Chiefs of Staff and Main Justice. (He did not

know for sure, reflecting how tactical operators are often not privy to the larger picture during military–DOJ collaboration). Decisions, however, involving the SEAL rescue of US mariners aboard the *Maersk Alabama* rose to the President of the United States.<sup>140</sup>

According to Ratner, the on-scene liaison with the Pentagon was a Navy JAG. The time for a disposition decision could take weeks, imposing operational challenges. He reported the JAG’s understanding of law and administration made him an effective liaison, permitting the boarding team to focus on operations and the case package. The JAG, however, lacked professional knowledge on gathering evidence, chain of custody, and LE tactics, limiting his value in advising on operations.

Experts observed that the level of coordination needed between ships and prosecutors complicated matters. More than 90 percent of pirates captured by naval personnel were summarily released.<sup>141</sup> Sometimes, on-scene personnel could not identify broader trends available to investigators ashore, or prosecutors would be overwhelmed to sort through cases.<sup>142</sup>

Sources reflect that military units were unprepared to gather evidence and preserve crime scenes. NCIS had special agents based in Bahrain for crime scene investigations; however, in their absence, a team would be “cobbled together,” with mixed results.<sup>143</sup> Ratner confirmed this lack of preparation; excellent operational results would be threatened by the paradox, “We caught them, now what?” Fortunately, Ratner modified his LEDET’s counterdrug experience to apply analogous criminal procedures to the immediate situation.

The cost of prosecutions led the US government to look for regional partners to prosecute pirates and for noncriminal solutions. Roughly \$100 million was spent in two years alone for only about 20 pirates prosecuted in the United States.<sup>144</sup> Prosecutions required extensive military resources to transfer pirates to the United States. The cost led Secretary of State Hillary Clinton to state the US government was not getting enough out of the operation.<sup>145</sup> Thus, the US government developed a protocol whereby pirates apprehended by the Navy could be transferred to Kenya and Seychelles for prosecution.<sup>146</sup> The DOJ sent “resident legal advisors” to assist. The bulk of prosecutions were performed by regional actors; nonregional actors prosecuted pirates where their national interests were involved.<sup>147</sup> For example, the United States prosecuted the hijacking of the *Maersk Alabama*, a US-flagged vessel.<sup>148</sup> The United States and international partners also encouraged commercial vessels to employ private guards.

## Counterdrug Operations and Joint Interagency Task Force–South

Perhaps the most successful example of military–DOJ cooperation is counterdrug operations in US Southern Command under JIATF–S. Led by a two-star flag officer, JIATF–S provides military intelligence support to LE agencies interdicting illicit trafficking in the Caribbean and off the coasts of Central and South America.<sup>149</sup>

JIATF–S is a well-known example of the merger of military and LE instruments of power employing “whole-of-government” operations across all Armed Forces branches, nine federal LE agencies, and a host of international partners.<sup>150</sup> It is responsible for interdicting 40 percent of the globe’s cocaine and the jailing of more than 4,600 narco-traffickers,<sup>151</sup> who receive stiff prison sentences incapacitating them as smugglers.<sup>152</sup>

Dr. Evan Munsing in *Joint Interagency Task Force–South: The Best Known, Least Understood Interagency Success* studies JIATF–S for aspects of interagency coordination worthy of replication. He provides an operational snapshot:

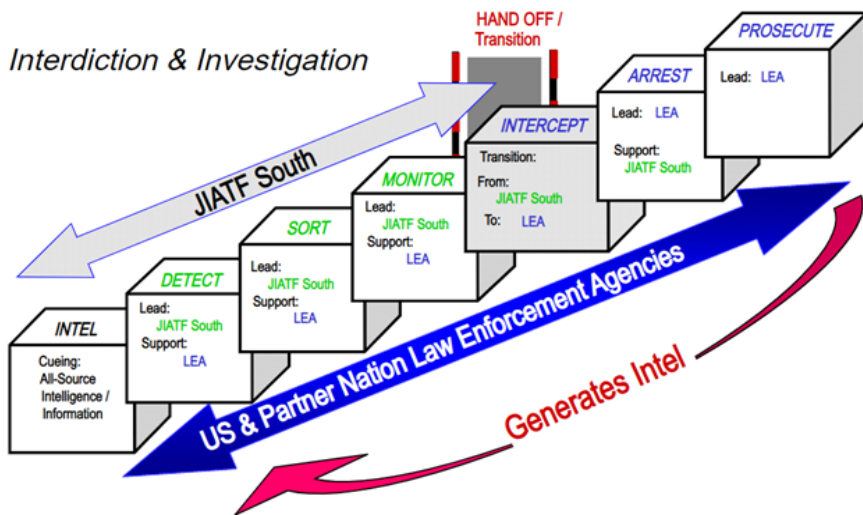
A typical case can start with JIATF–South receiving actionable law enforcement information from the DEA [Drug Enforcement Administration]. This prompts the deployment of . . . [a military or civilian aircraft] that subsequently detects and monitors a foreign flagged suspect vessel until JIATF–South can sortie a Coast Guard cutter or U.S. Navy or allied surface ship with an embarked [Coast Guard] Law Enforcement Detachment (LEDET) to intercept. When the ship arrives on scene [there is] a shift of tactical control from JIATF–South to the [Coast Guard]. For a foreign flag vessel, the Coast Guard tactical commander implements a bilateral agreement or arrangement in force with the vessel’s flag state to confirm registry and to stop, board and search the vessel for drugs. If drugs are found, jurisdiction and disposition over the vessel, drugs and crew are coordinated with the State Department, DOJ, and the flag state.<sup>153</sup>

This highlights JIATF–S’s protocol for Title 10 forces vectoring or transporting USCG members to the scene who perform direct LE actions (namely, arrests, searches, interrogations, and other investigative efforts). US Navy vessels shift tactical control (TACON) to the USCG when arriving on the scene, meaning the LE agency is in charge. As part of its “passive” involvement, Title 10 forces can also provide backup to USCG members such as providing logistics or security with US Navy VBSS team.<sup>154</sup> US Navy helicopters under USCG control even chase down go-fast vessels, with a USCG designated marksman employing disabling fire to stop them.<sup>155</sup> The protocol is geared toward Title 10 forces, avoiding PCA issues.

Munsing also explores recurring challenges as military and LE personnel cooperate. One challenge is that LE personnel are accustomed to the long-term effort to prosecute a case (years); the process conflicts with the military, which seeks to terminate operations quickly, deny public disclosure of

tactics and intelligence techniques, and keep personnel off the witness stand.<sup>156</sup> This also explains the procedure by which intelligence informs routine patrols, which spot smugglers, empowering LE agencies to prosecute independently. Another challenge is that the intense interagency competition for the “credit” that tends to be assigned to the USAO and the LE agency that prosecutes the case.<sup>157</sup> JIATF-S seeks to insulate itself from such interagency conflict by having the DOJ, DOS, and USCG separately determine which USAO will prosecute an individual case.<sup>158</sup>

Another challenge is the “nobody’s in charge” aspect of interagency operations,<sup>159</sup> leading to an emphasis on personal relationships to bridge bureaucratic divides. One source stated, “You need to go drinking with the DEA guys and schmooze with the Ambassadors.”<sup>160</sup> This generates “peer pressure” to work and play hard together. For example, JIATF-S and the lead Organized Crime Drug Task Force in Tampa, Florida, owe their close relationship to their directors being close friends as junior officers.<sup>161</sup> They overcame years of disunion to create computer links to share information in real time. However, such trust is fragile; one agent described, “If you burn a LE guy once, he’ll never give you another chance.”<sup>162</sup>



(Source: US Special Operations Command South, Coalition Operations, PowerPoint Presentation, 2005, <https://slideplayer.com/slide/8112540/>.)

**Figure 5. “End-to-End” loop—Military/Law Enforcement/DOJ synergy.**

A critical asset is JIATF-S’s ability to generate human intelligence. Narco-traffickers are incentivized to cooperate by giving information for lighter sen-

tences.<sup>163</sup> Some will “flip,” becoming agents and infiltrating organized crime.<sup>164</sup> This “end-to-end” loop generates exponential success. Otherwise, interdicting ships are just “guys sailing around looking for people.”<sup>165</sup>

### **Practical Insights from USCG and DOJ Cooperation**

This paper seeks to flesh out practical advice to facilitate military–DOJ cooperation by exploring the USCG and DOJ’s daily interactions. The interviews with Poux, Gullo, Herman, and Ratner provided an invaluable perspective not available in print sources.<sup>166</sup>

All interviewees emphasized the lynchpin role of JAGs being liaisons for military–DOJ relations. As a senior DOJ official, Poux had a high estimation of JAGs, calling them “mission-oriented.” He said he never heard a JAG say, “I don’t know;” instead, they will say, “I’ll find out.” Poux indicated JAGs deciphered military policies and tactics as field personnel tended to be overly technical. In his view, for a DOJ prosecutor to handle a military case without a JAG would be like “trying to get something done in a foreign country without knowing the language.”<sup>167</sup>

All interviewees emphasized the need for JAGs to communicate to DOJ prosecutors what cases the military is seeing and may refer. Herman emphasized the need for JAGs to explain to military personnel how to properly gather evidence given their general lack of training. Poux emphasized special agents assisting military personnel in gathering evidence and JAGs facilitating communications.

Poux, Herman, and Gullo discussed the benefits and challenges of JAGs being Special Assistant US Attorneys (SAUSA). The DOJ may appoint a JAG as a SAUSA to assist on cases related to military functions and authorized to appear in court. The DOD encourages the appointment of SAUSAs for cases involving military interests.<sup>168</sup> The military views SAUSA appointments as prestigious. Poux stated a SAUSA could greatly enhance the DOJ’s understanding of military processes and culture. In turn, Poux says SAUSAs can “demystify” the DOJ for military persons.

Gullo emphasized challenges for SAUSAs given their inexperience with federal criminal procedure and DOJ computers and administration. He thought most JAGs could not simultaneously be a SAUSA and perform full-time military duties. Poux confirmed that a SAUSA position “must be a full commitment.”<sup>169</sup> He related how a SAUSA missed a deadline; that USAO removed him and has not accepted another since. Both Gullo and Herman emphasized the need for a SAUSA’s proximity to the USAO’s physical offices.



Distance imposes challenges because of the lack of access to DOJ computers and the inability to attend hearings.

Poux emphasized the value of personal relationships to ease military–DOJ tensions: “I know it sounds like a cliché, but it is really getting to know people.” He related, “most things go South at 5 pm on a Friday. You need to have a relationship before and after.”<sup>170</sup> Herman agreed: “Ensure you are not dealing with AUSAs for the first time during a crisis.” But he emphasized the limits “personal relationships are important to help comms [communications] but can be overvalued. They are independent. They are going to do what they think is best.”<sup>171</sup>

Interviewees discussed efforts to facilitate interagency communication. Poux said senior military and DOJ leaders should try to meet yearly to demonstrate interoperability. However, he emphasized regular contact between military personnel and prosecutors doing the work. Poux and Herman promoted joint training and information exchanges. DOJ prosecutors will sometimes formalize such information exchanges via LE tasks force meetings. The DOJ will have different entities provide training to broaden perspectives. Herman and Gullo also indicate JAGs could have one-on-one meetings with prosecutors to discuss situations being encountered.

Poux discussed a joint-training curriculum that he has coordinated with the USCG at the Federal Law Enforcement Training Center for more than five years. The most valuable aspect was it got “all the cooks in the kitchen,” namely personnel at operational units, special agents, JAGs, and prosecutors. The three-day training built long-term professional and personal relationships. Among dozens of agencies, Poux’s office has one of the strongest relationships with the USCG due to such efforts. Such cross-training programs are rare, however. Ratner, with more than 10 years of experience, has never received feedback from prosecutors, which is instead channeled through JAGs. Ratner perceived some alienation but assumed it was necessary protocol; he felt that direct communication with the DOJ would have encouraged team spirit.

Poux’s and Gullo’s thoughts differed about how the USCG should refer cases. Poux thought general criteria for case selection should be in writing but not so specific as to override discretion. He offered an example from environmental crimes prosecutions: the criteria are significant environmental harm (or risk thereof) and morally culpable behavior (e.g., criminal intent, obstructing justice, etc.).<sup>172</sup> The DOJ and military should provide clear direction as to how far to investigate the case before referring. He volunteered that, in the vessel pollution context, this direction was put in simple terms: (1) develop probable cause of crime, (2) attempt to interview all potential witnesses, (3) seize all potential evidence, and (4) document the path of pollution

into the water. He emphasized objective criteria was laudatory in nature; facts and circumstance could warrant referral without all “wickets” being hit. In contrast, Gullo stated that the formulaic approach was unrealistic. He proposed using a subjective standard such as “clear and convincing evidence” of a crime. He elaborated the heightened standard provides a benchmark to ensure that the probable cause threshold is exceeded and to demand a substantial amount of investigation has been completed before later referral.<sup>173</sup>

Poux, Herman, and Gullo all described the informal nature of referral briefs. The critical part was to communicate facts. This was best done verbally, with a short PowerPoint to guide the conversation. Memos were unnecessary and delayed timely decision making. Poux and Herman recommended JAGs participate in helping explain law and policy as investigators discussed facts.

Poux and Gullo agreed the USCG sometimes took too long to refer cases. Some referral authorities hesitated in referring the case to the DOJ, viewing the decision as momentous. In contrast, on the DOJ side, all the prosecutor would do is “create a folder” on their computer. The referral would not trigger an indictment but would simply cause additional investigation and review by DOJ and LE authorities. Poux offered the referral authority need not “get into the weeds” and should rely on their subordinates’ judgment. Poux stated, “whether the agency thinks a case is prosecutable doesn’t carry much weight because so much is entrusted to the prosecutor’s review of the facts and discretion.”<sup>174</sup> Gullo cited how a referral got delayed for months at USCG headquarters because JAGs were indecisive about the strength of a case though it had been thoroughly investigated.<sup>175</sup>

Poux and Herman offered views on the different military and DOJ cultures, relating how DOJ prosecutors view themselves as independent, putting less emphasis on the “chain of command.” Appealing a DOJ prosecutor’s decision will have little effect unless it involves unprofessionalism. Instead, prosecutors are persuaded by facts. Poux related how prosecutors tend to be casual because they need to hear all ideas—good and bad ones. In contrast, he thought military people could be noncommittal and “standoffish” because they are accustomed to a more rigorous chain of command. Herman noted the possibility that military personnel unaccustomed to working with the DOJ might not initially understand why their hard work, time, and energy was met by a DOJ decision not to prosecute. He counseled that, most often, prosecutors usually have a “great pulse on what is important and what is not” and have a full picture of national priorities. However, he noted it is of critical importance for military JAGs to ensure their services’ and commanders’ intents are clearly articulated to the DOJ.

## **Analysis, Conclusions, and Recommendations**

### **Analysis**

Military commanders should expect to collaborate with DOJ prosecutors whenever national security challenges require combined military–LE operations. This need may not be readily apparent to commanders at the tactical level since DOJ prosecutors are “finishers,” with military staff and LE agents handling matters in earlier stages of operations.<sup>176</sup> Also, identifying when operations may result in prosecution involves sophisticated knowledge of law and policy, which on-scene units cannot process.

Therefore, commanders at the joint task force or combatant command levels bear the responsibility for preparing to work with DOJ prosecutors. These commanders possess the staff to identify the appropriateness of prosecutions and facilitate them. Moreover, they are required to plan with whole-of-government actors, including the DOJ, in the Joint Operational Planning Process (JOPP) and must consider civilian LE agencies’ needs for information per 10 U.S.C. § 271 “to the maximum extent practicable.”<sup>177</sup> This conclusion also correlates with USCG district commanders—arguably equivalent to geographic combatant commanders—being responsible for referring cases. It also connects, in counterpiracy and counterdrug contexts, how Combined Task Force 151 and JIATF–S are the respective conduits to the DOJ.

Combined military–LE operations may be appropriate when US military operations need to discern between legitimate and illegitimate activities and interdict only those illegitimate ones. That means the United States will need the ability to apprehend, arrest, and imprison bad actors. For example, for DOD assets involved in cybersecurity, mission accomplishment may mean incapacitating a cyberattacker working in cyberspace. Given a kinetic response will typically be unfeasible, ultimate success may mean imprisonment of the cyberattacker or prosecution of a corporation (which could be a covert agent for a foreign power). This paper posits general categories to help identify such situations below.

*National security challenges which can be assisted by military intelligence capabilities or the abilities of military command-and-control (C2) systems to fuse intelligence sources, or a combination thereof.* The best examples are US-CYBERCOM’s “persistent engagement” strategy informing DOJ efforts and JIATF–S’s fusing multiple intelligence sources to combat illicit trafficking.

*Insurrection and domestic disturbance.* In the event of a presidential declaration, the US military would directly assist the attorney general. In the event of an undeclared disturbance, authorities would likely use National Guard

units operating under the authority of their governors, which are not subject to the PCA (e.g., 2021 inauguration security).

*Domestic incidents involving WMD.* While the DOJ is the lead agency for the response, significant incidents may involve military capabilities for a hazardous material response or direct action to capture attackers.

*Nonkinetic national security threats overseas requiring military capabilities.* A prime example is military assets projecting power against nonmilitary threats distant from the United States, e.g., Gulf of Oman counterpiracy. Another example is military intelligence and C2 combating illegal drugs, e.g., JIATF-S.

*National security threats where the military may need to counter illegitimate actors intermingled with legitimate civil society.* Examples include cybersecurity, terrorism, and maritime offenses such as piracy and drug trafficking.

*National security threats where bad actors could be converted to human intelligence sources through the threat of incarceration.* The best example is the successful experience in the counterdrug model.

*Assault by civilians upon US officials, military personnel on assignment, or US nationals abroad.* Examples include referring cases involving assaults on military personnel performing duties domestically or overseas (e.g., the 1998 US Embassy bombing or prosecuting terrorists who killed US service members in Iraq)<sup>178</sup> and the 2020 extradition of terrorists who killed American and French nationals in Syria.<sup>179</sup>

*National security threats requiring the United States to enhance other nations' prosecution capabilities.* In the counterpiracy example, the DOJ sent "resident legal advisors" to build Kenyan prosecution capabilities. Partly answering Joint Special Operations University's proposed research question,<sup>180</sup> the DOJ could bolster Afghan prosecutions of wrongdoers captured by Afghan or coalition forces.

*Lack of Preparation of Military Forces to work with DOJ.* Print sources and interviews indicate a lack of preparation for military forces to work with the DOJ. The lack of concrete guidance and clear expectations can mean preparation can fall upon individual military commanders. Commanders at the tactical level, however, lack the capability to prepare. Critical evidence can go uncollected, important cases can go unprosecuted, or cases not ripe for prosecution can languish in unresolved status, wasting resources.

Given the breadth of Title 10 assistance authorities, numerous exceptions to the PCA, and the ability to partner with LE agencies, commanders should presume that operations requiring the combination of military-DOJ missions power are feasible. Commanders should integrate judge advocates and DOJ prosecutors in the JOPP process to devise specific legal theories, procedures, and feasible courses of action.

Plans may vary depending on whether operations occur inside or outside US territory. Inside US territory, the PCA, Title 10 provisions, and DODI 3025.21 clearly apply within their entirety. Commanders should typically eschew Title 10 forces performing active LE activities, including arrests, searches for evidence, seizures, interdictions conducted solely by Title 10 forces,<sup>181</sup> and interrogations. Exceptions must be supported by a statutory or constitutional exemption. They should be prepared, however, to apply a wide range of assistance to civilian LE, including, but not limited to, sharing information and intelligence, operating equipment to assist LE operations, sharing facilities, and assisting with WMD response.

Outside of US territory, the PCA and related Title 10 provisions *do not* apply as a matter of law. DOD 3025.21 only applies them as a matter of policy, and the secretary and deputy secretary may grant exceptions for “extraordinary and compelling circumstances.” Granting exceptions bear considerable public and foreign policy considerations, warranting advanced planning and consultation with interagency partners, such as the DOS.

Regardless of location, the default protocol is Title 10 forces employing a passive or indirect role in military–LE operations, as best shown in the counterdrug/JIATF–S example. Title 10 forces could vector or transport LE agents to the scene and provide backup (e.g., logistics and security) to LE agents who take investigative actions (e.g., arrests, searches for evidence, and interrogation). Title 10 forces could also carry LE agents who operate weapons to stop vehicles or otherwise compel compliance, as also shown in the counterdrug/JIATF–S example.

The protocol serves to insulate the military from arguments of PCA violations, keep military personnel off witness stands, and safeguard sensitive capabilities from criminal discovery. It also preserves military readiness by avoiding the need for combat units to become proficient with LE procedures, as shown by US Navy destroyers utilizing USCG boarding teams during counterpiracy operations. Finally, it avoids undesirable foreign and public affairs consequences stemming from US combat units patrol, arresting, and taking people to the United States for trial.

When faced with violating PCA restrictions or significant operational failure, military commanders should choose the latter. Military commanders acting in good faith would confront situations where PCA violations are ambiguous or technical, which would not meet the “willful” element for criminal prosecution. Courts have demonstrated an unwillingness to dismiss cases for lack of jurisdiction or suppress evidence for alleged PCA violations. Adverse consequences would be limited to policy implications and administrative remedies such as loss of command.

The term *referral* goes without definition throughout agency guidance and regulations. The term means an “act of sending or directing” something but has multiple implications as to the purpose, including “service, consideration, or a decision.”<sup>182</sup> The lack of a specific definition yields unproductive debate over a critical term of art. This paper posits the following definition: a *referral* is where: (a) the authorized commander informs DOJ officials about an instance where there is a probable cause of a crime and (b) recommends that DOJ prosecutors engage to investigate further to effectuate criminal proceedings.

Part (a) recognizes the chain of command needed. Designating the appropriate level of command facilitates the right entities working together. In the USCG example, the district commander usually makes the referral decision, which necessitates on-scene units to work with MCIO special agents, the right staff officials, and JAGs. The recommendatory aspects in part (b) reflect that a referral is not for “information.” The implication is that the agency thinks it should be prosecuted. Also, the idea that DOJ prosecutors “engage” reflects that they become part of an interagency team investigating the matter. There has already been some investigation,<sup>183</sup> and now they need to engage their investigative resources such as subpoenaing records.

The phrases *accept* or *decline* a referral was discussed by Poux, Gullo, and Herman and bear explication. If the DOJ is accepting a referral, prosecutors will engage in the investigation. If a referral is declined, the DOJ prosecutor will not participate. That does not mean the investigation is over; the investigation could continue with an eye toward reengaging with the DOJ. As Poux suggests, the prosecutor should explain his or her rationale and provide the referring entity with an opportunity to explain otherwise.

A military commander can send cases to the DOJ in two ways: a direct referral or via a LE task force. Sending a case to the DOJ via a LE task force, nominally led by DOJ prosecutors, permits the military to separate itself for optics, PCA issues, and efficiency. Terrorism cases could be sent to a joint terrorism task force and cyber cases to the Cyber-Digital Task Force. For example, JIATF-S sends cases to USCG district commanders, who pass these cases along to DOJ prosecutors in consultation with Main Justice and the DOS. However, sending cases via a LE task force presumes a similar, institutionalized interagency commitment. Where the military cannot simply defer, the military commander should directly refer cases. For instance, the counterpiracy mission was an ad hoc relationship between the military and LE authorities, given US Navy assets distance from logistical support. Another example could be terrorism cases with complex operational concerns; the military would need to show a willingness to hand over a suspected terrorist via a referral.

Either way, military and DOJ authorities need to agree beforehand on what wrongdoings should be sent to the DOJ when encountered by military operations. The need for agreement beforehand is evident in the complexity of whole-of-government operations. Some prosecutions could impact foreign relations, requiring consultation with the DOS. Such consensus may require a “mandate from higher [authority],” as Munsing relates, incentivizing agencies to work together.

Military commanders and DOJ prosecutors should analyze what types of wrongdoing should be addressed using the DOJ’s *Principles of Prosecution*. They should ask whether prosecution would serve a substantial federal interest, a subject is subject to effective prosecution in another jurisdiction, and there is an adequate substitute to criminal prosecution.<sup>184</sup> A prime example is the US Navy’s involvement in counterpiracy. Prosecutions of pirates attacking US-flagged vessels were viewed as serving a substantial federal interest. Pirate attacks not involving other nationals, however, were considered ripe for prosecutions by regional partners such as Kenya. Thus, the US government developed a process to transfer such cases to the regional partners, with the DOJ assisting local prosecutors. Finally, the US government looked for an adequate substitute to prosecution given the numbers of pirates and the cost of prosecutions. The US government thus encouraged private vessels to employ private security guards. This three-part framework stymied a complex threat.

The types of wrongdoing to be addressed by joint military and LE operations should be described in simple terms in writing. For example, military commanders and the DOJ could agree to collaborate to address acts of piracy against US nationals or US-flagged ships. Another example is the USCG and DOJ working to combat international environmental crimes involving significant environmental harm coupled with moral culpability (intent, concealment, etc.).

The next challenge is to provide clear expectations to on-scene personnel. For example, Ratner knew the information to communicate and evidence to gather while doing JIATF-S operations given its robust feedback systems. However, ad hoc military-LE operations can flounder via lack of preparation. While on-scene personnel must develop probable cause of a crime, the threshold for making an arrest or filing charges cannot be sufficient for referral given its low threshold. The best example from Poux’s interview is within the USCG mission to combat illegal vessel pollution. There, USCG operational units understand to recommend referral if they have probable cause of a crime and investigative efforts have reached a specified stage, namely they have (1) attempted to interview all witnesses, (2) documented the path of discharged pollutants into the water, and (3) seized all potential evidence. USCG and DOJ officials know from

experience that this result produces a case worthy of referral. Such guidance to field personnel must be concise given the pressure on them.

Gullo observes it is challenging to devise a list of objective triggers and instead prefers a referral authority's subjective standard such as "clear and convincing evidence." He offered that subjective analysis allows for operational units to assess matters on a case-by-case basis as opposed to one-size-fits-all analysis with objective criteria set in writing.<sup>185</sup> This paper, however, rejects a subjective standard beyond "probable cause" because those standards are intended for use by judges or similar actors who can review evidence in a controlled setting. Heightened subjective standards invite unproductive differences of opinion and delay.

As Poux and Gullo suggest, the referral authority should defer to the judgment of the operational and staff personnel as opposed to "getting into the weeds." The referral authority should be prepared to defer to recommendations to refer the case to the DOJ unless there is a clear indication of a violation of agency policy or the law. The commander ultimately authorizing the referral may consider policy matters such as agency priorities, evenhanded enforcement of the law, international relations, and even optics. Those decisions, however, should be made by the referral authority, not by on-scene personnel who are not privy to such considerations.

DOJ and DOD policies do not mandate a level of command for making a referral. The USCG regulations at 33 C.F.R. § 1.07.90 make good sense, however, by making it the judgment call of the district commander who has the necessary control of entities necessary to effectuate a referral, including control of the on-scene units, the ability to arrange assistance from special agents, and access to policy and legal staffs. By analogy, the referral authority for DOD cases should generally be at the combatant commander-level, where leaders likewise have the required control of operational units and the necessary staff to coordinate a referral. However, there may be a need for the referral decision to be held at even higher levels. For example, in the counterpiracy arena, decisions about prosecuting individual pirates were being made at the Pentagon level. Nevertheless, DOD commanders should attempt to delegate referral authority to lower-level commanders as circumstances permit, similar to how USCG district commanders sometimes delegate authority to refer misdemeanor cases.

As Poux recommended, senior military and DOJ leaders should meet to demonstrate cooperation; however, true interoperability appears to be based upon personal relationships, which breakdown bureaucratic divides. Poux indicated that "things go south" on a Friday afternoon, and people are willing to help each



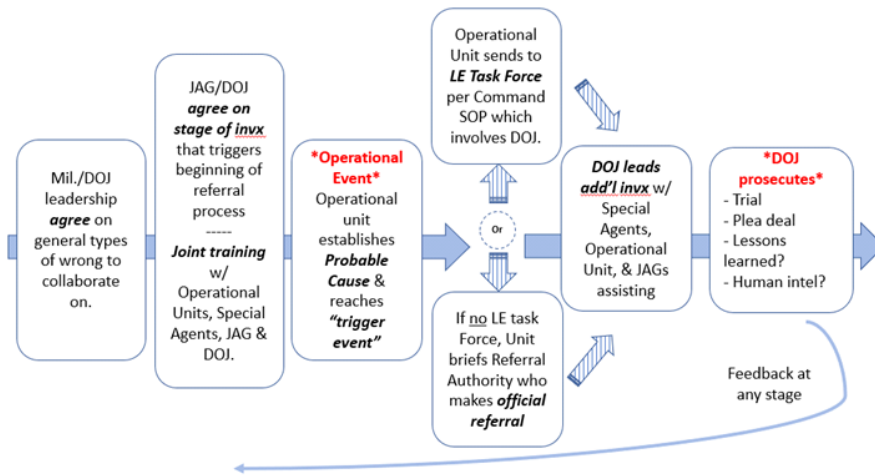
other if they like and trust each other. Munsing likewise indicates common purpose and relationships create “peer pressure” to work hard together.

Gen Dwight Eisenhower, USA, instructed his officers regarding unity of command “patience, tolerance, absolute honesty, . . . and firmness are absolutely essential.”<sup>186</sup> His guidance is apt for military persons working with the DOJ. Patience and tolerance are needed to weather the length and tedium of investigative efforts. Honestly and firmness are critical. Interviewees indicate DOJ prosecutors value honesty and candor even if the subject matter is unpleasant. The margin of error in cases requiring proof beyond a reasonable doubt requires prosecutors to be open to all ideas. Likewise, military personnel must be firm with DOJ prosecutors. The commitment required for a successful prosecution is absolute. If the military is unwilling to devote resources for operational reasons, it must be clearly stated as opposed to delaying the news to avoid bureaucratic friction.

Being absolutely honest with DOJ prosecutors involves giving them the whole picture, even if it reflects mistakes. It is better to be up front with problems in a case. With enough time, prosecutors may be able to avoid detrimental issues. Also, it would be better for the DOJ to decline referral as opposed to prosecutors discovering a latent issue later. This is perhaps why the LE agent in Munsing’s article related, “if you burn a LE guy once, he’ll never trust you again.”<sup>187</sup>

*Integration of operational military personnel, special agents, and military JAGs.* Military–DOJ interoperability necessitates the integration of special agents and JAGs with operational military personnel (who are not special agents). DOJ prosecutors are accustomed to working with special agents to investigate cases and other agency attorneys to help them with legal matters. Further, special agents and JAGs have the requisite training to work with the DOJ, whereas other military personnel likely do not.

Special agents, JAGs, and operational military personnel need to see each other as equal members of a team. The interviews and the counterpiracy example reveal the following effective model. Operational military personnel will lead the LE operation. Special agents, either remotely or on-scene, will assist with gathering evidence. JAGs, usually remotely, will advise on the investigation and be the liaison to the DOJ. After referral, the special agent will serve as the “case agent,” compiling the evidence for the DOJ prosecutor and coordinating further investigation. A graph of the referral process was developed and is shown in figure 6.



**Figure 6. Military/DOJ integration**

Critically, a JAG needs to be involved at all stages. JAGs are critical for analyzing military-specific legal issues and explaining military policies, tactics, and administrative matters to the DOJ. He or she has enough military training to understand the basics of operations or get further information. Without JAG involvement, a DOJ prosecutor doing a military case would be like “trying to do something in a foreign country without knowing the language,” as Poux related. As Poux further stated, DOJ prosecutors tend to be impressed with JAGs’ “mission-oriented” mind-set, where they proactively strive to achieve the mission in a team environment as opposed to taking a more rigid view of an attorney-client relationship.

Military commanders should recommend that the DOJ appoint a JAG as SAUSA for cases requiring significant military–DOJ interoperability. The chief value of a SAUSA is facilitating interagency coordination. The SAUSA would analyze military-unique legal issues and explain military policies and tactics to DOJ prosecutors and communicate to military personnel the evidence sought by the DOJ. The SAUSA’s involvement, however, must be a full commitment. Otherwise, it appears a JAG, not assigned as a SAUSA, could effectively be the liaison to the DOJ without creating an empty expectation of assisting the litigation.

Achieving integration requires a relationship before, during, and after operations. During the pre-operational phase, there should be a training or information exchange that gets “all the cooks in the kitchen,” in Poux’s words.<sup>188</sup> These

include operational military persons, special agents, JAGs, and DOJ prosecutors. The JAG, able to better understand different agency authorities, should manage the training in coordination with the DOJ. If one or more entities cannot attend, the JAG should relay their input. Operational military persons and JAGs should be trained in evidence-gathering procedures to avoid single-point failures. As in the counterpiracy example, military operational persons can be forced to gather evidence without the support of special agents.

Finally, there must be a path for feedback from the prosecutors back to the operational units. DOJ prosecutors will note problems and best practices as prosecutions unfold. DOJ prosecutors find a way to personally communicate these lessons learned in a seminar, as Ratner suggested.<sup>189</sup> If not, JAGs should gather relay their lessons learned.

## **Conclusions**

This paper concludes there is a five-part framework for a successful military–DOJ partnership. First, military and DOJ authorities should agree upon the general types of wrongdoing, which, if encountered during military operations, should be referred to the DOJ for prosecution. Agreement beforehand is critical to the nature of whole-of-government operations and may involve extensive interagency consultation. During this planning phase, military and DOJ authorities would presume the broad assistance authorities at Title 10 of U.S. Code and numerous legal exceptions to PCA permit military–LE collaboration. Military authorities could also plan for the USCG to lead maritime operations as it is exempt from the PCA and related Title 10 provisions. JAGs should work with DOJ and DOS officials (if overseas) to identify specific legal theories and devise compliant tactics.

Second, military and DOJ authorities should identify an operational result that triggers referring cases to the DOJ. The triggering event should be operational units forming probable cause of a criminal offense and reaching an objective stage in the investigation. JAGs and the DOJ should develop the triggering event to be expressed in simple terms and to be calculated to warrant additional investigation for possible criminal proceedings.

Third, military and DOJ authorities should agree upon the level of military command that should exercise discretion to refer the case to the DOJ. The referral authority should have TACON of the operational units conducting the operation and possess adequate staff and JAG support to effectuate the referral. A referral authority should generally be a geographic combatant commander or a USCG district commander who can delegate the referral decision to a subordinate for certain cases. The referral authority should

decide whether he or she will send cases to the DOJ via a LE task force or make an official referral communication to the DOJ.

Fourth, military and DOJ authorities should identify supported and supporting relationships during operational and prosecutorial stages. In general, the DOJ will play a supporting role to the military until there is an official referral; then, the military will play a supporting role to the DOJ prosecution. The need to identify and accept such roles is critical as both agencies have sequential interdependence upon each other for mission success. During operational phases, prosecutors will rely on military personnel to identify the proper cases and collect evidence. After referral, military commanders will rely on the DOJ prosecutor's competence and abilities to effectuate the prosecution.

Fifth, military and DOJ authorities need to establish informational exchanges and joint-training programs for end-to-end feedback. Before military units are expected to conduct LE operations, JAGs and DOJ prosecutors need to develop a training curriculum to guide operations and evidence collection. The ideal training program should involve all key players, including personnel at operational military units, special agents, JAGs, and DOJ prosecutors. If one or more entities cannot attend, the JAG should relay it to them.

## **Recommendations**

The war colleges should implement training models introducing students to DOJ organization, authorities, and capabilities. The DOJ is one of the four central departments of the national security apparatus along with the DHS, DOS, and DOD. The war colleges have training models on all except the DOJ. Training models would help military leaders explore when military and LE instruments of power should be combined to address national security issues domestically and extraterritorially.

The Armed Forces' JAG schools (e.g., US Army JAG Legal Center and School, US Navy Justice School, and USAF Judge Advocate General's School) should train incoming JAGs on the authorities, structure, and missions of the DOJ. The Armed Forces JAG programs should develop similar legal education programs for currently serving JAGs. These schools should also train JAGs on basic LE procedures such as chain of custody and introduce them to how to work with MCIO special agents and LE task forces. Of note, such training models would also help JAGs with guiding investigations for court-martial proceedings. These training modules should explain the limitations imposed by the PCA, related statutes at 10 U.S.C. §§ 371 – 381, and exceptions to the PCA.

The DOD should develop doctrine guiding how Title 10 forces may support LE operations in US territory and outside US territory. This distinction is important to effective planning since the PCA and related provisions apply by policy and not by law. Such enhanced doctrine will aid combatant commanders to apply military and LE instruments of power abroad while considering serious questions of foreign policy and public perceptions. Since 1989, the Office of Legal Counsel has noted “ambiguities” in the DOD’s application of PCA provisions overseas, leading to legal risk.<sup>190</sup> The rise of irregular threats necessitating hybrid responses should incentivize the DOD to resolve these ambiguities.

The Armed Forces and the DOJ should agree upon a specific definition for *referral*. The proposed definition is that a *criminal referral* is where an agency “informs DOJ about a case and recommends DOJ engage in further investigation for potential criminal proceedings.”<sup>191</sup> The DOJ should implement this definition within the DOJ’s *Justice Manual*.

## **Meeting the Future**

The sophistication of asymmetric national security threats is bound to intensify from state and nonstate actors. Adversaries will increasingly seek to use legitimate streams of commerce to harm the United States, negating the United States’ conventional military advantages and requiring the cooperation of military and LE instruments of power. China will likely increasingly use fishing vessels to engage in illegal fishing to expand its sovereign maritime interests;<sup>192</sup> cyberhackers will increasingly exploit the world wide web. In April 2020, during a briefing related to the Coronavirus Task Force, Pres. Donald J. Trump appeared with leaders of the DOJ, DHS, and DOD to announce redeploying DOD assets to engage in counterdrug operations, in part, to counter Venezuela’s suspected involvement in the drug trade.<sup>193</sup> This announcement during a time of crisis demonstrates the need for the military to be prepared, on short notice, to collaborate with LE agencies, especially the DOJ, for the national defense. What is required is open communications, teamwork, and an understanding of mutual objectives. This paper attempted to provide a practical framework to facilitate synergy between military and LE apparatuses.

## Notes

(All notes appear in shortened form. For full details, see the appropriate entry in the bibliography.)

### 1. Notes

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81. Gullo interview.

82. Gullo interview.

83. Gullo interview.

84. Gullo interview.

85. US Department of Justice, “Administratively Determined Pay Charts,” 21 September 2019, <https://www.justice.gov/usao/career-center/salary-information/administratively-determined-pay-plan-charts>.

86. US Joint Chief of Staff, Joint Publication 3-08, I-2, I-7.

87. US Joint Chief of Staff, Joint Publication 3-08, Appendix J.

88. See US Joint Chief of Staff, Joint Publication 3-08, I-7.

89. US Joint Chiefs of Staff, Joint Publication 3-12 (R), III-11, 13.

90. Compare with Joint Chiefs of Staff, Joint Publication 3-12 (R), III-13.

91. See US Army, *Domestic Operational Law Handbook 2018 Handbook for Judge Advocates* (Charlottesville, VA: Center for Law and Military Operations, 2018), 80–81, [https://www.loc.gov/rr/frd/Military\\_Law/pdf/domestic-law-handbook-2018.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/domestic-law-handbook-2018.pdf).

92. See US Joint Chiefs of Staff, Joint Publication 3-07.4: *Counterdrug Operations* (Washington, DC: The Pentagon, 2019), I-4.

93. Congress passed the PCA in 1878 to address perceived misuses of federal troops during the Reconstruction Era. See Name Redacted, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* (Washington, DC: Congressional Research Service, 2018), 18–21, <https://fas.org/sgp/crs/natsec/R42659.pdf>.

94. US Army, *Domestic Operations Law Handbook 2018*, 81.

95. US Army, *Domestic Operations Law Handbook 2018*, 79–80.

96. Name Redacted, *Posse Comitatus Act and Related Matters*.

97. See Munsing, “Joint Interagency Task Force–South,” 6–8.

98. Munsing, “Joint Interagency Task Force–South,” 6.

99. 10 U.S.C. § 276.

100. See 10 USC. § 275.

101. There are several supporting legal theories. First, Congress passed the PCA to address domestic concerns, not overseas use of military power. Second, laws are presumed to apply only within the United States absent a clear intent by Congress otherwise; Congress does not expressly state the PCA or related provisions at Title 10, Chapter 15 apply extraterritorially. Third, 10 U.S.C. § 278 provides that “nothing in this chapter [Chapter 15] shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981.” While there may be arguments that Chapter 15 extends PCA restrictions overseas, § 278 clearly shows Chapter 15 is not intended to restrict activities beyond the PCA itself to include extraterritorial application. See William Barr, Office of Legal Counsel to Assistant to the President for National Security Affairs, 3 November 1989, 337–338, in *US Department of Justice, Office of Legal Counsel*, [https://www.justice.gov/sites/default/files/olc/opinions/1989/11/31/op-olc-v013-p0321\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/1989/11/31/op-olc-v013-p0321_0.pdf). To the extent that different agencies of the US government disagree as to the law, Office of Legal Counsel’s opinion should prevail it advises the president and all other executive branch agencies. See US Department of Justice, “Office of Legal Counsel,” 19 February 2021, <https://www.justice.gov/olc>.

102. See Barr to Assistant to the President, 344. Note the Office of Legal Counsel believes the president's authority to use the Armed Forces to enforce laws derives from the Constitution itself. The PCA and related provisions at Title 10 only somewhat restrict the president's constitutional powers; what they do not prohibit, the Constitution permits.

103. US Department of Justice, "Criminal Resource Manual," §§ 664, 670, 28 February 2021, <https://www.justice.gov/archives/jm/criminal-resource-manual>. These sources note that US territory extends 12 miles off the coast of the United States by Presidential Proclamation 5928.

104. See US Department of Defense, *Defense Support of Civil Authorities*, 3.

105. US Joint Chief of Staff, Chairman of the Joint Chief of Staff Instruction (CJCSI) 3710.02B, *DOD Counterdrug Support* (Washington, DC: The Pentagon, 2007), A-3.

106. 33 U.S.C. §§ 381 – 382. This provides the president may use the public armed vessels of the United States, (which include DOD assets) to subdue and seize any vessel that has committed piratical aggression upon any vessel.

107. 22 U.S.C. § 461. This provides the president may use the Armed Forces to enforce arms embargos pursuant to the Neutrality Act.

108. 16 U.S.C. § 1861a. This authorizes the DHS secretary to receive assistance from naval vessels in enforcing fishery laws.

109. See US Department of Defense, *Defense Support of Civil Authorities*, 5; and US Army, *Domestic Operational Law Handbook* 2018, 90.

110. Name Redacted, *Posse Comitatus Act and Related Matters*, 57.

111. See *US v. Khan*, 35 F.3d 426, 432 (9th Circuit 1994); and *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1478 (11th Cir. 1992)

112. *Khan* 35 F.3d at 432.

113. See Master Communications Specialist Senior Chief William Lovelady, US Navy, Commander, Naval Air Forces, Public Affairs, "HSL-60 'Jaguars' On Prowl for Drugs," *Florida Times-Union*, <https://www.jacksonville.com/article/20130612/NEWS/801251458>.

114. See Name Redacted, *Posse Comitatus Act and Related Matters*, 55.

115. See Name Redacted, *Posse Comitatus Act and Related Matters*, 66. These convictions date to the 1800s.

116. See Barr to Assistant to the President, 336–38.

117. Courts generally hold the exclusionary rule is not applicable to PCA provision; those that have ruled that it does, have refused to apply it. See Name Redacted, *Posse Comitatus Act*, 67–68.

118. See *Black's Law Dictionary*, s.v. "prosecute."

119. 33 C.F.R. § 1.07-90(a).

120. US Coast Guard, Marine Safety Manual, Volume V, Investigations and Enforcement (Washington, DC: US Coast Guard Headquarters, 2008), A3-12, [https://media.defense.gov/2017/Mar/29/2001723821/-1/-1/0/CIM\\_16000\\_10A.PDF](https://media.defense.gov/2017/Mar/29/2001723821/-1/-1/0/CIM_16000_10A.PDF).

121. 33 C.F.R. § 1.07-90(b).

122. 33 C.F.R. § 1.01-1. A district commander has “[f]inal authority for the performance within the confines of his district . . . [including] maritime law enforcement.”

123. *Compare with* 33 C.F.R. § 1.01-1. The regulation states “delegations of final authority run from the District Commander to commanding officers of units under the District Commander for the performance of the functions of law enforcement.”

124. *See* 46 C.F.R. Part 4 (Marine Casualties and Investigations).

125. US Joint Chiefs of Staff, Joint Publication 3-12 (R), I-6.

126. Paul Nakasone and Michael Sulmeyer, “How to Compete in Cyberspace,” *Foreign Affairs*, 25 August 2020, <https://www.foreignaffairs.com/articles/united-states/2020-08-25/cybersecurity>.

127. Julian E. Barnes, “US Cyber Command Expands Operations to Hunt Hackers From Russia, Iran and China,” *New York Times*, 2 November 2020, <https://www.nytimes.com/2020/11/02/us/politics/cyber-command-hackers-russia.html>.

128. *See* Office of Public Affairs, US Department of Justice, “United States Files Complaint to Forfeit 280 Cryptocurrency Accounts.”

129. US Department of Justice, *Report of the Attorney General’s Cyber Digital Task Force* (Washington, DC: Robert F. Kennedy Building, 2018), xii, <https://www.justice.gov/archives/ag/page/file/1076696/download>.

130. US Department of Justice, “US DOJ: Ten Years Later: The Justice Department after 9/11,” 20 February 2021, <https://www.justice.gov/archive/911/protect.html>.

131. Examples include John Walker Lindh (captured during the opening phases of Operation Enduring Freedom) and Iyman Faris (who fought in Kashmir and Afghanistan with the Taliban in the 1980s). *See* US Department of Justice, “US DOJ: Ten Years Later.”

132. *Compare with* Matthew Syed, “View Point: Was CIA ‘Too White’ to Spot 9/11 Clues?” *BBC News*, 19 September 2019, <https://www.bbc.com/news/world-us-canada-49582852>.

133. Finnegan, “Taking Down Terrorists in Court.”

134. Eastern District of Virginia, US Department of Justice, “ISIS Militants Charged with Deaths of Americans in Syria,” 7 October 2020, <https://www.justice.gov/usao-edva/pr/isis-militants-charged-deaths-americans-syria>.

135. Jonathan Bellish, *The Systematic Prosecution of Somali Pirate Leadership and the Primacy of Multi-Level Cooperation* (University of Denver, June 2014), 1, 7, <https://www.law.du.edu/documents/ved-nanda-enter/SystematicProsecutionPaperDU.pdf>.

136. Jay Bahadur and Venetia Archer, “Somalia Pirates Adopt Troubling New Tactics,” *Daily Beast*, 31 January 2012, <https://www.thedailybeast.com/somalia-pirates-adopt-troubling-new-tactics?ref=scroll>.

137. Ploch, *Piracy off the Horn of Africa*, 15, 25.

138. Scott Genovese, “The Maritime Operational Threat Response – The Unified US Response to Maritime Piracy,” *Coast Guard Journal of Safety and Security at Sea* (Spring 2012), 57–58, [https://www.dco.uscg.mil/Portals/9/DCO%20Documents/Proceedings%20Magazine/Archive/2012/Vol69\\_No1\\_Spr2012.pdf?ver=2017-05-31-120745-683](https://www.dco.uscg.mil/Portals/9/DCO%20Documents/Proceedings%20Magazine/Archive/2012/Vol69_No1_Spr2012.pdf?ver=2017-05-31-120745-683).

139. See US Joint Chiefs of Staff, Joint Publication 3-08, III-3, 8.
140. Ploch, *Piracy off the Horn of Africa*, 15.
141. Ploch, *Piracy off the Horn of Africa*, 27.
142. Ploch, *Piracy off the Horn of Africa*, 28–29.
143. Kenneth Scott, *Prosecuting Pirates: Lessons Learned and Continuing Challenges, Oceans Beyond Piracy* (Broomfield, CO: One Earth, One Future, 2012), 16. <https://oceansbeyondpiracy.org/sites/default/files/attachments/ProsecutingPiratesReportDigital.pdf>.
144. Ploch, *Piracy off the Horn of Africa*, 1.
145. Ploch, *Piracy off the Horn of Africa*, 29.
146. Ploch, *Piracy off the Horn of Africa*, 35.
147. Bellish, “The Systematic Prosecution of Somali Pirate Leadership,” 18–19.
148. Bellish, “The Systematic Prosecution of Somali Pirate Leadership,” 15.
149. US Joint Interagency Task Force–South “About Us,” 1 October 2019, <https://www.jiatfs.southcom.mil/About-Us/>.
150. Munsing and Lamb, “Joint Interagency Task Force–South,” 3.
151. Munsing and Lamb, “Joint Interagency Task Force–South,” 3.
152. See US Attorney’s Office, Middle District of Florida, “Columbia Man Pleads Guilty to Drug Charge,” 22 February 2019, <https://www.justice.gov/usao-mdfl/pr/colombian-man-pleads-guilty-drug-charge-1>.
153. US Attorney’s Office, Middle District of Florida, “Columbia Man Pleads Guilty to Drug Charge,” 3.
154. Compare with *US v. Khan*; and *US v. Mendoza–Cecelia*. These cases note the extensive involvement of US Navy ships and personnel, labeling their involvement as “passive” and not implicating the PCA.
155. See Lovelady, “HSL-60 ‘Jaguars’ on Prowl for Drugs.”
156. Lovelady, “HSL-60 ‘Jaguars’ on Prowl for Drugs,” 13.
157. Lovelady, “HSL-60 ‘Jaguars’ on Prowl for Drugs,” 45.
158. Lovelady, “HSL-60 ‘Jaguars’ on Prowl for Drugs,” 45.
159. Compare with Gabriel Marcella, “National Security and the Interagency Process,” 59 in *The US Army War College Guide to National Security Issues, Volume II: National Security Policy and Strategy*, 4th ed., edited by J. Boone Bartholomees, Jr. (Carlisle Barracks, PA: US Army War College, Strategic Studies Institute, June 2010). The author discusses the “nobody’s in charge of interagency relations” in the context of national security.
160. Munsing, “Joint Interagency Task Force,” 54.
161. Munsing, “Joint Interagency Task Force,” 55–56.
162. Munsing, “Joint Interagency Task Force,” 55.
163. Munsing, “Joint Interagency Task Force,” 57–58.
164. Munsing, “Joint Interagency Task Force,” 13–14.
165. Munsing, “Joint Interagency Task Force,” 15.

166. Note: the author's own perspective is also salient as a USCG judge advocate and former officer in charge of a law enforcement detachment, who has assisted DOJ prosecutions of varied maritime infractions.

167. Poux interview.

168. US Department of Defense, Instruction No. 5525.07: *Implementation of the Memorandum of Understanding (MOU) Between the Department of Justice (DoJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes*. Washington DC: The Pentagon, 2007, Enclosure 2, 9. <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/552507p.pdf>.

169. Gullo interview.

170. Poux interview.

171. Herman interview.

172. See also, Michael B. Karr, "Champions Point of View," in *The Coast Guard Journal of Safety at Sea, Proceeding of the Marine Safety & Security Council* (Winter 2004–2005), 9. The information that Poux gives is also publicly available in this source.

173. Poux interview.

174. Poux interview.

175. Gullo interview.

176. See Finnegan, "Taking Down Terrorists in Court."

177. See US Joint Chiefs of Staff, Joint Publication 5-0: *Joint Planning* (Washington, DC: The Pentagon, 2017), I-2.

178. US Joint Chiefs of Staff, Joint Publication 5-0.

179. Eastern District of Virginia, "ISIS Militants Charged with Deaths."

180. Compare with US Joint Special Operations University, *Special Operations Research Topics*, 17.

181. Note that DOD 3025.21, Enclosure (3) at page 20 prohibits "interdictions" by Title 10 Forces. However, in general, the instruction permits Title 10 forces to operate "equipment" to support LE agencies insofar as their participation is indirect (passive) and is responsive to a request by a civilian LE agency. It specifically permits Title 10 forces to operate such equipment for certain serious offenses such as terrorism. Thus, DOD 3025.21 is best summarized as prohibiting interdictions conducted *solely* by Title 10 forces where there is no supported LE agency present. This reading of the instruction also comports with case law noted in the section labeled "Posse Comitatus Act and Related Restrictions and Assistance Authorities of Title 10."

182. *Black's Law Dictionary*, s.v. "prosecute."

183. This paper eschews the term *criminal investigation*, which has different subjective meanings and invites artificial separation between operational military personnel and special agents. Whether something is subjectively a criminal investigation has no real consequence in a court of law, as what matters are the objective facts gathered. The term usually means, bureaucratically speaking, an investigation led by special agents of an MCIO or a LE agency. However, mission success may require investigation by operational military personnel with or without special agent assistance.

184. US Department of Justice, *Justice Manual*, §§ 9-27.000–9-27.300.

185. Gullo interview.
186. Michael Canna, "Command and Control of Multinational Operations Involving US Military Forces," *The Atlantic Council of the United States* (August 2004), 31.
187. Munsing, need title and page number.
188. Poux interview.
189. Ratner interview.
190. Barr to Assistant to President, 344.
191. Who is being quoted?
192. See John Doyle, "Coast Guard Commandant: Illegal Fishing a 'National Security Challenge that Warrants U.S. Response,'" *SeaPower Magazine*, 23 April 2020, <https://seapowermagazine.org/coast-guard-commandant-illegal-chinese-fishing-a-national-security-challenge-that-warrants-u-s-response/>.
193. "Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing," Office of the President of the United States, 1 April 2020, <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-16/>.

## **Abbreviations**

AFOSI	Air Force Office of Special Investigations
AUSA	Assistant US Attorneys
CGIS	Coast Guard Investigative Services
DEA	Drug Enforcement Administration
DOD	Department of Defense
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
JFC	joint force commanders
JOPP	Joint Operational Planning Process
LE	Law enforcement
LEDET	Law enforcement detachment
MCIO	Military criminal investigative organization
MOTR	Maritime Operational Threat Response
NCIS	Naval Criminal Investigative Service
PCA	Posse Comitatus Act
S.D.N.Y.	Southern District of New York
SAUSA	Special Assistant US Attorneys
TACON	Tactical control
USAO	US Attorney's Office
USCG	US Coast Guard
VBSS	Vessel board search and seizure
WMD	Weapons of mass destruction



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