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## **Re: Comments for the Meeting of the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents**

The American Civil Liberties Union submits these comments to the first organizational meeting of the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents to urge the Panel to keep in mind the longstanding historical and constitutionally-based restrictions on the domestic deployment of military forces.

Accordingly, we ask the Panel to refrain from assuming at the outset that choosing to use military forces to respond to domestic emergencies is automatically the best course of action. In fact, using the military in this way could violate traditional American prohibitions against military participation in domestic law enforcement. Civilian authorities, not the military, have historically controlled and directed the internal affairs of the United States. This rule traces its origins to the nation's founding and had been reaffirmed in landmark statutes such as the Posse Comitatus Act, which is designed to preserve the foundational principles of our Constitution and democracy.<sup>1</sup> Unfortunately, our government's increasing domestic use of the military in drug enforcement, in border enforcement, in intelligence matters, and now in emergency response situations risks eroding this fundamental principle. As the Panel fulfills its congressional mandate to evaluate the authorities and capabilities of the Department of Defense (DoD) to conduct operations in support of U.S. civil authorities in the event of a chemical, biological, radiological, nuclear, or high yield explosive (CBRNE) incident, we ask you to recognize the unique threat that militarizing crisis response operations could pose to our democracy.

Avoiding military involvement in civilian law enforcement activities is essential to the protection of Americans' privacy and civil rights. As such, this Panel should consider alternatives for emergency CBRNE response that maintain the traditional dominance of civilian agencies in domestic operations and thereby leave the military to focus on its own mission of fighting foreign enemies. The U.S. Department of Homeland Security,

whose mission includes, “to prevent and deter terrorist threats and to protect against *and respond to* threats and hazards to the nation,” would be the natural agency to house a dedicated CBRNE response capability.<sup>ii</sup>

Where the Panel finds the DoD possesses unique capabilities or equipment, the Panel should recommend that DoD train and equip its civilian counterparts so that these emergency response functions, when required, can be performed by non-military personnel. Where the Panel finds that only the military can perform an essential function, it should recommend assigning that function to state National Guard units rather than federal forces.

Scandals involving DoD programs like the National Security Agency’s warrantless wiretapping program and the Counter Intelligence Field Activity (CIFA) spying efforts against anti-war protesters give Americans little faith that the DoD can effectively keep its operations within established legal limits.<sup>iii</sup> We ask that the Panel keep this propensity to overreach in mind when determining the appropriate role of the military in responding to domestic emergencies.

We would be pleased to meet with members of the Panel or staff to further discuss these issues. Thank you for the opportunity to present our concerns.

Sincerely,



Michael W. Macleod-Ball  
Acting Director, Washington Legislative Office



Michael German  
Policy Counsel

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<sup>i</sup> 18 U.S.C. §1385.

<sup>ii</sup> ONE TEAM, ONE MISSION, SECURING OUR HOMELAND: U.S. DEPARTMENT OF HOMELAND SECURITY STRATEGIC PLAN 2008-2013, (2008), [http://www.dhs.gov/xlibrary/assets/DHS\\_StratPlan\\_FINAL\\_spread.pdf](http://www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf).

<sup>iii</sup> NO REAL THREAT: THE PENTAGON’S SECRET DATABASE ON PEACEFUL PROTESTS, AMERICAN CIVIL LIBERTIES UNION (Jan. 2007), [http://www.aclu.org/pdfs/safefree/spyfiles\\_norealthreat\\_20070117.pdf](http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf).