OTHER SECURITY FORCES TOO: TRADITIONAL COMBATANT COMMANDER ACTIVITIES BETWEEN U.S. SPECIAL OPERATIONS FORCES AND FOREIGN NON-MILITARY FORCES

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I. Introduction

On the night of September 11 and morning of 12 September 2012, more than sixty terrorists conducted three different armed attacks against two U.S. facilities in Benghazi, Libya.[1] Over the course of eight hours, the attacking forces overwhelmed the facilities' on-ground security teams with small arms and mortar fire, killing four Americans, including the U.S. Ambassador to Libya.[2]

During the attacks, the U.S. Department of Defense repositioned aerial assets,[3] teams of Marines,[4] and two teams of special operations forces: the European Command (EUCOM) Commander's In-Extremis Force (CIF), which was on a training mission in Croatia when the attacks began, and a separate Special Operations Forces (SOF) team based in the United States.[5] To the detriment of the besieged U.S. personnel, only unmanned, unarmed aerial surveillance assets arrived on-scene by the time the

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[1] S. REP. NO. 113-134, at 3–9 (2014).

[2] *Id.*

[3] *Id.* at 28.

[4] Two Marine Fleet Antiterrorism Security Teams ("FAST platoons") based in Rota, Spain. *Id.* at 30.

[5] *Id.* at 28. *See also* H. REP. NO. 114–848, at 58 (2016).

survivors and deceased were en route from Benghazi.[6] Given more time, both U.S. SOF teams would have deployed to the crisis scene.[7] As it was, they made it no farther than a staging base in Sigonella, Italy before the evacuation was complete.[8]

Of the two teams, the regionally-aligned CIF is generally more responsive and offers emergency action capabilities for missions such as hostage rescue and noncombatant evacuation, including the capability to immediately assault targets as required.[9] Typically arriving on-scene later, the SOF team based in the United States complements the CIF with more robust capabilities.[10] As a consolidated crisis response force, both teams must coordinate and be prepared to operate in combination with on-scene security forces to eliminate a threat.[11] In Benghazi, had the SOF teams arrived in Libya, this would have meant coordination and operations with overwhelmed security teams comprising of personnel from the U.S. Department of State Bureau of Diplomatic Security, the U.S. Central Intelligence Agency, the Libyan National Police, a local militia, and a local security contractor.[12]

Interagency and international coordination are difficult tasks under the best of circumstances, and become near superhuman in the midst of defending against a multi-pronged attack. At that point, any pre-existing familiarity between an inbound U.S. SOF teams and the on-scene security forces is critical to quickly and effectively eliminating the threat. Unfortunately, the legal framework for building familiarity with foreign security forces rests on an uncertain foundation and U.S. SOF teams entering crises like the Benghazi attacks, may find themselves fighting alongside strangers.

A. Purpose

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[6] S. REP., *supra* note 1, at 28.
[7] *Id.* at 30-31.
[8] *Id.*
[9] H. REP., *supra* note 5, at 58–59.
[10] *Id.* at 59.
[11] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-26, COUNTERTERRORISM II-3 (24 Dec. 2014) [hereinafter JOINT PUB. 3-26].
[12] *Id.*

Through the cloud of political controversy[13] surrounding the Benghazi attacks at least one clear question emerged: What can the United States and its agencies do better next time? The multiple investigations into the Benghazi attacks probed this question from multiple avenues of approach[14] and this article does not rehash or critique the investigations or their findings. Instead, this article focuses on a relatively narrow avenue not previously considered: clarifying and refining the legal and policy frameworks affecting U.S. SOF's ability to enhance interoperability with security forces of friendly foreign countries before a crisis occurs or before a planned operation. With an understanding of legally permissible pre-operational activities with foreign forces, legal advisors can provide the type of accurate and nuanced advice that enables U.S. forces to build key relationships with foreign forces, enhancing readiness through information sharing, combined planning and preparation, and combined safety and familiarization activities.

For this narrow issue, it is important to detail where the law ends and policy begins. As touched on throughout this article,[15] existing restraints on pre-operational activities that hinder U.S. SOF's ability to build relationships with foreign non-military forces, such as the Libyan National police and local militia that responded to the Benghazi attacks, are largely policy based, but often take on the color of law because the policy is long-standing and not widely understood.

To be clear, terrorist attacks like the ones in Benghazi are not the only reason pre-operational activities between U.S. SOF and other security forces of friendly foreign countries are important. The example of the Benghazi attacks is salient, but U.S. SOF's congressionally mandated responsibilities extend beyond counterterrorism and include other activities, such as civil affairs and foreign internal defense,[16] that

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[13] *See generally* Kurt Eichenwald, *Benghazi Biopsy: A Comprehensive Guide to One of America's Worst Political Outrages*, NEWSWEEK (Oct. 21, 2015, 4:18 PM), https://www.newsweek.com/benghazi-biopsy-comprehensive-guide-one-americas-worst-political-outrages-385853.

[14] S. REP, *supra* note 1 (highlighting recommendations for improvement throughout the report); H. REP., *supra* note 5, at 409–414.

[15] *See, e.g.*, discussion *infra* Parts II.D, IV.A.

[16] Foreign internal defense (FID) is the "[p]articipation by civilian and military agencies of a government or international organization in any of the programs or activities taken by a host nation (HN) government to free and protect its society from subversion, lawlessness, insurgency, violent extremism, terrorism, and other threats to its security." JOINT CHIEFS OF STAFF, JOINT PUB. 3-22, FOREIGN INTERNAL DEFENSE ix (17 Aug. 2018) [hereinafter JOINT PUB. 3-22].

necessarily entail working side-by-side with other security forces of friendly foreign countries.[17] This article argues that, when applied to U.S. SOF, the legal framework governing pre-operational activities with foreign forces *does* permit engagements with other security forces of friendly foreign countries, even in the absence of express statutory authority, and that the policy framework should follow suit in order to enhance U.S. SOF readiness for future combined exercises and operations.

B. Defining "Other Security Forces"

Consistent with Chapter 16, Title 10 United States Code, which details the statutory authorities available to the Department of Defense (DoD) for security cooperation with foreign forces, this article distinguishes between "military forces of friendly foreign countries" and "other security forces of friendly foreign countries."[18] Although used throughout Chapter 16, neither term is formally defined. Instead, Chapter 16 defines the related term "national security forces," which, for most purposes, encompasses only government forces at the national level, and not subnational or non-governmental forces. [19] This leaves open the question of whether the defined term subsumes "military forces" and "other security forces" or whether the latter terms, as used in Chapter 16, are also intended to include subnational and non-governmental forces. This article uses "military forces" to refer to national-level military forces and "other security forces" to refer to non-military national, subnational, and non-governmental forces. This is consistent with the DoD's definition of "security forces," which distinguishes between "military forces" and a wide range of other forces, including governmental forces (at all levels of government) and non-governmental forces.[20]

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[17] Special operations activities includes the following: (1) direct action; (2) strategic reconnaissance; (3) unconventional warfare; (4) foreign internal defense; (5) civil affairs; (6) military information support operations; (7) counterterrorism; (8) humanitarian assistance; (9) theater search and rescue; and (10) such other activities as may be specified by the President or the Secretary of Defense. 10 U.S.C. § 167 (2018).

[18] *See, e.g.*, 10 U.S.C. § 321(a)(1) (Supp. IV 2016).

[19] 10 U.S.C. § 301(6) (Supp. IV 2016).

[20] JOINT PUB. 3-22, *supra* note 16, at VI-24, GL-6 (scoping "security forces" to include "military forces; police forces and gendarmeries; border police, coast guard, and customs officials; paramilitary forces; forces peculiar to specific nations, states, tribes, or ethnic groups; prison, correctional, and penal services forces; infrastructure protection forces; [and] governmental ministries or departments responsible for the above forces.").

C. Roadmap

Part II of this article lays the fiscal law groundwork for the U.S. SOF focused discussion to follow, first reminding readers of the three pillars of fiscal law analysis—purpose, time, and amount—focusing on the three-pronged necessary expense rule underpinning any analysis of whether appropriated funds are being used for a valid purpose. From there, Part II progresses to a discussion of *The Honorable Bill Alexander*; the GAO opinion emphasizing the DoD's circumscribed role in security sector assistance activities and articulating the DoD's authority to undertake pre-operational combined-forces activities for "safety and familiarization . . . in order to ensure 'interoperability."'[21] Part II then introduces the concept of Traditional Combatant Commander Activities (TCA) as an expanded set of pre-operational combined-forces activities based on a Combatant Commander's inherent authority to promote regional security in their areas of responsibility and otherwise carry out their statutory duties. Part II concludes by highlighting existing policy that constrains TCA to military-to-military activities. Part III illustrates how this constraint has a particular impact on special operations activities, increasing the probability that U.S. SOF will be called upon to conduct combined operations with unfamiliar other security force partners in response to emerging events. Part IV argues that the military-to-military constraint is policy based and advocates for removing the constraint so that U.S. SOF may efficiently interact with the foreign security forces they will foreseeably be called to fight alongside. Part IV also seeks to align TCA, including activities with other security forces, with the Department of Defense's security cooperation authorities in Chapter 16, Title 10 United States Code. Finally, Part IV proposes codification of TCA to cement U.S. SOF's legal authority to engage with other security forces and to round out Chapter 16, 10 United States Code, so that it explicitly provides for the full spectrum of DoD security cooperation activities.

II. A Fiscal Law Question

The question of whether U.S. SOF may, without express statutory authority, engage in pre-operational activities with other security forces of friendly foreign countries is ultimately a fiscal law one, centered on whether such activities are within the purpose of the Operations and Maintenance (O&M) and military personnel appropriations. The

[21] Hon. Bill Alexander, 63 Comp. Gen. 422, 44 (1984) [hereinafter HBA Opinion].

applicable fiscal law principles are well-established and expounded upon in great detail elsewhere.[22] Accordingly, this Part restates the applicable principles only to the extent necessary to lay the foundation for the discussion that follows.

A. Exercising the Congressional Power of the Purse

The fundamental rule of U.S. fiscal law is that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[23] This "power of the purse" is vested with the U.S. Congress and is regarded as "the most important single curb in the Constitution on Presidential power," [24] requiring an affirmative act by Congress to authorize an expenditure, not merely the absence of a Congressional prohibition.[25] Congress exercises the power of the purse through statutory framework governing the collection and use of public funds[26] and through annual appropriations and authorizations establishing funding levels and the purposes to which public funds may be put.[27]

The statutory framework incorporates the key fiscal law principle that appropriated funds are only available for obligation or expenditure for authorized purposes, within authorized timeframes, and up to authorized amounts. In other words, all obligations and expenditures must be proper

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[22] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-463SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (4th ed. 2016) [hereinafter GAO RED BOOK]; CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., U.S. ARMY, FISCAL LAW DESKBOOK 10-7 (2018).

[23] U.S. CONST., art. I, § 9, cl. 7; *see also* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) (reaffirming that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress").

[24] GAO RED BOOK, *supra* note 22, at 1-5 (citing Edward S. Corwin, *The Constitution and What it Means Today*, 134 (14th ed. 1978)).

[25] United States v. MacCollom, 426 U.S. 317, 321 (1976) (stating "the established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress").

[26] *See generally* GAO RED BOOK, *supra* note 22, at 1-8.

[27] *Id.* at 1-6. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1237, 130 Stat. 2494-96 (2016) [hereinafter FY17 NDAA] (extending the "Ukraine Security Assistance Initiative," which authorizes the use of appropriated funds for purposes such as training for Ukrainian staff officers and senior military leadership); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 9014, 131 Stat. 291 (appropriating $150,000,000 for the Ukraine Security Assistance Initiative for fiscal year 2017).

as to purpose, time, and amount.[28] The requirement to use funds only for authorized purposes is codified at 31 U.S.C. § 1301 (the "purpose statute"), which states that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[29] The time[30] and amount[31] requirements are similarly codified.

B. Conducting a Purpose Analysis—The Necessary Expense Rule

Although violations of any of the purpose, time, and amount requirements can trigger reporting requirements [32] and possible administrative[33] and criminal penalties,[34] the central question of whether O&M funds may be used for U.S. SOF to engage in TCA with other security forces of friendly foreign countries is focused on the purpose requirement. Conducting a purpose analysis begins with the purpose statute. The purpose statute's prohibition is clear and unambiguous,[35] such that the difficulty in applying the statute comes from the near impossibility of spelling out all "objects for which the appropriations were

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[28] *See generally* GAO RED BOOK, *supra* note 22, at 1-23; discussion *infra* Part II.B.

[29] 31 U.S.C. § 1301(a) (2018).

[30] 31 U.S.C. § 1341(a)(1)(B) (2018) (stating a federal officer or employee may not incur obligations "for the payment of money before an appropriation is made unless authorized by law"); 31 U.S.C. § 1502(a) (2018) (stating appropriations are "available only for payment of expenses properly incurred during the period of availability").

[31] 31 U.S.C. § 1341(a)(1)(A) (stating a federal officer or employee may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"); 31 U.S.C. § 1517(a) (2018) (stating a federal officer or employee "may not make or authorize an expenditure or obligation exceeding: (1) an apportionment; or (2) the amount permitted by regulations prescribed under section 1514(a) of this title").

[32] 31 U.S.C. §§ 1351, 1517(b) (2018) (requiring agency heads to "report immediately to the President and Congress all relevant facts and a statement of actions take" when there has been a violation of 31 U.S.C. §§ 1341(a), 1342, or 1517).

[33] 31 U.S.C. § 1349 (2018) (subjecting federal officers and employees violating 31 U.S.C. § 1341(a) or 1342 to "appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office").

[34] 31 U.S.C. § 1350 (2018) (imposing, for knowing and willful violations of 31 U.S.C. § 1341(a) or 1342, criminal penalties up to a "fine[] not more than $5,000, imprison[ment] for not more than 2 years, or both").

[35] 4 Comp. Dec. 569, 570 (1898) (stating "[i]t is difficult to see how a legislative prohibition could be expressed in stronger terms. The law is plain, and any disbursing officer disregards it at his peril.").

made."[36] Accordingly, when applying the purpose statute, one must turn to the necessary expense rule,[37] which entails a three-step analysis for determining whether an obligation or expenditure is indeed "necessary or proper or incident to the proper execution of the object" the appropriation from which it is drawn. [38]

C. Safety and Familiarization Activities

In 1984, the Comptroller General applied the necessary expense rule when examining (among other issues) the use of O&M funds to interact with Honduran military forces under the justification that the U.S. was not providing "formal training," but was merely providing "familiarization and safety orientation at no additional cost to the U.S."[39] The facts of the case and the resulting opinion have been discussed ad nauseum,[40] but are

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[36] 31 U.S.C. § 1301(a) (2018).

[37] 6 Comp. Gen. 619 (1927).

> It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by its express authority.

Id. at 621.

[38] GAO RED BOOK, *supra* note 22, at 3-16–3-17.

> The necessary expense rule embodies a three-step analysis:
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> 1. The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.
> 2. The expenditure must not be prohibited by law.
> 3. The expenditure must not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

Id.

[39] HBA Opinion, *supra* note 21, at 41–49.

[40] A LexisNexis search returns 127 secondary and administrative materials results for the search term "63 Comp. Gen. 422." *See, e.g.*, Major Timothy A. Furin, *Legally Funding*

worth reiterating to clearly identify what constraints were and were not laid out in the opinion.

The decision centered on "Ahuas Tara II," a six-month combined exercise with Honduran military forces, which began in 1983 and ended on 8 February 1984.[41] The exercise entailed the participation of 12,000 U.S troops; the United States funded construction of four–3,000-8,000 foot airstrips, 300 wooden huts to serve as various life support and administrative facilities, and a school; the deployment of two radar systems; medical assistance to 50,000 Honduran civilians; veterinary assistance to 40,000 animals; and artillery, infantry, and medical training to hundreds of Honduran military personnel.[42] Obviously large in scale, Ahuas Tara II prompted the eponymous Honorable Bill Alexander, U.S. House of Representatives, to request that the Comptroller General provide a formal legal opinion on the exercise's fiscal propriety.[43]

Concluding that the DoD had indeed misspent its O&M funds, the Comptroller General's response addressed in detail the variety of fiscal law concerns raised by Ahuas Tara II, including the use of O&M funds for military construction projects, the authority (or lack thereof) to conduct O&M funded civic and humanitarian assistance, and the use of O&M funds to conduct "familiarization and safety orientation" with Honduran military forces.[44] Examining U.S interactions with Honduran military forces, the Comptroller General highlighted their relatively limited pre-exercise capabilities and the substantial training they required before they could adequately participate in Ahuas Tara II.[45] The Comptroller General acknowledged that "some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure 'interoperability' of the two forces."[46] But:

Military Support to Stability, Security, Transition, and Reconstruction Operations, ARMY LAW., Oct. 2008, at 2–7.

[41] HBA Opinion, *supra* note 21, at 8

[42] *Id.*

[43] *Id.* at 1.

[44] *Id.*

[45] *Id.* at 48 (stating it "should [] have been apparent to [the Department of Defense] at the time the exercises were planned that substantial training would be required for adequate Honduran participation: for example, [the Department of Defense] scheduled combined field artillery exercises using 105mm guns with Honduran soldiers who had never been trained on such weapons").

[46] *Id.* at 44.

> [W]here familiarization and safety instruction prior to combined exercises rise to a level of formal training comparable to that normally provided by security assistance projects, it is our view that those activities fall within the scope of security assistance, for which comprehensive legislative programs (and specific appropriation categories) have been established by the Congress.[47]

In other words, training of the Honduran military forces was otherwise provided for under specific security assistance appropriations and, even if it cleared the first two steps, the use of O&M for that purpose failed the third step of the necessary expense rule, violating the purpose statute and, if not correctable, the Anti-Deficiency Act.[48]

Still, the decision explicitly acknowledged the necessity of some level of O&M funded safety and familiarization interaction before combined-force activities. In doing so, it alluded to at least two factors for determining whether safety and familiarization activities with other security forces of friendly foreign countries are within the purpose of the relevant O&M appropriation.

One factor is cost. If proposed safety and familiarization orientation before combined-forces activities are at no additional cost to the United States, then that is an initial indication that the activities may appropriately be funded with O&M.[49] But for safety and familiarization activities to have anything other than the barest viability, some additional costs must be acceptable. Presumably, this would include at least a modicum of pay and allowances, travel expenses, and supply expenses for U.S. forces necessary for minimal safety and familiarization activities.

Depth of training is the other factor. Safety and familiarization activities may include some transfer of information and skills, even if the "transfer is principally in one direction" because one of the participating

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[47] *Id.*

[48] *Id.* at 2–5.

[49] *Id.* at 42 (accepting the principal that O&M funded "familiarization and safety orientation at no additional cost to the U.S." could be permissible, but finding that safety and familiarization orientation before Ahuas Tara II in fact resulted in significant additional cost to the United States).

forces is more developed than other participating forces.[50] At some point, however, a transfer of information and skills is security sector assistance that is otherwise provided for and cannot be funded with O&M.[51] Providing a partner force with a new combat capability is an example of the type of activity that crosses that threshold.[52]

Crucially, the opinion is also notable for what it did not do: constrain authority to conduct O&M funded safety and familiarization activities to military forces of friendly foreign countries. The issues raised were in the context of activities conducted with Honduran military forces. Accordingly, the Comptroller General did not address whether the allowance for O&M funded safety and familiarization activities could also apply to other security forces. This point can be lost when applying the holdings of the *Honorable Bill Alexander (HBA) Opinion*, such that subsequent policy decisions, discussed in the Part II.D, *infra*, are sometimes presumed to have legal force.

D. Traditional Combatant Commander Activities

After the *HBA Opinion*, TCA emerged as an expanded set of permissible pre-operational O&M and military personnel funded activities with the security forces of friendly foreign countries. Originally enunciated in a statutory authorization for which appropriations were never provided,[53] TCA have a somewhat confused history[54] and are now described primarily in a series of orders from the Joint Chiefs of Staff

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[50] *Id.* at 44.

[51] *Id.* (holding that safety and familiarization activities do not include instruction that rises to the level of training normally provided under statutory programs for security assistance).

[52] *Id.* at 48 (noting that Honduran forces required substantial training before executing the combined exercise, including training on 105mm field artillery that the Honduran forces had never previously used).

[53] 10 U.S.C. § 168 (2012), *repealed by* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1253, 130 Stat. 2000, 2532.

[54] MAJ Anthony V. Lenze, *Traditional Combatant Commander Activities: Acknowledging and Analyzing Combatant Commanders' Authority to Interact with Foreign Militaries*, 225 MIL. L. REV. 641, 657–62 (2018) (describing the 1994 enactment of 10 U.S.C. § 168 authorizing "military-to-military contacts and comparable activities," Congress's subsequent failure to appropriate funds for the implementation of the authorization, the zombie revival of military-to-military contacts through Joint Chiefs of Staff orders issued in 1995 and 1996, and the ultimate repeal of the never used statutory authorization in 2016).

(*TCA Orders*) [55] and in guidance published by the implementing geographic combatant commands.[56]

Under the Joint Chiefs of Staff guidance, TCA include at least: military liaison teams; traveling contact teams; state partnership programs; regional conferences and seminars; information exchanges; [57] unit exchanges; staff assistance/assessment visits; training program review and assessments; ship rider programs; joint/combined exercise observers; limited humanitarian and civic assistance (HCA);[58] bilateral staff talks; and medical and dental support planning.[59] At least one combatant command has expanded on this non-exhaustive list to include familiarization events.[60]

This set of "traditional" activities is based in large part on the combatant commanders' authority to conduct activities necessary to carry out their statutory responsibilities. For instance, 10 U.S.C. § 164 states that combatant commanders are "directly responsible to the Secretary for the preparedness of the command to carry out missions assigned to the command." [61] The *TCA Orders* further identify the "long-standing requirement to interact with the militaries of nations within their area of responsibility/area of interest in order to promote regional security and other national security goals" as one of those missions assigned to the combatant commanders.[62] In carrying out that mission, the combatant

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[55] VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING (2 May 1995) [hereinafter TCA ORDER 1]; VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING paras. 2-3 (18 Oct. 1995) [hereinafter TCA ORDER 2]; VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING UPDATE (19 Aug. 1996) [hereinafter TCA ORDER 3].

[56] *See, e.g.*, UNITED STATES SOUTHERN COMMAND, TCA SMART BOOK (14 Oct 2016) [hereinafter SOUTHCOM TCA SMART BOOK]; UNITED STATES EUROPEAN COMMAND, THEATER SECURITY COOPERATION RESOURCES HANDBOOK 161 (22 Jun. 2018) [hereinafter EUCOM TSC HANDBOOK].

[57] This activity is stated as "personnel and information exchanges" in TCA ORDER 2, *supra* note 55, but Congress has since provided separate statutory authority for personnel exchanges that likely precludes their continued inclusion in TCA. *See* 10 U.S.C. § 311 (Supp. IV 2016).

[58] Many humanitarian and civic assistance (HCA) activities are provided for in or prohibited by statute. 10 U.S.C. § 401 (2018). If an HCA activity is otherwise provided for or is prohibited, then it may not be conducted under TCA authority. *See* discussion *supra* Part II.B.

[59] TCA ORDER 2, *supra* note 55, para. 3.

[60] EUCOM TSC HANDBOOK, *supra* note 56, at 161.

[61] 10 U.S.C. § 164(b)(2)(B) (2018).

[62] TCA ORDER 1, *supra* note 55, para. 5.

commanders have statutory authority to direct, organize, train, and employ subordinate commands and forces,[63] while the *TCA Orders* direct O&M and military personnel funding for that purpose, subject to the requirements of the necessary expense rule.[64] Expanding slightly beyond the *TCA Orders*, the combatant commands have themselves referred back to their responsibilities and duties under 10 U.S.C. § 164 to identify additional TCA that may be funded by O&M.[65]

Aside from the requirements of the necessary expense rule, a key restraint on the implementation of TCA is that the *TCA Orders* are primarily focused on interactions with the military forces of friendly foreign countries, with no clear allowance for interactions with the other security forces of friendly foreign countries.[66] The *TCA Orders* do not enunciate a legal requirement for this military-to-military restriction and the executing combatant commands have applied the restriction in different ways. Some have maintained a strict adherence,[67] while at least one combatant command does make a limited exception for "civilians with direct nexus or support to militaries *or security forces*" (emphasis added).[68] In addition, although not addressing the issue head-on, the Secretary of Defense has separately implied that not all TCA need be military-to-military.[69] Nevertheless, until the *TCA Orders* are explicitly

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[63] 10 U.S.C. § 164(c)(1).

[64] *See* TCA ORDER 2, *supra* note 55, paras. 2-3 (authorizing O&M and military personnel funding for TCA except for activities specifically prohibited or otherwise provided for by Congress).

[65] *See* SOUTHCOM TCA SMART BOOK, *supra* note 56, at 10 (identifying invitational travel in support of the powers and duties assigned to the Combatant Commanders in 10 U.S.C. § 164 as permissible O&M funded TCA).

[66] *See* TCA ORDER 1, *supra* note 55, para. 5 ("[TCA] funding fulfills the [Combatant Commands'] long-standing requirement to interact with the militaries of nations within their area of responsibility/area of interest"); TCA Order 2, *supra* note 55, para. 4 ("[t]hese funds fulfill the [Combatant Commands] need for flexible resources to interact with the militaries in their AORs"); TCA ORDER 3, *supra* note 55, para. 1 ("[TCA] is one of the pillars of our foreign military interaction (FMI) initiatives.").

[67] *See* EUCOM TSC HANDBOOK, *supra* note 56, at 161 (reiterating that TCA is "a flexible resource to interact with the militaries in [a combatant command's] area[] of responsibility"); JENNIFER D. P. MORONEY ET AL., RAND CORPORATION, REVIEW OF SECURITY COOPERATION MECHANISMS COMBATANT COMMANDS UTILIZE TO BUILD PARTNER CAPACITY 177 (2013) (noting that the AFRICOM TCA program is "used for mil-mil events").

[68] SOUTHCOM TCA SMART BOOK, *supra* note 56, at 8.

[69] Memorandum from Sec'y of Defense to Secretaries of the Military Department et al., subject: Implementation of Section 8057, DoD Appropriations Act, 2014 (division C of Public Law 113-76) ("the DoD Leahy Law") Tab A (18 Aug. 2014) (distinguishing between "military-to-military contacts" and other types of "individual and collective

updated to allow for TCA between U.S. SOF and other security forces of friendly foreign countries, the commanders that decide when, where, and with whom to conduct TCA are at risk and their legal advisors are appropriately conservative when advising on the scope of TCA.

Ultimately, though, TCA between U.S. SOF and other security forces of friendly foreign countries bear a logical relationship to the O&M and military personnel appropriations, are not prohibited, are not otherwise provided for, and thus do not violate the purpose statute (i.e., it would not in fact be an Anti-Deficiency Act violation to use those appropriations for such TCA).[70] Accordingly, the primary risks are procedural and administrative, rather than legal in nature. The procedural risk stems from the tight timeline for reporting suspected Anti-Deficiency Act violations. A "flash report" must be submitted through command channels to the Office of the Assistant Secretary for Financial Management for the applicable military department within two weeks of discovery.[71] For any individual unaware that the restriction on TCA with other security forces is based on obscure, decades-old policy, rather than any clear legal requirement, submitting the flash report is the safe bet. The flash report, though, triggers an extensive investigatory process that can include both a preliminary review[72] and a formal investigation,[73] exposing the unit that conducted the TCA with other security forces to months of scrutiny.[74] Then, even if the preliminary review or formal investigation concludes that there was no Anti-Deficiency Act violation, the approving commander may still be subject to administrative action for contravening the *TCA Orders*.

As discussed in Part III of this article, the cautiousness that the procedural and administrative risks breed has practical implications for U.S. SOF readiness. Accordingly, Parts III and IV of this article make the argument that, when executed by U.S. SOF, TCA can and should include interactions with other security forces of friendly foreign countries.[75]

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interface activities . . . *where the primary focus is interoperability or mutually beneficial exchanges and not training of foreign security forces*").

[70] *See* discussion *supra* Part II.B and *infra* Parts III–IV.

[71] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 14, ch. 03, para. 030101 (Nov. 2010).

[72] *Id.* at para. 030202.

[73] *Id.* at para. 030205.

[74] The preliminary review alone entails a roughly fourteen week timeline. *Id*. at para. 030202.

[75] There is some disagreement about whether TCA and safety and familiarization activities as described in the HBA Opinion are categorically the same, with TCA

III. With Operational Impacts

Even if the baseline issue is one of fiscal law and policy, its resolution has clear operational impacts for U.S. SOF. The commander of United States Special Operations Command (USSOCOM) must train, equip, and employ U.S. SOF to execute ten statutorily specified activities: (1) direct action; (2) strategic reconnaissance; (3) unconventional warfare; (4) foreign internal defense; (5) civil affairs; (6) military information support operations; (7) counterterrorism; (8) humanitarian assistance; (9) theater search and rescue; and (10) such other activities as may be specified by the President or the Secretary of Defense.[76] By their nature and by military doctrine, many of these special operations activities are necessarily or routinely conducted in combination with foreign other security forces. As a result, restricting TCA to military-to-military interactions has a particular impact on U.S. SOF readiness to execute its statutory missions.

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encompassing safety and familiarization activities, or whether they are wholly separate bases for engaging with security forces of friendly foreign countries. At least one commenter takes the latter position, describing the HBA Opinion as only "tangentially related to the proper legal analysis for military-to-military contacts" conducted as TCA. *See* Lenze, *supra* note 54, at 670. Under this view, activities under the HBA Opinion have the aim of enhancing interoperability, while TCA's purpose is to "interact with [foreign] forces for national and theater strategic goals," with no training permitted. *Id.* at 670-72. This article takes the alternate position that safety and familiarization activities and TCA fall into the same category—pre-operational or pre-exercise activities with security forces of friendly foreign countries that are necessary expenses of the O&M appropriations (i.e., do not require separate statutory authority). Under this view, the HBA Opinion recognized safety and familiarization activities with security forces of friendly foreign countries in order to prepare for and execute missions assigned to the Combatant Commanders as one aspect of the Combatant Commanders' inherent authority. TCA are based on the same inherent authority and are also intended to enhance readiness for future combined forces missions, but incorporate and expand beyond safety and familiarization activities to include other interactions that do not rise to the level of security sector assistance, such as interactions at a regional conference. This view is partially based on the fact that the Geographic Combatant Commands have themselves incorporated familiarization activities into their TCA guidance. *See, e.g.*, EUCOM TSC HANDBOOK, *supra* note 56, at 161. It is also based on Joint Chiefs of Staff guidance that TCA funding from the O&M appropriations cannot be used for events prohibited by Congress or for which Congress has provided other funding sources,, but "can be used to fund any other O and M . . . activity for which the [Combatant Commander] currently has authority." TCA ORDER 2, *supra* note 55. Safety and familiarization activities would seem to be "any other O and M . . . activity for which the [Combatant Commander] currently has authority." As used in this article, the term TCA includes safety and familiarization activities.

[76] 10 U.S.C. § 167(k) (2018). This is in addition to the authorities and responsibilities common to all combatant commanders under 10 U.S.C. § 164.

Although any of the specified SOF activities may be conducted in combination with other security forces of friendly foreign countries, the following sections focus on the four U.S. SOF activities most frequently conducted in combination with other security forces: unconventional warfare, foreign internal defense, civil affairs, and counterterrorism. Each section begins by highlighting the doctrine applicable to a particular activity, focusing on the aspects of each activity that would typically be conducted with other security forces. Each section then provides an illustrative example of the importance of pre-operational activities between U.S. SOF and other security forces of friendly foreign countries. The discussion and examples ultimately demonstrate that, in the absence of a legal prohibition[77] or other statutory funding scheme,[78] U.S. SOF TCA with other security forces is critical for U.S. SOF readiness. Thus, it is "necessary or proper or incident to the proper execution"[79] of the O&M appropriations (or the military personnel appropriations, for certain expenses) and may be funded from those appropriations.[80]

A. Unconventional Warfare

Unconventional warfare (UW), when conducted by the United States, consists of support to indigenous insurgencies or resistance movements to "coerce, disrupt or overthrow a government or occupying power."[81] The best known examples of United States' UW operations are the

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[77] *See* discussion *supra* Part II.D and *infra* Part IV.B (highlighting that existing restrictions on TCA with non-military forces are policy based, not law based).

[78] *See* discussion *infra* Part IV.C (discussing how TCA is not explicitly provided for by statute and can be viewed as a stepping stone to the statutory authorities for that do otherwise provide for security cooperation activities).

[79] 6 Comp. Gen. 619 621 (1927).

[80] *See* discussion *supra* Part II.B

[81] JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS xi (16 July 2014).

> [Unconventional warfare (UW)] consists of operations and activities that are conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied area.

Id. In the National Defense Authorization Act for 2016, Congress adopted this definition, with one modest change, defining unconventional warfare as "activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, *or* guerrilla force in a denied area." National Defense Authorization Act for Fiscal Year 2016, Pub. L.114-92, § 1097, 129 Stat. 726, 1020 (2015) (emphasis added).

multinational "Jedburgh" teams deployed during World War II in support of the French Resistance against occupying German forces.[82] The Jedburgh teams worked alongside the resistance forces, providing training and equipment, maintaining communications between the French Resistance and Allied high command, and liaising between the various factions of the resistance.[83] After World War II, the United States conducted UW operations during the Cold War in locations around the world, including Eastern Europe, Southeast Asia, and Latin America, and in the early days of post-9/11 operations in Afghanistan and Iraq.[84]

Under modern doctrine, effective UW begins well before a crisis, through "long-term preparation, thorough assessments, and relationships with key players."[85] In its UW Pocket Guide, USSOCOM details the importance of Phase 0: Steady State and Phase I: Preparation activities, including activities "to assure or solidify relationships with friends and allies" and "Gain Access to and Identify Resistance Assets."[86] Importantly, Phase 0 and Phase I activities do not necessarily take place under the authority of an approved UW campaign plan or operation.[87] Instead, the planning, preparation, and relationship building in Phase 0 "can include the full menu of theater cooperation engagement activities,"[88] presumably including TCA. Similarly, Phase I relationship building and resistance force analysis takes place before actual contact with resistance forces, which is reserved for Phase II: Initial Contact.[89]

Instead of through direct engagement with resistance forces, early phase preparation, assessments, and relationship building can take place through engagements with the foreign national-level agencies and security forces that have responsibility for developing and overseeing resistance forces. In many cases, the responsible agency will be the foreign Ministry of Defense. This is true, for example, in the Baltic countries. The Estonian

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[82] Joseph L. Votel et al., *Unconventional Warfare in the Grey Zone*, JOINT FORCE Q., 1st Q. 2016, at 106.
[83] *Id.*
[84] *Id.*
[85] David S. Maxwell, *Do We Really Understand Unconventional Warfare?*, SMALL WARS J., http://smallwarsjournal.com/jrnl/art/do-we-really-understand-unconventional-warfare (last visited June 14, 2019).
[86] U.S. SPECIAL OPERATIONS COMMAND, UNCONVENTIONAL WARFARE POCKET GUIDE 11–12 (Apr. 2016).
[87] *See id.* (identifying "Identify Threats, and Design and Plan UW Options" as a Phase 0 activity and "Design, Plan, and Update the UW Campaign" as a Phase I activity).
[88] *Id* at 11.
[89] *Id* at 12.

Defence League,[90] Lithuanian National Defence Volunteer Forces (KASP),[91] and Latvian National Guard (Zemessardze)[92] are volunteer paramilitary forces that will act as resistance forces during foreign invasions and that are formally incorporated into national defense plans and the structure of the national armed forces.[93] As a result, the responsible United States geographic combatant commander is fully empowered under existing U.S. law and policy to conduct relationship-building TCA with the Baltic military forces that can share information about and provide access to the paramilitary resistance forces that U.S. SOF may be called upon to support during future UW operations.

If, however, a volunteer force is organized under a foreign ministry other than the Ministry of Defense, such that other security forces have development and oversight responsibility, TCA policy would constrain the ability of the geographic combatant commander's U.S. SOF assets to prepare for UW. This is true even if the volunteer force is nearly identical to the Baltic paramilitaries in all other respects. A good example is the Ukrainian Donbas Battalion, a group formed in 2014 to resist separatists in the eastern region of Ukraine, including in territory controlled by the separatists.[94] Initially constituted as a private militia, the Donbas Battalion was quickly incorporated into the Ukrainian National Guard.[95] In Ukraine, unlike in the Baltic countries, the Ministry of Internal Affairs, not the Ministry of Defense, oversees the National Guard.[96] As a result of this

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[90] EST. MINISTRY OF DEF., ESTONIAN MILITARY DEFENCE 2026 (2017), http://www.kaitseministeerium.ee/sites/default/files/sisulehed/eesmargid_tegevused/rkak 2026-a6-spreads_eng-v6.pdf; *see also* Andrew E. Cramer, *Wary of Russia's Ambitions, Estonia Prepares a Nation of Insurgents*, N.Y. TIMES, Nov. 1, 2016, at A4.

[91] *National Defence Volunteer Forces*, LITH. ARMED FORCES, https://kariuomene.kam.lt/en/structure_1469/national_defence_volunteer_forces_1357.html (last visited June 14, 2019).

[92] *Latvian National Guard – Zemessardze*, GLOBALSECURITY.ORG, https://www.globalsecurity.org/military/world/europe/lv-zemessardze.htm (last visited June 14, 2019).

[93] James K. Wither, *"Modern Guerrillas and the Defense of the Baltic States*, SMALL WARS J., http://smallwarsjournal.com/jrnl/art/modern-guerrillas-and-defense-baltic-states (last visited June 14, 2019).

[94] Sabra Ayres, *The Donbass Battalion Prepares to Save Ukraine from Separatists*, AL JAZEERA AM. (Jun. 29, 2014, 5:00 AM), http://america.aljazeera.com/articles/2014/6/28/the-donbas-battalionpreparestosaveukrainefromseparatists.html.

[95] *Id.*

[96] *Id. See also* The Government Approved the Strategy for the Development of the Ministry of Internal Affairs until 2020, MINISTRY OF INTERIOR OF UKR., https://mvs.gov.ua/en/news/10872_The_Government_approved_the_Strategy_fo

quirk in the organization of Ukraine's national security apparatus, interactions between U.S. SOF and the other security forces that have direct ties to the Donbas Battalion could not be conducted as O&M funded TCA. In other words, there would be a critical constraint on U.S. SOF's ability to conduct the UW Phase 0 and Phase I planning, preparation, and relationship building that can lead to a successful UW campaign; a constraint primarily based on Ukraine's unique organization of its security forces and not on the nature or mission of the Donbas Battalion itself.

B. Foreign Internal Defense

In many ways the inverse of UW, foreign internal defense (FID) is the activity through which a government such as the United States or an international organization participates in a host nation government's efforts to counter and insulate its populace from internal threats such as violent extremism, insurgency, and other forms of subversion.[97] Foreign Internal Defense often requires a whole of U.S. government approach (i.e., a coordinated effort between executive agencies), with the DoD supporting other agencies' FID activities with routine security cooperation by both SOF and conventional forces, conducted in accordance with a geographic combatant commander's theater campaign plan.[98]

Even though FID is a whole of government activity, U.S. SOF play a unique role and are "forces of choice for FID, due to their extensive language capability, cultural training, advising skills, and regional expertise."[99] In some circumstances, such as in remote areas with a limited U.S. conventional force presence, U.S. SOF may in fact be the sole military FID effort, training host nation forces and conducting information operations with a goal of precluding the need for greater U.S. military participation.[100] Importantly, U.S. SOF's role in a FID operation is not limited to interactions with military forces and may include engagements with other security forces of friendly foreign forces.[101]

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r_the_Development_of_the_Ministry_of_Internal_Affairs_until_2020_PHOTOS_VIDEO_PRESENTATION.htm (last visited Sept. 5 2019).

[97] JOINT PUB. 3-22, *supra* note 16, at ix

[98] *Id.*at ix, I-2.

[99] *Id.* at IV-15.

[100] *Id.* at IV-17.

[101] *Id.* at I-22.

In 2003, after the invasion of Iraq by U.S. SOF and conventional forces and the collapse of the incumbent Iraqi government, U.S. SOF FID activities played an important role in rebuilding the Iraqi Security Forces.[102] In doing so, they engaged with military forces, developing Iraqi SOF. They also engaged with other security forces, working directly with the Iraqi Ministry of Interior Emergency Response Unit.[103] As a direct result of U.S. SOF efforts, the military forces and other security forces developed into "fully capable urban-trained CT force[s]" providing the reformed Government of Iraq a critical capability that was the key to success during the liberation of Mosul from ISIS fourteen years later, in 2017.[104]

Although U.S. SOF development of Iraqi CT forces included training, equipping, and construction that went beyond TCA and required express statutory authority,[105] the example makes clear the importance of U.S. SOF interactions with other security forces of friendly foreign countries. Under slightly different circumstances, such as where the United States is seeking to stabilize a host nation government rather than to install a new government, pre-operational efforts to identify and build relationships with the full range of potential partner forces would, as intended by the *TCA Orders* "promote regional security and other national security goals."[106] This could include readiness to conduct FID if and when directed. Or, by demonstrating U.S. resolve and enhancing host nation situational awareness and capabilities, pre-operational efforts with appropriate partners could even preempt the foreign internal instability that gives rise to FID missions in the first place. But if potential partners include other security forces like the Iraqi Ministry of Interior Emergency Response Unit, the responsible geographic combatant commander and executing U.S. SOF unit cannot rely on the *TCA Orders* and must instead turn to a statutory authority, accept procedural and administrative risk,[107] or forego engagements with the unit all together.

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[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *See, e.g.*, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L.109-13, 119 Stat. 231, 236 (2005) (establishing the Iraq Security Forces Fund (ISFF) "to provide assistance . . . to the security forces of Iraq, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding").
[106] TCA ORDER 1, *supra* note 55, para. 5.
[107] *See* discussion *supra* Part II.D.

C. Civil Affairs

Civil affairs operations, and the broader category of civil-military operations (CMO), [108] enable military commanders to fulfill their responsibility to coordinate and integrate with the host nation civil component during the conduct of military operations.[109] By definition, civil affairs operations require interactions with foreign non-military forces and organizations.[110]

Importantly, civil affairs are not conducted only in the context of combat operations. They are conducted "where [U.S.] military forces are present" [111] and have an ongoing mission to "[c]oordinate military activities with other U.S. Government departments and agencies, civilian agencies of other governments, host-nation military or paramilitary elements, and nongovernmental organizations."[112] Indeed, civil affairs can take place outside any military operation, whether combat or non-combat; military commanders are also responsible for integrating them into "programs[] and activities."[113] In fulfilling their responsibility to coordinate with civil organizations during military operations, programs, and activities, it is almost axiomatic that civil affairs forces should seek interactions that, if conducted with military forces of friendly foreign

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[108] "CMO are the activities performed by military forces to establish, maintain, influence, or exploit relationships between military forces and indigenous populations and institutions (IPI). CMO support US objectives for host nation (HN) and regional stability." JOINT CHIEFS OF STAFF, JOINT PUB 3-57, CIVIL-MILITARY OPERATIONS I-1 (9 Jul. 2018) [hereinafter JOINT PUB. 3-57]. CMO are conducted at "[a]t the strategic, operational, and tactical levels of warfare, during all military operations [in order to] facilitate unified action *between military forces and nonmilitary entities*" (emphasis added). *Id.* at I-3.

[109] *Id*. at I-6.

[110] U.S. DEP'T OF DEF., DIR. 2000.13, CIVIL AFFAIRS Definitions (11 Mar. 2014).

> [Civil affairs operations are] military operations conducted by civil affairs forces that enhance the relationship between military forces and civil authorities in localities where military forces are present; require interaction and consultation with other interagency organizations, intergovernmental organizations, non-governmental organizations, indigenous populations and institutions, and the private sector; and involve application of functional specialty skills that normally are the responsibility of civil government to enhance the conduct of civil-military operations.

Id.

[111] *Id.*

[112] *Id.* at 1.

[113] *Id.* at 2.

forces, would be considered TCA and funded as a necessary expense of O&M.

For example, consider a civil affairs team planning for possible U.S. military operations in an allied foreign country. One risk they identify is that an electronic warfare attack or cyber attack could disable the foreign ally's emergency alert and reporting system. Such an attack would severely restrict the U.S.'s and the ally's ability to communicate with and receive critical information from the civilian population, with potentially devastating effects if the degradation were a precursor to kinetic attacks.[114]

To mitigate that risk and in accordance with the strategic goals of the responsible geographic combatant command, the civil affairs team seeks to interact with the allied foreign country to enhance the team's understanding of the ally's emergency alert and reporting system, identify alternate means of communication with the civilian population, and share information regarding possible defenses against the anticipated electronic warfare attack or cyber attack. The team identifies several means of doing so, including sending a two-person liaison team to the national headquarters of the agency responsible for the emergency alert and response.

During their discussion with their command's legal advisor, the civil affairs team is encouraged that the activity seems to fall within the scope of TCA and sense that they are well on their way to executing a low-cost, high-impact event that will truly enhance regional security. But the civil affairs team is stymied as the discussion progresses when the legal advisor

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[114] This is not an attenuated scenario. In September 2017, Russia reportedly disabled Latvia's emergency services hotline using a mobile communications jammer. Gederts Gelzis and Robin Emmott, *Russia May Have Tested Cyber Warfare on Latvia, Western Officials Say*, REUTERS (Oct. 5, 2017, 6:52 AM), https://www.reuters.com/article/us-russia-nato/russia-may-have-tested-cyber-warfare-on-latvia-western-officials-say-idUSKBN1CA142. This real-world jamming took place during Russia's Zapad 2017 war games, which included approximately 100,000 Russian troops exercising along the borders of the Baltic countries, live fire bombings near the Lithuanian border of Russia's Kaliningrad Oblast, and ballistic missile launches from hard to detect mobile platforms. *Id*. The Lithuanian Defence Minister described Zapad 2017 as a "simulated [] attack on all Baltic countries." *Id.* Presumably, if such an attack were real and not simulated, the U.S. would come to the defense of the Baltic countries in accordance with it North Atlantic Treaty obligations. *See* North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. It would do so with greater readiness if its civil affairs forces were permitted to engage in pre-crisis preparations with the other security forces of vulnerable allies.

asks the fateful question: "does the emergency alert and reporting system fall under the ally's Ministry of Defense?" The answer, unfortunately, is no. The system is the responsibility of the national police, falling under the Ministry of the Interior. The legal advisor dutifully advises the civil affairs team that, since the event is not a military-to-military interaction, it cannot, by policy, be conducted as O&M funded TCA. Instead, the civil affairs team must seek an applicable security sector assistance authority,[115] which requires significantly longer lead-time for planning and approval, or incorporate the event into an existing operation, program, or activity, if one with the necessary scope even exists.

D. Counterterrorism

United States Special Operations Forces counterterrorism (CT) teams, such as the CIF that responded to the Benghazi attacks, must be ready to immediately execute Chairman of the Joint Chiefs of Staff or geographic combatant command crisis response plans in complex operational environments.[116] This requires significant coordination and support from the U.S. agencies, as well as from "[partner nations] for basing and/or forces and [host nation] government and security forces."[117] Joint doctrine acknowledges the valuable deterrence and readiness effects of U.S. CT forces routinely interacting with other security forces of friendly foreign countries pre-crisis.

Pre-crisis, pre-conflict CT shaping activities are deliberately broken into two categories: (1) security cooperation and (2) military engagement.[118] Security cooperation is focused on building partner capacity and capabilities[119] and typically requires express statutory authority, regardless of whether the security cooperation activity is being conducted with a military or non-military force.[120] Military engagement,

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[115] *See, e.g.*, 10 U.S.C. § 321 (Supp. IV 2016) (authorizing U.S. SOF to train with the other security forces of a friendly foreign country).

[116] JOINT PUB. 3-26, *supra* note 11 (noting that "CT crisis response operations are rapid, relatively small scale, of limited duration, and may involve multiple threat locations").

[117] *Id.* at II-3.

[118] *Id.* at II-2.

[119] *Id.*

[120] The term "security cooperation" as used in JOINT PUB. 3-26 predates the definition of "security cooperation programs and activities of the Department of Defense" in 10 U.S.C. § 301(7) (Supp. IV 2016) and the consolidation of security cooperation authorities into Chapter 16, 10 United States Code. As a result, the JOINT PUB. 3-26 use of the term differs in some respects from the statutory use. Still, the similarities are extensive enough

on the other hand, is a "routine" activity "to build trust and confidence, share information, coordinate mutual activities, maintain influence, build defense relationships, and develop allied and friendly military capabilities for self-defense and multinational operations."[121] Critically, as part of overall military engagement efforts, joint doctrine calls for CT forces to engage with military and with other security forces.[122]

The particular importance of routine pre-crisis engagements with other security forces is exemplified in the Benghazi scenario. Recall that the U.S. SOF CT teams responding to the attacks would have, if they had arrived in Libya before U.S. personnel were en route from Benghazi, conducted operations alongside a loosely integrated mix of U.S. interagency, foreign, and private security forces, none of which were military forces.[123] Any pre-crisis U.S. SOF military engagement with those security forces undoubtedly would have improved mid-crisis interoperability through increased familiarization with partner force communications systems and tactics, techniques, and procedures.

Similar attacks on U.S. Embassies and their personnel could realistically unfold in any number of friendly foreign countries, including those to which U.S. SOF has more immediate access. Aside from the generalized threat of terrorists striking any place at any time,[124] potential geographic flashpoints and potential foreign non-military CT force partners can be identified before a crisis occurs. With appropriate leeway to conduct TCA, U.S. SOF could build interoperability with those local CT forces before a crisis occurs.

Bosnia and Herzegovina (BiH) is one of those potential flashpoints with a ready non-military CT force. It is a "cooperative counterterrorism

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that most security cooperation activities under JOINT PUB. 3-26 would fall within the scope of a statutory security cooperation authority. *Compare id.* ("Security cooperation that involves interaction with [partner nation] or host nation [] counterterrorism defense forces builds relationships that promote US [counterterrorism] interests and develops indigenous and [partner nation counterterrorism] capabilities and capacities.") *with* 10 U.S.C § 333 (Supp. IV 2016) (providing statutory authority to build the capacity of foreign national security forces for counterterrorism and other operations).

121 JOINT PUB. 3-26, *supra* note 11 at II-2.

122 *Id.*

123 *See supra* note 12 and accompanying text.

124 *See* NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM, GLOBAL TERRORISM IN 2017: BACKGROUND REPORT (Aug. 2018) (identifying 10,900 total terrorist attacks worldwide in 2017).

partner" that faces extremist threats within its borders.[125] At times, groups opposed to U.S. policies have staged protests in Sarajevo, prompting U.S. Embassy Sarajevo to warn U.S. citizens that "[e]ven demonstrations intended to be peaceful can turn confrontational and escalate into violence."[126] If such a demonstration were to escalate into (or serve as cover for) an attack on the U.S. Embassy or U.S. personnel, U.S. SOF would likely be called upon to respond, as they were in Libya.

When responding, U.S. SOF would likely be working alongside the BiH Ministry of Security's State Investigation and Protection Agency (SIPA), the lead BiH law enforcement unit for counterterrorism.[127] But even though the responsible U.S. SOF unit could identify a terrorist threat to U.S. persons and a cooperative CT partner in BiH with whom it would be valuable to build a relationship in order to counter that threat, pre-crises TCA with the SIPA would not be feasible because the SIPA is an other security force. fo

IV. Aligning TCA with Other Security Sector Assistance Authorities

In Part II, this article made the initial case that the foundational fiscal law principles for pre-operational activities with foreign security forces do not prohibit O&M funded activities with other security forces, highlighting that the only express impediment to such activities with other security forces is the military-to-military focus of the *TCA Orders*.[128] Part III of this article demonstrated the necessity of enabling U.S. SOF to conduct TCA with other security forces of friendly foreign countries. This part returns to the legal analysis, examining more specific possible legal objections to pre-operational activities between U.S. SOF and other security forces of friendly foreign countries, concluding that there is legal leeway for U.S. SOF to conduct O&M and military personnel funded TCA with other security forces; room to maneuver that could be a boon if the *TCA Orders*' policy restrictions are relaxed.

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[125] U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 76 (2018) [hereinafter DoS TERRORISM REPORT].

[126] U.S. DEP'T OF STATE, SECURITY MESSAGE FOR U.S. CITIZENS: DEMONSTRATION IN SARAJEVO ON SUNDAY 12/17 (Dec. 2017) (advising U.S. citizens to avoid the location of demonstrations in Sarajevo protesting the relocation of the U.S. Embassy in Israel from Tel Aviv to Jerusalem).

[127] DoS TERRORISM REPORT, *supra* note 125, at 77.

[128] *See* discussion *supra* Part II.D.

Reticence to apply safety and familiarization or TCA authority to interactions between U.S. military forces and other security forces stems from two places: (1) the Department of State's (DoS) traditional primacy in the realm of security sector assistance, especially with respect to engagements with other security forces of friendly foreign countries; and (2) the potential overlap between safety and familiarization activities or TCA and the security sector assistance programs through which Congress has authorized the funding, training, and equipping of the security forces of friendly foreign countries for a wide range of purposes.

This part examines the DoS's traditional primacy in security sector assistance to demonstrate that the DoS's role is not absolute and does not supersede the DoD's authority to conduct TCA that are necessary for U.S. SOF to fulfill its statutory responsibilities. This part also provides an overview of the express statutory authorities for security cooperation. In doing so, this part shows in the language of the necessary expense rule, those authorities do not "otherwise provide for" TCA with other security forces of friendly foreign countries, such that those activities may be legally funded with O&M. Finally, this part argues for a revived statutory TCA authority in order to cement U.S. SOF's ability to conduct TCA with other security forces of friendly foreign forces and to complete the authoritative legal framework for security cooperation found in Chapter 16, 10 United States Code.

A. "Security Sector Assistance" as an Umbrella Term

The foundational and initial task of defining "security sector assistance" and the related terms "security assistance" and "security cooperation" is not simple, with different branches and agencies of the U.S. government defining and applying the terms differently. This can make it difficult to coherently discuss the respective responsibilities of the various executive agencies or identify where TCA ends and statutory authorities begin.

As a starting point, presidential policy, defined "security sector assistance" as any U.S. Government "policy, program, [or] activity" used to:

- Engage with foreign partners and help shape their policies and actions in the security sector;

- Help foreign partners build and sustain the capacity and effectiveness of legitimate institutions to provide security, safety, and justice for their people; [or],
- Enable foreign partners to contribute to efforts that address common security challenges.[129]

Under this definition, "security sector assistance" includes the relevant policies, programs, or activities of any executive agency. Complicating matters, though, Congress has considered a proposed definition for "security sector assistance" that, in contrast to the presidential policy definition,[130] encompasses DoS programs, but not DoD or other executive agency programs.[131] In addition, Congress has defined "security cooperation" as DoD specific,[132] but it has not defined "security assistance."

The DoD adheres to the presidential policy definition and further defines "security cooperation" as all its relationship building and foreign partner development activities, including "security assistance," which the DoD defines as a subset of security cooperation that is funded and authorized by the DoS and administered by the Defense Security Cooperation Agency.[133] The DoS, on the other hand, uses the term "security assistance" in a manner that contradicts the DoD's definition, employing it to describe *any* DoS or DoD assistance to foreign military or other security forces.[134]

To synthesize these definitions, and consistent with presidential policy, this article uses the term "security sector assistance" to mean: (1) DoS approved, funded, and administered "security assistance;" (2) DoD approved, funded, and administered "security cooperation;" and (3) hybrid

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[129] Press Release, The White House, Office of the Press Secretary, Fact Sheet: U.S. Security Sector Assistance Policy (Apr. 5, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/04/05/fact-sheet-us-security-sector-assistance-policy.

[130] *Id.*

[131] Dep't of State Authorization Act of 2018, H.R. 5592, 115th Cong. (2018).

[132] 10 U.S.C. § 301(7) (Supp. IV 2016).

[133] *See* U.S. DEP'T OF DEF., DIR. 5132.03, DOD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION 17 (Dec. 29, 2016).

[134] *See* U.S. DEP'T OF STATE, Off. of Sec. Assistance., https://www.state.gov/t/pm/sa/ (last visited Oct. 18, 2018); U.S. DEP'T OF STATE, Title 10 Team, https://www.state.gov/t/pm/sa/c78161.htm (last visited Oct. 18, 2018) (describing programs such as 10 U.S.C. § 333, which the DoD terms a security cooperation programs, as "DoD security assistance programs").

security assistance/cooperation, approved and funded by the DoS, but administered by the DoD.[135]

B. Department of State Primacy in Security Sector Assistance

At the outset of security sector assistance programs in the 1940s and 1950s,[136] the Secretary of State was given responsibility for program direction and oversight based on a "principle of civilian leadership, influence, and oversight."[137] At first, it was the President, through Executive Orders, who placed this responsibility in the hands of the Secretary of State.[138] Then, with the Foreign Assistance Act of 1961, the Congress solidified the Secretary of State's oversight responsibility, stating that "[u]nder the direction of the President, the Secretary of State shall be responsible for the continuous supervision and general direction of economic assistance, military assistance, and military education and training programs,"[139] with the Secretary of Defense having much more circumscribed responsibilities focused solely on military assistance.[140]

Although the precise division of responsibilities between the DoS and DoD gradually shifted and became more complex, the DoS retained its overarching responsibility for supervision and direction of security sector

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[135] This also appears to be the approach adopted by the DoD in practice. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-20, SECURITY COOPERATION I-6–I-8 (23 May 2017) (incorporating Department of State (DoS) and Department of Defense (DoD) funded programs into the definition of "security sector assistance").

[136] *See, e.g.*, Greek-Turkish Aid Act, Pub. L. No. 80-75 (1947); Mutual Defense Assistance Act, Pub. L. 81-329 (1949); Mutual Security Act, Pub. L. No. 82-165 (1951); Mutual Security Act, Pub. L. 83-665 (1954).

[137] NINA M. SERAFINO, CONG. RESEARCH SERV., R44444, SECURITY ASSISTANCE AND COOPERATION: SHARED RESPONSIBILITY OF THE DEPARTMENTS OF STATE AND DEFENSE 5–6 (2016) [hereinafter CRS-R44444].

[138] *Id*.

[139] Foreign Assistance Act of 1961, Pub. L. 87-195, § 622(c), 75 Stat. 424 (1961). *See also* CRS-R44444, *supra* note 137, at 37-39.

[140] Foreign Assistance Act of 1961, Pub. L. 87-195, § 623, 75 Stat. 424 (1961). Under the Foreign Assistance Act, the Secretary of Defense has primary responsibility for—

> (1) the determination of military end-item requirements;
> (2) the procurement of military equipment in a manner which permits its integration with service programs;
> (3) the supervision of end-item use by the recipient countries;
> (4) the supervision of the training of foreign military and related civilian personnel;
> (5) the movement and delivery of military end-items; and
> (6) within the Department of Defense, the performance of any other functions with respect to the furnishing of military assistance, education and training.

Id.

assistance programs until the 1980s.[141] Starting in 1981, the Congress began to expand the DoD's role by *ad hoc* "authorizing DOD to directly train, equip, and otherwise assist foreign military and other security forces through new provisions in annual National Defense Authorization Acts (NDAA)."[142] This eventually resulted in a "complex and confusing 'patchwork'" of authorities scattered across Title 10 and NDAAs,[143] recently cleaned up in the Congress's overhaul of DoD security cooperation authorities in the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA). The FY17 NDAA, along with providing new authorities, amended and consolidated existing DoD authorities into a newly enacted Chapter 16, Title 10 United States Code.[144]

Today, the DoS clearly retains security sector assistance primacy, but its authority is not absolute. The DoD does have independent authority under Chapter 16, including the authority to engage with other security forces of friendly foreign countries under some circumstances. The basis for this enhancement of DoD authorities is detailed in the Senate Armed Services Committee (SASC) conference report accompanying the FY17 NDAA.

In the conference report, the SASC initially emphasized that "[t]he Department of State is the lead agency responsible for the policy, supervision, and general management of the United States' [security sector assistance] programs and activities."[145] But in almost the same breath, the SASC also recognized that "the Department of Defense . . . plays a critical role,"[146] and justified its recommendation for the consolidation of DoD security cooperation authorities in Chapter 16 by noting that "over the last 15 years, the Department's engagement with national security forces of friendly foreign countries has expanded substantially in response to changing strategic requirements."[147] The consolidation, although "not intended to create a Department of Defense mission that competes with security assistance overseen by the State Department, . . . [is intended to]

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[141] CRS-R44444, *supra* note 137, at 39–40 (describing the supplementation and expansion of the Foreign Assistance Act through legislation under Title 22, United States Code, executed through the DoS).
[142] *Id.* at 40–41.
[143] CRS-R44444, *supra* note137, at 1.
[144] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L.114-328, § 1241, 130 Stat. 2000, 2497 (2016).
[145] S. REP. NO. 114-255, at 315 (2016) (Conf. Rep.).
[146] *Id.*
[147] *Id.* at 316.

enable the Department [of Defense] to meet its own defense-specific objectives in support of broader defense strategy and plans."[148]

This interplay between DoS and Department of Defense, with the balance of authority in the DoS's hands, carries through to the procedural aspects of the Chapter 16 security cooperation authorities. For many of the security cooperation authorities, the Secretary of Defense is the designated approval authority, but reliant on the Secretary of State for consultation, concurrence, coordination, joint development and planning, or implementation.[149]

At least two patterns emerge when examining the Secretary of State's precise role in security cooperation under Chapter 16. First, the more closely a security cooperation authority resembles traditional security sector assistance, with the primary benefit accruing to the foreign partner, the more in-depth the Secretary of State's involvement.[150] Similarly, Secretary of State involvement can be triggered if the partner security force is another security force of a friendly foreign country.[151] But both those coins have flip sides. First, when there is a clear benefit to U.S. forces from training with the military forces of a friendly foreign country, the DoD has unilateral approval authority, not subject to Secretary of State input.[152] Furthermore, when conducted by U.S. SOF the DoD's unilateral

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[148] *Id.*

[149] *See* 10 U.S.C. § 311(a)(3) (Supp. IV 2016); 10 U.S.C. § 312(b)(1)(B) Supp. IV 2016); 10 U.S.C. § 331(e) (Supp. IV 2016); 10 U.S.C. § 332(b)(1) (Supp. IV 2016); 10 U.S.C. § 333(b) (Supp. IV 2016); 10 U.S.C. § 341(a)(1) (Supp. IV 2016); 10 U.S.C. § 342(f)(3)(B)(i) and (h)(1) (Supp. IV 2016); 10 U.S.C. § 343(c)(2) (Supp. IV 2016); 10 U.S.C. § 344(a)–(b) (Supp. IV 2016); 10 U.S.C. § 346(a) (Supp. IV 2016); 10 U.S.C. § 349(b)(1) (Supp. IV 2016); 10 U.S.C. § 350(c)(1) (Supp. IV 2016).

[150] *See, e.g.*, 10 U.S.C. § 332(b)(1) (requiring Secretary of State concurrence, joint development and planning, and coordination on implementation for programs to provide training and equipment to foreign national security forces).

[151] *See, e.g.*, 10 U.S.C. § 311 (authorizing the Secretary of Defense to enter defense personnel exchange agreements and requiring Secretary of State coordination only to the extent an exchange is with "a non-defense security ministry of a foreign government" or "an international or regional security organization"); 10 U.S.C. § 312 (authorizing the Secretary of Defense to pay expenses necessary for theater security cooperation, including payment of expenses for defense personnel of friendly foreign countries, but requiring Secretary of State concurrence to pay expenses of "other personnel of friendly foreign governments and non-governmental personnel").

[152] 10 U.S.C. § 321 (authorizing the Secretary of Defense to approve training with foreign forces and payment of the foreign forces' incremental expenses, so long as the training supports, to the maximum extent practicable, the mission essential tasks of the participating U.S. unit).

approval authority extends to training with other security forces of friendly foreign countries.[153]

Between U.S. SOF and other security forces of friendly foreign countries is on the flip side of both those coins, where the DoD has the widest latitude. It meets "defense-specific objectives" [154] and does not normally include conventional U.S. forces. In addition, TCA are generally less intensive, executed with fewer resources and for shorter durations than security cooperation activities executed under statutory authority.[155] As a result, without a clear legal prohibition and for so long as the DoD, by Congressional design, retains some unilateral security cooperation authority, the DoS's general security sector assistance primacy should not preclude necessary TCA between U.S. SOF and other security forces of friendly foreign countries.

C. Traditional Combatant Commander Activities as a Stepping Stone to Combined-Forces Activities or to More Intensive Security Cooperation

Congress consolidated the DoD's security cooperation authorities under Chapter 16, Title 10 United States Code, into four overarching categories: (1) military-to-military engagements;[156] (2) training with foreign forces;[157] (3) support for operations and capacity building;[158] and (4) educational and training activities.[159] Within those four categories, there are eighteen specified security cooperation programs and activities. This article does not individually address the scope of each specified program or activity, but it does make the case that the codified security cooperation authorities do not otherwise provide for TCA with other

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[153] *Id.* at (a)(2) (restricting U.S. general purpose forces, but not U.S. SOF, to training only with the military forces of a friendly foreign country); 10 U.S.C. § 322 (authorizing combatant commanders to approve U.S. SOF training with the "armed forces and other security forces of a friendly foreign country," so long as the primary purpose of the training is to train the SOF belonging to that combatant command).

[154] S. REP., *supra* note 145, at 316.

[155] *See* TCA Order 2, *supra* note 55, para. 3; TCA Order 2, *supra* note 55, para. 5–6 (authorizing TCA funding for naturally limited activities, such as "traveling contact teams" and "staff assistance visits," while prohibiting such funding for resource-intensive activities, such as training, construction, research and development, and activities for which Congress has provided a specific authority or funding source).

[156] 10 U.S.C. §§ 311–313 (Supp. IV 2016).

[157] 10 U.S.C. §§ 321–322 (Supp. IV 2016).

[158] 10 U.S.C. §§ 331–336 (Supp. IV 2016).

[159] 10 U.S.C. §§ 341–351 (Supp. IV 2016).

security forces of friendly foreign countries and that O&M funded TCA with other security forces are a legally permissible stepping stone to the more vigorous statutory authorities.

The best way to make that case is by analogizing between TCA with military forces of friendly foreign countries and the same activities with other security forces of friendly foreign countries. As made clear in the *HBA Opinion*, safety and familiarization activities with foreign military forces end where express statutory authority for formal training begins.[160] Similarly, and consistent with the thrust of the *HBA Opinion*, O&M funds provided for TCA with foreign military forces are "not intended to replace or duplicate any other specifically authorized or appropriated funds sources"[161] and are intended to "promote regional security and other U.S. national security goals" [162] up to the point where express statutory authority begins.[163] Thus, O&M funded TCA with the military forces of friendly foreign countries are a means of building familiarity and relationships with potential partner forces that can be a critical first step toward conducting combined exercises or training and equipping under statutory authorities for security cooperation, with an ultimate eye toward readiness for potential combined operations. The table at Appendix A highlights this point, showing how TCA underlie the statutory security cooperation authorities that permit more intensive activities with foreign military forces.[164]

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[160] HBA Opinion, *supra* note 21, at 44 (stating that an activity falls within the scope of legislative authorities for security assistance when it "rise[s] to level of formal training comparable to that normally provided by security assistance projects).

[161] TCA Order 2, *supra* note 55, para. 4.

[162] *Id.*, para. 1.

[163] The limited scope of the examples of TCA provided by the Joint Chiefs is also an indication that TCA are necessarily less intensive than statutory security sector assistance and are not simply a gap filler that can be employed to conduct robust engagements simply because there is no express authority authorizing the activity. *Id.* at para. 3.

[164] The security assistance and hybrid authorities under the purview of the Secretary of State are generally more intensive still. While security cooperation authorities are intended to meet a relatively narrow range of DoD objectives, security assistance and hybrid authorities are intended to achieve a wide range of foreign policy ends. *Compare, e.g.*, 10 U.S.C. § 301(7) (describing the purpose of security cooperation as "build[ing[and develop[ing] allied and friendly security capabilities or self-defense and multinational operations," "provid[ing] the [U.S.] armed forces with access to the foreign country," and "build[ing] relationships that promote specific United States security interests") *with* 22 U.S.C. §2752 (2018) (requiring the Secretary of State to coordinate programs executed under the Arms Export Control Act with broader foreign policy objectives, such as economic assistance) *and* 22 U.S.C. § 2754 (2018) (providing a laundry list of purposes for which military sales or leases may be authorized, including enabling foreign forces to "construct public works and to engage in other activities

With the arguable exception of certain authorities for educational and training activities,[165] each of the statutory authorities for security cooperation also permits activities with other security forces.[166] Like TCA with foreign military forces, TCA between U.S. SOF and other security forces of friendly foreign countries are a critical first step in building the necessary relationships and familiarity to conduct successful combined-forces activities or make effective use of the statutory security cooperation authorities. But, as discussed in Part III, *supra*, and highlighted in Appendix A, the *TCA Orders*' military-to-military policy often removes that first step, creating a gap that would not exist if the anticipated partner force were a military force. This gap persists notwithstanding the fact that, in its 2017 revamping of the DoD's security cooperation authorities, the Congress repeatedly recognized the Department's role, and U.S. SOF's role in particular, in conducting a wide range of security cooperation activities with the other security forces of friendly foreign countries.

To close this gap, Part IV.D, *infra*, proposes policy updates and codification to cement U.S. SOF authority to conduct TCA with other security forces, but those need not be the first steps. The necessary expense rule that forms the basis for O&M funded TCA with the military forces of friendly foreign countries is an adaptive rule; one that reflects "changes in societal expectations regarding what constitutes a necessary expense."[167] Application of the rule already permits O&M funded TCA

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helpful to the economic and social development of such friendly countries"). In addition, security assistance and hybrid authorities are generally focused on providing a level of military training, equipment, and services similar to or beyond what is provided for by security cooperation authorities. *See* CRS-R44444, *supra* note137, at 43–47 (summarizing Title 22 DoS security sector assistance authorities). As a legal matter, if a security assistance or hybrid authority provides for an activity, then it may not be conducted as a TCA. As a practical matter, if a proposed activity meets the definition of TCA, is aimed at achieving a specific DoD objective, and is not provided for by a security cooperation authority, then it almost certainly is not provided for by a security assistance or hybrid authority.

[165] *See, e.g.*, 10 U.S.C. § 346 (Supp. IV 2016) (authorizing distribution of educational and training materials and information technology "to enhance interoperability between the armed forces and military forces of friendly foreign countries," while also authorizing distribution to "military and civilian personnel of a friendly foreign government"); 10 U.S.C. § 347 (Supp. IV 2016) (authorizing personnel from foreign countries to attend U.S. service academies, without making clear whether foreign non-military personnel may attend).

[166] Although there may be differences in how the activities are planned and conducted. *See supra* Part IV.A.

[167] GAO RED BOOK, *supra* note 22, at 3-15–3-16 (stating that the GAO "act[s] to maintain a vigorous body of case law [applying the necessary expense rule] responsive to the changing needs of government").

between U.S. SOF and foreign military forces. Applying the rule when the proposed partner force is another security force invokes no additional strict legal prohibitions or restrictions. To the extent there ever was a bona fide rationale for restricting U.S. SOF ability to conduct O&M funded TCA with other security forces, that rationale should be adapted to account for the DoD's generally enhanced authority to engage with other security forces and for U.S. SOF's statutory responsibility to prepare for combined operations with other security forces of friendly foreign countries.

D. Circumscribing and Codifying TCA Authority

The persistent gap in U.S. SOF's ability to conduct TCA with other security forces is largely a result of the tortured history of those activities.[168] It is also based, however, in the lack of comprehensive, up-to-date guidance, reflecting contemporary realities. The legal and policy touchstones, the *HBA Opinion*[169] and the *TCA Orders*[170] were published in 1984 and 1995–1996, respectively, and are limited in their relevance to the question of whether U.S. SOF may legally engage with other security forces of friendly foreign countries through TCA.

Though highly persuasive and widely followed, the *HBA Opinion* is not strictly authoritative[171] and its reach is limited by the facts presented in the case. It does not address other activities, outside safety, and familiarization, that are within a commander's traditional authority, nor does it address U.S. military interactions, SOF or otherwise, with other security forces of friendly foreign countries. For their part, the *TCA Orders*, although binding on the combatant commands, are policy documents that do not fully account for the fact that U.S. SOF must, by statute, be ready to conduct special operations activities that require working alongside other security forces of friendly foreign countries.

As suggested by other commentators, updated DoD policy guidance would go a long way toward resolving wide-ranging uncertainty regarding

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168 *See supra* notes 53–56 and accompanying text.
169 HBA Opinion, *supra* note 21.
170 TCA ORDERS, *supra* note 55.
171 Authority of the Environmental Protection Agency to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property, 32 Op. O.L.C. 79, 85 (2008) (finding "[t]he opinions of the Comptroller General are not binding on the Executive Branch").

the scope of TCA.[172] It would also help curtail the extra-legal restraints on U.S. SOF interactions with other security forces of friendly foreign countries that hinder U.S. SOF's ability to prepare to execute its statutorily assigned activities. If done at the DoD level in accordance with the DoD Issuances Program[173] a policy update would benefit from a comprehensive internal review and approval process [174] and wide dissemination, especially if published on the public portal for DoD issuances.[175]

In addition to a policy update, this article proposes that the Congress enact a statutory authority for O&M funded TCA under Chapter 16, Title 10 United States Code, in order to achieve several important ends. First, it would place TCA on the strongest possible fiscal law footing. As an express statutory authority, there would be little doubt that the DoD could expend its O&M funds to conduct low-level, but critical, security cooperation activities with appropriate foreign partners in order to prepare for combined-forces activities or build toward more extensive security cooperation under other statutory authorities. In other words, there would be no need to resort to an extensive analysis and the application of the necessary expense rule to confirm the DoD's authority to engage in such activities. Second, it would clarify Congress's full intent concerning the DoD's authority to engage in TCA.[176] In an express statutory authority, the Congress could resolve questions of the DoS's appropriate involvement with TCA, TCA's relationship to the other security cooperation authorities of Chapter 16, the scope of permissible TCA, and, critically for the purposes of this article, U.S. SOF's authority to engage in TCA with the other security forces of friendly foreign countries in order to ensure the effective conduct of the special operations activities specified by the Congress in 10 U.S.C. § 167. Finally, an express authority could

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[172] *See* Lenze, *supra* note 54, at 680 (stating that "[f]or the DoD to more effectively interact with foreign militaries within the limits of the law (and provide a proper long-term understanding), the DoD should publish guidance that clearly articulates that combatant commanders have discretion to conduct such activities under TCA as they see fit").

[173] U.S. DEP'T OF DEF. INSTR. 5025.01, DOD ISSUANCES PROGRAM (1 Aug. 2016) (C2, 22 Dec. 2017).

[174] *Id.* at 18.

[175] *DoD Issuances*, DEP'T DEF. EXECUTIVE SERVICES DIRECTORATE, https://www.esd.whs.mil/DD/DoD-Issuances/ (last visited June 17, 2019).

[176] In this regard, a statutory TCA authority would further the purpose of consolidating security cooperation authorities under Chapter 16, which was to "provide greater clarity about the nature of scope of the Department [of Defense's] security cooperation programs and activities to those who plan, manage, implement, and conduct oversight of these programs." S. REP., *supra* note 145, at 316–317.

improve Congressional oversight of DoD activities, mitigating concerns that the DoD may encroach on the DoS's primacy in security sector assistance or that the combatant commands will turn to TCA, which are relatively easy to execute, when other security cooperation authorities that require higher level coordination and approval are more applicable.

Although an express statutory authority for TCA could take any number of forms, this article proposes several key provisions to ensure the continued effectiveness of TCA as an easily executable security cooperation authority,[177] to implement the apparent intent of the Congress for security cooperation generally, and to ensure appropriate levels of Congressional oversight and DoS involvement. The remainder of this Part argues that an express statutory authority for TCA should: (1) authorize U.S. SOF to engage in TCA with other security forces of friendly foreign countries and (2), with respect to the DoS's involvement, default to the general statutory requirement that the respective chief of mission be kept fully informed of executive agency operations and activities of a foreign country.[178] The remainder of this Part also suggests that, as reasonable restraints on TCA, an express statutory authority could: (1) limit TCA activities to engagements with the national-level military and other security forces of friendly foreign countries and (2) authorize the use of appropriated funds only for the expenses of U.S. forces. Then, using the

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[177] As an inherent authority of the Combatant Commanders, the routine execution of TCA is not subject to the higher level approval or bureaucratic processes applied to the security cooperation authorities currently codified in Chapter 16, Title 10 United States Code. Funds provided for TCA are intended to be "flexible resources," that for "day-to-day operations . . . will not be centrally managed," with the Combatant Commands responsible for "direct oversight and execution . . . within established policy/legal guidelines." TCA Order 2, *supra* note 55, paras. 1 & 4.

[178] 22 U.S.C. § 3927(b) (2018):

> Any executive branch agency having employees in a foreign country shall keep the chief of mission to that country fully and currently informed with respect to all activities and operations of its employees in that country, and shall insure that all of its employees in that country (except for Voice of America correspondents on official assignment and employees under the command of a United States area military commander) comply fully with all applicable directives of the chief of mission.

language of the repealed 10 U.S.C. § 168[179] and the *TCA Orders*[180] as a foundation, Appendix B provides language that could be adopted to codify TCA, including U.S. SOF's authority to engage with the other security forces of friendly foreign countries.

1. Engagement with National Security Forces Only

Congress is clearly concerned with the types of foreign security forces (i.e., the foreign force's mission set and level of government) U.S. military forces engage with. In its conference report accompanying the FY17 NDAA, the SASC justified, in part, the creation of Chapter 16, Title 10 United States Code, by noting the DoD's increased engagements with the "national security forces of friendly foreign countries."[181] Then, in the legislative act, the Congress carefully defined "national security forces"[182] to include only those forces with missions that generally align with the U.S. DoD's national security role[183] and to exclude almost all sub-national

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[179] 10 U.S.C. § 168 (2012), *repealed by* National Defense Authorization Act (NDAA) for Fiscal Year 2017, Pub. L. No. 114-328, § 1253. 10 U.S.C. § 168 authorized military-to-military contacts and comparable activities. The authorization included a list of permissible activities that, when Congress failed to appropriate funds to implement 10 U.S.C. § 168, were largely incorporated into the TCA ORDERS, *supra* note 55. *See also* Lenze, *supra* note 54, at 657–658.

[180] *See* TCA ORDERS, *supra* note 55.

[181] S. REP., *supra* note 145, at 316.

[182] 10 U.S.C. § 301(6) (Supp. IV 2016):

> The term "national security forces", in the case of a foreign country, means the following:
> (A) National military and national-level security forces of the foreign country that have the functional responsibilities for which training is authorized in section 333(a) of this title.
> (B) With respect to operations referred to in section 333(a)(2) of this title, military and civilian first responders of the foreign country at the national or local level that have such operations among their functional responsibilities.

[183] "National security forces" includes only those forces with functional responsibility for:

> (1) Counterterrorism operations.
> (2) Counter-weapons of mass destruction operations.
> (3) Counter-illicit drug trafficking operations.
> (4) Counter-transnational organized crime operations.
> (5) Maritime and border security operations.
> (6) Military intelligence operations.

security forces.[184] It then limited the most robust security cooperation authority, the authority to build partner capacity under 10 U.S.C. § 333 to training and equipping those defined "national security forces."[185] That limitation appears to be a means of limiting the risk of Department of Defense encroachment upon the DoSs' security sector assistance primacy.[186]

For the same reason, limiting TCA to engagement with "national security forces" as defined in 10 U.S.C. § 301(6), would be appropriate. Although not all security cooperation authorities are limited to engagements with "national security forces," [187] especially for those authorities with a direct benefit to U.S. forces,[188] a tradeoff for TCA's ease of execution is a heightened risk of encroachment on DoS primacy. A "national security forces" limitation for TCA would provide some assurance that the approving combatant command is not exceeding its international affairs expertise and, for example, interacting with a local security force unit that may have limited national or international recognition or that may raise U.S. legal concerns, especially if the local security force unit may have committed human rights violations.[189] Tying

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> (7) Operations or activities that contribute to an international coalition operation that is determined by the Secretary to be in the national interest of the United States.

10 U.S.C. § 301(6)(A); 10 U.S.C. § 333(a) (Supp. IV 2016).

[184] Only local first responders with responsibility for counter-weapons of mass destruction operations meet the definition of "national security forces." 10 U.S.C. § 301(6)(B).

[185] 10 U.S.C. § 333.

[186] The SASC expressed concern that the "train and equip" authority does not "create a Department of Defense mission that competes with security assistance overseen by the State Department." S. REP., *supra* note 145 at 316. Instead, security assistance should, in general, still be conducted through DoS programs such as Foreign Military Financing and Foreign Military Sales, through which the United States provides financing (including non-repayable grants) to select countries so that they may purchase U.S. defense articles, services, and training. *See Foreign Military Financing*, DEFENSE SECURITY COOPERATION AGENCY, http://www.dsca.mil/programs/foreign-military-financing-fmf (last visited June 17, 2019).

[187] Indeed, 10 U.S.C. § 333 is the only one.

[188] *See, e.g.*, 10 U.S.C. § 321(a)(1) (Supp. IV 2016) (authorizing training with (as opposed to providing training to) "the military forces or other security forces of a friendly foreign country," which is not defined and presumably could include sub-national forces).

[189] The DoD Leahy Law, which prohibits the use of funds appropriated for assistance to a foreign security force unit if the selected unit has committed a gross violation of human rights, would not apply because TCA does not constitute "training," but the issue may

a statutory TCA authority to the definition of "national security forces" would also provide some assurance that the selected foreign security force units have operational responsibilities that correlate to the DoD's mission.[190]

2. Only U.S. SOF May Engage with Other Security Forces

Permitting only U.S. SOF to conduct TCA with other security forces of friendly foreign countries would be another reasonable restraint on a statutory TCA authority; one that is consistent with other security cooperation authorities and appropriately limits the possibility of encroachment on DoS primacy in security sector assistance. Chapter 16, 10 United State Code addresses security cooperation activities with other security forces in two ways. For example, 10 U.S.C. § 311 authorizes the exchange of defense personnel[191] between the United States and friendly foreign countries, but requires Secretary of State concurrence if the exchange is with a non-military ministry or organization.[192] On the other hand, 10 U.S.C. § 321 authorizes training with friendly foreign countries

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still cause Congressional or international concern. *See* 22 U.S.C. § 2378d (2012); 10 U.S.C. § 362 (Supp. IV 2016); Memorandum from Sec'y of Defense to Secretaries of the Military Department et al., subject: Implementation of Section 8057, DoD Appropriations Act, 2014 (division C of Public Law 113-76) ("the DoD Leahy Law") Tab A (18 Aug. 2014) (stating training requiring DoD Leahy Law vetting does not include typical TCA, such as: incidental familiarization, safety, and interoperability training; subject matter expert exchanges; military-to-military contacts; seminars; conferences; partnerships; pre deployment site surveys; planning and coordination visits; and other small unit exchanges).

[190] *See supra* note 183 and accompanying text. One potential difficulty with adopting the 10 U.S.C. § 301(6) definition of "national security forces" in a codified TCA authority is that the such forces must have "functional responsbilit[y]" for at least one of the types of operations identified in 10 U.S.C. § 333, which does not explicitly include the SOF activities of unconventional warfare, internal defense, or civil affairs. In most cases, though, the foreign national security forces responsible for those activities are likely also responsible for one of the types of operations explicitly identified in 10 U.S.C. § 333. For instance, a foreign force responsible for developing and overseeing potential resistance forces would likely also have border security responsibilities, while a foreign force responsible for protection against internal threats would also have counterterrorism responsibilities, and a foreign force responsible for civil affairs could also have responsibility for any one or more of the operations identified in 10 U.S.C. § 333.

[191] Including personnel of a defense ministry, security ministry, or international or regional security organization. 10 U.S.C. § 311(a)(2)(B) (Supp. IV 2016).

[192] 10 U.S.C. § 311(a)(3) (requiring Secretary of State concurrence for personnel exchanges with "[a] non-defense security ministry of a foreign government" or "[a]n international or regional security organization").

without requiring Secretary of State input, but permits only U.S. SOF to train with the other security forces of friendly foreign countries.[193] For TCA, the latter restraint would be more appropriate because U.S. SOF have the primary need to interact with other security forces and it would maintain ease of execution for events that may arise on short notice and should not be time or resource intensive.

3. Expenses of United States Forces Only

A statutory TCA authority should permit the expenditure of appropriated funds only for the expenses of United States forces. As a general matter, the O&M appropriations available for most TCA are for the "operation and maintenance of the [military departments or activities and agencies of the Department of Defense],"[194] such that the use of such funds for the benefit of foreign forces are not necessary expenses of the O&M appropriations. Instead, the use of O&M funds to pay expenses for the benefit of foreign forces requires a separate express statutory authority.[195] In many cases, a requirement to pay the expenses of participating foreign forces is an indication that an event has progressed beyond TCA[196] and should be executed, in whole or in part, under another security cooperation authority.[197] In addition, limiting authorized expenditures to only those necessary for U.S. forces is another means of ensuring that TCA can be executed efficiently, but do not become a

[193] 10 U.S.C. § 321(a)(2) (restricting U.S. general purpose forces, but not U.S. SOF, to training only with the military forces of a friendly foreign country).
[194] Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 130 Stat. 232 (2016).
[195] *See, e.g.*, 10 U.S.C. § 312(b) (2018) (authorizing, when necessary for theater security cooperation, the payment of travel, subsistence, and similar personnel expenses for non-governmental personnel and the defense and other personnel of friendly foreign governments).
[196] *See* discussion *supra* Part II.C (identifying cost and level of assistance provided to foreign forces as factors for determining whether an activity may be funded with O&M).
[197] For example, if a foreign force requires assistance with travel expenses to attend a conference hosted by a combatant command, the costs of hosting the conference could be funded under TCA authority, but the travel expenses of the foreign force should be funded in accordance with 10 U.S.C. § 312 which, in the language of the necessary expense rule, "otherwise provides for" the payment of personnel expenses necessary for theater security cooperation. As another example, if a proposed U.S. "traveling contact team" will require a foreign force to incur substantial incremental expenses, then that is a good indication that the proposal is not in fact for a traveling contact team, but is for a more intensive security cooperation event, such as an event to train with foreign forces that should be funded under 10 U.S.C. § 321.

substitute for other security cooperation activities for which higher approval levels or greater DoS involvement is warranted.

4. Keeping the Department of State Informed

As currently implemented, combatant commanders must obtain the concurrence of the appropriate United States Embassy before conducting TCA,[198] but are not required, as they would be for most security cooperation authorities under Chapter 16, Title 10 United States Code, to involve the Secretary of State.[199] In a codified TCA authority, the Congress *could* insert a requirement for concurrence for the relevant United States Embassy, but doing so would deviate from Congressional practice for the other Chapter 16 authorities which, when DoS involvement is warranted, place responsibility at the Secretary level and not at the subordinate Embassy level.[200] On the other hand, consistent with its practice for the other Chapter 16 authorities, Congress *could* require Secretary of State involvement (concurrence or otherwise) and leave it to the Secretary to delegate that authority.[201] Either of those alternatives, though, would defeat the necessary efficiency of TCA, creating legal hurdles where none currently exist and impairing the purpose of TCA as a stepping stone. Instead, a statutory TCA authority should remain silent on DoS involvement, defaulting to the general statutory requirement that the executing combatant command keep the responsible chief of mission "fully and currently informed" of all TCA in a given country.[202] This would preserve a role for the DoS in the TCA process while maintaining the vital efficiency of TCA.

V. Conclusion

The United States' strategic approach to national defense, outlined in the *Summary of the 2018 National Defense Strategy*, is built on three

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198 TCA ORDER 2, *supra* note 55, at para. 1.

199 *See* sources cited *supra* note 149 and accompanying text.

200 *Id*.

201 *See* CRS-R44444, *supra* note137, at 8 (stating "[a]ctivities requiring concurrence are generally reviewed at the highest levels of the State Department").

202 22 U.S.C. § 3927(b) (2018) (requiring that "[a]ny executive branch agency having employees in a foreign country shall keep the chief of mission to that country fully and currently informed with respect to all activities and operations of its employees in that country").

pillars.[203] One of those three is "Strengthen[ing] Alliances and Attract[ing] New Partners,"[204] recognizing that "[o]ur allies and partners provide complementary capabilities and forces along with unique perspectives, regional relationships, and information that improve our understanding of the environment and expand our options."[205] Maintaining this pillar requires "[e]xpanding regional consultative mechanisms and collaborative planning"[206] and "[d]eepen[ing] interoperability."[207]

Traditional Combatant Commander Activities are tools almost tailor-made for furthering these strategically important initiatives. "Expanding consultative mechanisms and collaborative planning" at the national level becomes "bilateral staff talks" and "regional conferences and seminars" at the combatant command level, while "[d]eepen[ing] interoperability" becomes "information exchanges," "unit exchanges," and "safety and familiarization events."[208] When conducted with foreign military forces, TCA do not require statutory authority and are efficient and cost-effective, answering the *National Defense Strategy*'s call to extend the United States' network of alliances and partnerships in order to deter and decisively act against shared challenges.[209]

But when it comes to executing the *National Defense Strategy* through TCA with the other security forces that are natural partners for U.S. SOF, the DoD is self-defeating. Internal TCA policy that focuses on military-to-military interactions fails to account for the fact that by statute and doctrine, U.S. special operations are frequently conducted by, with, and through foreign non-military forces. For future operations like the Benghazi attacks or like the scenarios described in Part III, *supra*, this increases this risk that U.S. SOF will not know the forces they are operating alongside or how they fight and communicate.

This self-inflicted hamstringing is unwarranted. Properly scoped TCA between U.S. SOF and other security forces of friendly foreign forces are necessary, not prohibited, and not provided for in any statutory security

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[203] U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 4–11 (2018) [hereinafter NATIONAL DEFENSE STRATEGY].
[204] *Id.* at 8.
[205] *Id.*
[206] *Id.* at 9.
[207] *Id.*
[208] *See supra* notes 57–60 and accompanying text.
[209] *See* NATIONAL DEFENSE STRATEGY, *supra* note 203, at 8.

sector assistance authority. Thus, with minor revisions to the *TCA Orders* that are the source of the military-to-military restriction, TCA between U.S. SOF and other security forces could immediately be conducted as necessary expenses of the O&M and military personnel appropriations. To the extent that departmental oversight and standardization of TCA remains a concern, a new, formal DoD TCA policy could address those issues, as formal policy does for so many other DoD activities. Then, if the Congress chooses to conclusively lay the issue to rest, a statutory authority could be comfortably integrated into the recently reformed statutory frame work for security cooperation.

Appendix A. A Comparison of Authorities to Engage with Military Forces of Friendly Foreign Countries and Other Security Forces of Friendly Foreign Countries

This appendix highlights the disparate treatment of TCA with military forces of friendly foreign countries and TCA with other security forces of friendly foreign countries. This policy-based disparate treatment persists despite the fact that in the FY17 NDAA Congress provided authority for U.S. forces to interact with both military forces and other security forces for all statutory security cooperation activities. The block for TCA with other security forces of friendly foreign countries is yellow instead of red only because at least one combatant command makes a limited allowance for TCA with "civilians with direct nexus or support to militaries *or security forces*" (emphasis added). UNITED STATES SOUTHERN COMMAND, TCA SMART BOOK 8 (14 Oct 2016).

Appendix B. Proposed Statutory Authority for TCA Traditional Combatant Commander Activities

(a) PROGRAM AUTHORITY.—The commander of any unified or specified combatant command may approve traditional combatant commander activities with the national security forces of friendly foreign countries that are designed to promote regional security and other national security goals.

(b) AUTHORIZED ACTIVITIES.—Activities that may be approved under subsection (a) include the following:

(1) The activities of traveling contact teams.

(2) The activities of military liaison teams.

(3) Safety and familiarization activities.

(4) Seminars and conferences held primarily in a theater of operations.

(5) Distribution of publications primarily in a theater of operations.

(6) Other engagement activities within the traditional authority of a combatant commander.

(c) LIMITATIONS.—Activities conducted pursuant to subsection (a) are subject to the following limitations:

(1) Activities conducted by the general purpose forces of the United States must be primarily with the national military forces of a friendly foreign country.

(2) Payment of expenses is limited to expenses necessary for the participation of the U.S. armed forces and no expenses may be paid for the incremental or other costs of other countries.

(d) REGULATIONS.—The Secretary of Defense shall prescribe regulations for the administration of this section. The regulations shall establish accounting procedures to ensure that the expenditures pursuant to this section are appropriate.