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NATIONAL SECURITY RESEARCH DIVISION

Improving Interagency Information Sharing Using Technology Demonstrations

The Legal Basis for Using New Sensor
Technologies for Counterdrug Operations
Along the U.S. Border

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Summary

The Department of Defense (DoD) has been developing new sensor and data fusion capabilities for military forces for many years, and has significant experience in developing advanced sensor capabilities for a wide range of contingencies and missions. New and innovative intelligence, surveillance, and reconnaissance (ISR) capabilities have been developed to support military forces operating in Iraq and Afghanistan. These new capabilities, initially developed for overseas operations, may have the potential to provide important new detection and monitoring (D&M) capabilities that could be used along the U.S. border by the Department of Homeland Security (DHS), the Drug Enforcement Administration (DEA), and DoD.

DoD's Office of the Assistant Secretary of Defense, Research and Engineering (OASD/R&E), Rapid Reaction Technology Office (RRTO) organizes U.S.-based technology demonstrations to test and demonstrate the potential of such ISR technologies in as realistic an operational environment as possible (i.e., in field conditions that closely resemble those found in current theaters of operation, such as areas along the southern U.S. border). In this report, we focus on RRTO's Thunderstorm series of demonstrations.¹

U.S. law mandates information sharing among federal departments and agencies for national security purposes. Title 6 of the U.S. Code (USC) calls for the President to establish an information sharing environment (ISE) that all federal agencies are to use and share. Title 6 USC also directs DoD and other government agencies to support the development of an ISE that enables relevant national security and surveillance information to be shared between government agencies. The information sharing and safeguarding strategy published by the White House has specified that the ISE should also apply to information relevant to counterdrug operations.²

Title 10 USC directs DoD to play a key role in domestic counterdrug (CD) operations in support of U.S. law enforcement agencies. Title 10 USC, Section 124, designates DoD as the lead federal agency for D&M of air and maritime traffic to detect the transit of illicit drugs across the U.S. border. Furthermore, Section 1205 of the 1990 National Defense Authorization Act (NDAA) states that the Secretary of Defense should ensure that DoD conducts adequate research and development activities to improve its ability to carry out the CD D&M

¹ Thunderstorm demonstrations are conducted and sponsored by RRTO. Their purpose is to provide an enduring technology demonstration venue: to identify new, emerging, and transformational ISR technologies; demonstrate sensor, fusion, and display capabilities; and to improve information processing, exploitation, and dissemination concepts of operation. Thunderstorm participants have come from DoD, U.S. industry, U.S. Interagency partners, academia, and international industry firms.

² The White House, *National Strategy for Information Sharing and Safeguarding*, Washington, D.C., December 2012.

functions assigned to it.³ Therefore, it is appropriate for DoD acquisition authorities to undertake initiatives that can demonstrate effective CD D&M capabilities and effective interagency information sharing for CD operations.

Legal concerns have been raised as to whether Thunderstorm demonstrations, with this objective, would fully comply with U.S. law when they include advanced DoD sensors. A related question is whether advanced DoD sensors can legally be used in domestic CD operations when they are operated by U.S. military forces.

In this study, we sought to address both legal questions above. More specifically, we seek to answer legal questions that fall into two categories. First, does U.S. law restrict or prevent the use of DoD sensors in CD operations along the U.S. border? Here, we are also concerned with several caveats:

- If the sensor was not developed for CD operations
- If the sensor was developed using counterterrorism funds
- If a mission-based source of sensor development funding cannot be identified.

The second major question is: Does U.S. law restrict or prevent the use of DoD sensors or ISR capabilities in DoD technology demonstrations along the U.S. border? The type of technology demonstrations that we consider are those that would be used to assess the utility of DoD sensors under development that could support domestic civil authorities or U.S. military forces conducting counterinsurgency or counterterrorism operations overseas.

Our focus is on these two key questions because such issues have been raised in the past when RRTO has tried to evaluate new dual-use sensor technologies in demonstrations along the U.S. border.

Findings

We examined U.S. laws governing U.S. military CD support to federal, state, and local authorities and did not identify a legal basis for restricting the use of DoD sensors, which do not collect personally identifiable information or private information on U.S. citizens, in DoD or in joint DoD and Customs and Border Protection (CBP) demonstrations along the southern U.S. border, as long as these demonstrations do not directly involve DoD personnel searching, seizing, or arresting U.S. citizens.⁴ Furthermore, our analysis of U.S. law found that fiscal or appropriations law does not prohibit the use of DoD research, development, test, and evaluation (RDT&E) or private-sector internal research and development (IRAD) funds in technology demonstrations with a CD nexus, or restrict the use of a DoD sensor funded from a particular account.

Review of U.S. Law

Title 10 USC, Section 371, provides DoD broad authority to share information with law enforcement collected by DoD sensors during the normal course of military operations and

³ Section 1205 of P. Law 101-189, recorded as a note to Title 10, Section 124.

⁴ U.S. Code, Title 10, Section 375, "Restriction on Direct Participation by Military Personnel," added December 1, 1981.

training that “may be relevant to a violation of any Federal or State law.”⁵ Separate from normal military operations or training activities, U.S. law does not restrict the use of DoD sensors in domestic CD operations conducted by law enforcement agencies (LEAs) and supported with U.S. military forces, if a valid request for DoD CD support is made by an appropriate LEA official, as long as DoD is not directly engaged in law enforcement activities prohibited by Title 10 USC, Section 375, and as long as DoD sensor use is constrained to the geographic area along the U.S. border specified in Title 10 USC, Sections 124 and 374.⁶ We found no specific restrictions that pertain to sensor funding sources in either case.

As mentioned above, Title 10 USC, Section 124, designates DoD as the lead agency for D&M of targets suspected of transiting illegal drugs into the United States by aerial or maritime means. Title 10 USC, Section 374, also grants DoD the authority to detect and monitor surface targets suspected of smuggling illegal drugs into the United States, and specifies the geographic boundaries along the U.S. border where U.S. military units may conduct CD D&M operations.

The U.S. military has been granted additional authorities to support U.S. government CD operations on U.S. territory. These additional temporary authorities have been in place since 1991 (as defined in Section 1004 of the 1991 NDAA, as amended on December 31, 2011) and include the same geographic restrictions on where U.S. forces can conduct CD D&M operations as specified in Title 10 USC, Sections 124 and 374. This temporary provision of U.S. law grants DoD the authority to conduct any type of D&M operation within the specified geographic area, as long as a valid request for CD support is made by an appropriate LEA official.

Two other elements of the law that pertain to the use of the U.S. military within the borders of the United States are the Posse Comitatus Act (Title 18 USC, Section 1385) and Title 10 USC, Section 375 (mentioned above). Section 375 prohibits the direct participation of the U.S. military in a search, seizure, or arrest unless explicitly authorized in other parts of U.S. law. The Posse Comitatus Act states that it is a crime for an LEA official to use the U.S. military “willfully” to execute the law on U.S. territory, whereas Title 10 USC 375 prohibits the military units from performing law enforcement functions with U.S. territory unless specifically authorized by the President per Title 10 Sections 331 and 332. Both elements of the law are important for the purposes of our analysis because they govern how and when DoD sensors can be used, and how and when DoD is permitted to share real-time information over communication networks with LEA units, in support of LEA activities.

Some senior law enforcement officials have argued that it could be a violation of the Posse Comitatus Act if LEAs were to use real-time information provided by the U.S. military during the search, seizure, or arrest of a suspect, absent a valid LEA request for DoD support. This is one reason why Thunderstorm demonstrations would be halted temporarily and no real-time data would be shared with LEA if a suspect inadvertently entered the area of operation (and if no valid request and approval for DoD CD support to LEAs was in place).⁷ The legal basis for

⁵ U.S. Code, Title 10, Section 371, “Use of Information Collected During Military Operations,” added December 1, 1981.

⁶ Section 1004 of the 1991 NDAA, recorded as a note to Title 10, Section 374. All three sections of Title 10 stipulate the same geographic limit where DoD is authorized to conduct D&M operations, which is up to 25 miles into U.S. territory.

⁷ The second reason that Thunderstorm demonstrations are halted is the concern that DoD actions would be in violation of Title 10 USC, Section 375.

halting the demonstration stems from a concern that U.S. military access to real-time communications and monitoring data of the search, seizure, and arrest of a suspect would constitute the direct (and unapproved) participation of U.S. military personnel in these activities, and would therefore be a violation of the Posse Comitatus Act. However, if the Thunderstorm demonstration is conducted with the appropriate approvals in place (i.e., the 1004 approval process),⁸ then the demonstration could proceed in the event a suspect enters the area of operation, and real-time support could be provided to LEAs (just as in current ongoing LEA and DoD CD operations along the U.S. border). This information could then be used to evaluate the utility of these systems to support the real-time monitoring, seizure, and arrest of suspects.

Therefore, there appears to be no legal reason why a DoD sensor should be excluded from use in a Thunderstorm demonstration or in an actual CD operation as long as a valid request for support is made by an appropriate LEA official and so long as no personally identifiable information is collected. We also found no restrictions on the basis of how sensors were funded. Thunderstorm demonstrations are funded by RDT&E funds (BA3 [government, as opposed to private-sector] funds in particular), which permits the demonstrations to test sensors regardless of the mission that the technologies may be used for in the future. In contrast, there have at times been some restrictions on how actual CD operations can be funded, although these restrictions have been relaxed in the most recent NDAs signed into law in 2012 and 2013.

To be sure, sensors are ultimately scientific and engineering instruments—a sensor designed for one mission may be applicable and usable for other missions; however, a given sensor’s usefulness may not be determined until tested in a realistic operational environment.

Review of Department of Defense Policy

We also reviewed pertinent DoD policy governing CD operations. We found that gaps exist in DoD policy governing CD operations, tests, and demonstrations. While key policies do exist that govern U.S. military support to domestic CD operations (e.g., Chairman of the Joint Chiefs of Staff Instruction [CJCSI] 3710.01B and the Deputy Secretary of Defense memorandum in 2003⁹), these policies are necessary but not sufficient, for several reasons. First, CJCSI 3710.01B does not provide guidance on DoD technology demonstrations that have a CD nexus. Second, CJCSI 3710.01B applies only to the military departments and combatant commands, and not to the Office of the Secretary of Defense (OSD) nor to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (OUSD[AT&L]) in particular (Thunderstorm demonstrations are RDT&E activities led by OUSD[AT&L]). The appropriate place to provide guidance for DoD technology demonstrations is in a DoD directive or instruction. However, existing DoD directives and instructions also do not address technology demonstrations with a CD nexus. In addition, some relevant sections of DoD CD directives and instructions have been canceled, and not replaced nor updated.

Another complication of DoD CD policy is the approval process for guiding CD operations and technology demonstrations with a CD nexus. In terms of CD operations, some of the approval processes and authorities are located in memoranda not codified in DoD policy and not easily accessible, and the relevant organizations discussed in the memoranda may have

⁸ Amendment to Title 10 USC, Section 374, “Additional Support for Counter-Drug Activities,” current amendment in force from fiscal years 2012 to 2014.

⁹ U.S. Deputy Secretary of Defense, “Department Support to Domestic Law Enforcement Agencies Performing Counternarcotics Activities,” Department of Defense Memorandum, Washington, D.C., October 2, 2003.

changed since the guidance was produced. In terms of DoD tests and technology demonstrations with a CD nexus (and not funded using CD funds), no DoD policy exists, requiring officials to apply the approval process for CD operations in an ad hoc manner to technology demonstrations that are deemed to fall within the CD mission space.

Recommendations

The Office of the Under Secretary of Defense for Policy (OUSD[P]) should update and streamline DoD CD policy by developing a single DoD directive that consolidates all relevant DoD CD policy. This directive should:

- Incorporate the 2003 Deputy Secretary of Defense memoranda into a directive.
- Establish an approval process for technology demonstrations with a CD nexus. This process should include a coordination and deconfliction mechanism for the technology demonstration authorities and the relevant joint task force.

One challenge with updating DoD CD policy is that important DoD authorities that are now current and in force and may not be renewed in future law. One way to address this possibility is to clearly identify which parts of DoD policy rely on the temporary authorities granted in Section 1004 of the 1991 NDAA, and which do not.

Recognizing that an update to policy may take time, we have several near-term recommendations:

- The DoD Office of the General Counsel should issue a memorandum of instruction to clarify the legal requirements for approving DoD sensor use in technology demonstrations with a CD nexus.
- If the DoD Office of the General Counsel declines to pursue this matter, the Secretary of Defense or Under Secretary of Defense for Policy could issue a policy memorandum in the interim that provides clear guidance on how the DoD acquisition community should conduct and seek approval for DoD technology demonstrations with a CD nexus.
- RRTO should focus Thunderstorm demonstration mission objectives on CD operations (as opposed to counterterrorism operations) to streamline the approval process.

Finally, we recommend that DoD and DHS develop an interagency/interdepartmental agreement to clarify the legal framework for technology demonstrations. This agreement would be signed by the appropriate DoD and DHS officials, such as OUSD(P) and/or OUSD(AT&L) within DoD and the Office of Technology Innovation and Acquisition within DHS.