THE POSSE COMITATUS ACT: CLARIFICATION IS NECESSARY TO SUPPORT HOMELAND DEFENSE

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The 11 September 2001 terrorist attacks thrust the realities of an asymmetrical threat environment upon the United States in an unprecedented fashion. As a result of these attacks and the likelihood this country will experience additional attacks in the future, the Department of Defense and the subordinate services must understand the roles they will fulfill to identify and defeat this threat in support of homeland defense missions. The Posse Comitatus Act (PCA) is one of many significant issues the armed services must deal with in order to effectively participate in homeland defense. This law is central to much of the confusion and misunderstanding involved in the employment of military forces within the United States. Consequently, the primary question this thesis centers on is: Is it necessary to improve clarity in Department of Defense (DoD) interpretation and guidance of the PCA so that operational commanders are able to understand and support fully homeland defense of the United States of America as it relates to terrorist activities? In order to deter these future terrorist threats, every aspect of the homeland defense mission must be analyzed. Clarifying the meaning of the PCA for military commanders is a crucial step in this analysis.

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ABSTRACT

THE POSSE COMITATUS ACT: CLARIFICATION IS NECESSARY TO SUPPORT HOMELAND DEFENSE, by MAJ Geoffrey A. Crawford, 98 pages.

The 11 September 2001 terrorist attacks thrust the realities of an asymmetrical threat environment upon the United States in an unprecedented fashion. As a result of these attacks and the likelihood this country will experience additional attacks in the future, the Department of Defense (DoD) and the subordinate services must understand the roles they will fulfill to identify and defeat this threat in support of homeland defense missions.

The Posse Comitatus Act (PCA) is one of many significant issues the armed services must deal with in order to effectively participate in homeland defense. This law is central to much of the confusion and misunderstanding involved in the employment of military forces within the United States. Consequently, the primary question this thesis centers on is: Is it necessary to improve clarity in DoD interpretation and guidance of the PCA so that operational commanders are able to understand and fully support homeland defense of the United States of America as it relates to terrorist activities?

In order to deter these future terrorist threats, every aspect of the homeland defense mission must be analyzed. Clarifying the meaning of the PCA for military commanders is a crucial step in this analysis.

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ACRONYMS

CBRNE	Chemical, Biological, Nuclear, Radiological, and/or Explosive
CLEA	Civilian Law Enforcement Agencies
COOP	Continuity of Operations
CSIS	Center For Strategic and International Studies
DHS	Department of Homeland Security
DoD	Department of Defense
DoDD	Department of Defense Directive
DOMS	Director of Military Support
DSO	Domestic Support Operations
FBI	Federal Bureau of Investigations
FM	Field Manual
HLD	Homeland Defense
HLS	Homeland Security
JA	Judge Advocate
JPEN	Joint Protection Enterprise Network
LEA	Law Enforcement Agency
MACDIS	Military Assistance for Civil Disturbances
MSCA	Military Support to Civil Authorities
NCA	National Command Authority
NCT	National Commission on Terrorism
NORTHCOM	United States Northern Command
PCA	Posse Comitatus Act
SJA	Staff Judge Advocate

SSI	Strategic Studies Institute

ILLUSTRATION

Figure 1. Relationship Between Crisis Management and Consequence Management...40

CHAPTER 1

INTRODUCTION

> *Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.*
>
> Title 18, *United States Code*, Section 1385

The *Posse Comitatus* Problem

"*Posse Comitatus*" literally means the "power of the county" and was the term used to describe the ability of federal marshals to call forth all able-bodied men to include military forces to enforce civil law. The questionable use of this relatively common practice at times brought about the Posse Comitatus Act (PCA) that became law on 18 June 1878. This Act originally proscribed the use of the Army to enforce civil laws and with subsequent revisions expanded its application to the Air Force. This seems relatively simple and easy to interpret. The PCA seems also, at first glance, fairly innocuous and straightforward. Yet, as its history shows, it is shrouded in controversy and misunderstandings. These misunderstandings of the issues surrounding the PCA, as well as the difficulties of interpretation of this law place the United States military and civilian law enforcement agencies in potentially compromising situations. Unfortunately, "Our enemies, of course, do not recognize the artificial construct between law enforcement and national defense."[1] Due to these issues and the issues of homeland security the United States now faces, it is necessary to improve clarity in Department of Defense (DoD) interpretation and guidance of the PCA so that operational commanders are able to

understand and support fully homeland defense of the United States of America as it relates to terrorist activities.

"Future U.S. adversaries, recognizing that they are unlikely to prevail in theater war, it is believed, may instead choose to respond asymmetrically by attacking the U.S. homeland."[2] This foreshadowing of the necessity for a viable homeland defense capability was fully realized on 11 September 2001 when terrorists struck the United States in an unprecedented fashion. It is impossible to know whether a misunderstanding of the PCA caused a delay in the response of military aircraft intercepting the high jacked civilian airliners or had any other relevant bearing on these events, but these possibilities must be considered. The United States will very possibly experience additional attacks in the future within the borders of this nation. In order to deter these future threats, every aspect of the homeland defense mission must be analyzed. Determining whether revisions are necessary to DoD interpretation and guidance involving the PCA to allow military commanders to understand the framework in which they must operate to support homeland defense is the focus of this review.

The attacks of 11 September 2001 revealed vulnerabilities as a nation and heightened the country's awareness of a radically new but predicted threat. Although these attacks were the most infamous, a brief view of history within the United States and abroad highlight this complex threat the United States continues to face. The 1983 suicide bombing of a U.S. Marine barracks in Beirut, Lebanon, the 1993 World Trade Center bombing, the 1995 Oklahoma City Murrah Federal Building bombing, the 1996 Olympic Centennial Park and 1996 Al Khobar barracks bombings, the 1998 United States Embassy bombings in Kenya and Tanzania, the 2000 bombing of the USS *Cole*, the 2001

anthrax attacks, and in 2001 the discovery and thwarting of terrorist plots to attack United States Embassies in Paris, France, and Singapore all serve as further warnings that this nation and its people are lucrative targets. Vigilance and preparedness are key to defeating these threats before the United States suffers additional casualties.

As the PCA continues to be in the forefront of argument and review regarding the use of the military in the role of homeland defense, the DoD must analyze and determine the roles and missions they will fulfill and how the PCA will affect their ability to do so. The immediacy of the homeland defense mission no longer permits the luxury of extended reaction times and rhetoric on the implementation of the PCA. As it stands today, the confusion surrounding the PCA leaves most military personnel and their civilian counterparts operating in a realm of uncertainty as a result of a general misunderstanding and misinterpretation of the law.[3]

Scope

The PCA covers a vast range of possibilities and potential missions involving military and civilian law enforcement personnel. Due to the heightened awareness and sensitivities to terrorist activities, this paper examines the necessity to revise the DoD interpretation and guidance concerning the PCA as it pertains to the terrorism aspects of homeland defense. In doing so, it focuses primarily upon the operational requirements the DoD can realistically expect to face in these missions. An analysis of these requirements and the impact the PCA has on them provide the basis for the conclusions and recommendations proposed at the end of this thesis.

Why is this Important?

> Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. . . . To defeat this threat we must make

> use of every tool in our arsenal – military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing.
>
> Introduction to The National Security Strategy, 2002

The 2002 National Security Strategy specifically details the importance of homeland defense, and implies the use of the military as an option in performing homeland security missions.[4] Therefore, it would be very shortsighted if the DoD does not plan for and properly resource these potential missions within the borders of the United States. In doing so, the DoD has taken the first of many steps by creating the United States Northern Command (NORTHCOM). This unified command's mission is centered squarely on homeland defense and is a primary conduit to the Department of Homeland Security. Specifically, NORTHCOM's mission is to "conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories, and interests within the assigned area of responsibility; and as directed by the President or Secretary of Defense, provide military assistance to civil authorities including consequence management operations."[5] The formation of NORTHCOM signifies a major step towards the ability and preparedness of the DoD to plan for, detect, deter and react to threats within the United States.

The establishment of NORTHCOM indicates the DoD involvement in the Homeland Security mission will increase in response to terrorist threats. Within the United States, this is demonstrated by a heightened DoD awareness and resource commitment aimed at identifying terrorist activities and protecting the nation. Identifying these terrorist threats and preemptively defeating them is fundamental to homeland defense, and are not likely to change in the foreseeable future. Military leaders must understand their roles in these missions. This means they must be aware of their

operating environment and the legal boundaries they are obligated to operate within. This necessitates an understanding of the implications of the PCA.

A majority of the work, research, and analysis that currently exists concerning the PCA are rightfully the products of the legal system. Interpretations of law are necessary and valuable. However, they leave a gap in the understanding of the PCA, because these interpretations often have not clarified what the law actually means for most military commanders and their civilian counterparts. The very people tasked with executing missions subject to the PCA are forced to rely on legal advice and precedent *during execution*. This produces a reluctance to become involved in these situations and promotes tentative actions by the military when they are involved. Ulysses S. Grant addressed this very issue to Congress in 1875 when he stated:

> I repeat that the task assumed by the troops is not a pleasant one to them; that the Army is not composed of lawyers capable of judging at a moment's notice just how far they can go in the maintenance of law and order, and that it is impossible to give specific instructions providing for all possible contingencies that might arise.[6]

This paper attempts to bridge this gap by addressing the terrorism issue from the standpoint of an operational commander.

From an operational perspective, it is necessary to identify the likely tasks the military will receive due to the increased likelihood of DoD involvement in the homeland defense missions of counter and anti-terrorism. Because of the unique capabilities the military services possess, the options are vast and diverse in nature. Future missions will likely involve: (1) intelligence gathering and sharing; (2) reconnaissance; (3) interdiction; (4) border and coastal defense; (5) Chemical, Biological, Nuclear, Radiological, and/or Explosive (CBNRE) detection, decontamination, and containment; (6) transportation; (7)

security; (8) escort; (9) training; and (10) potentially displaced civilian control in support of the government and homeland defense. These missions are possible and even probable because the military possesses the unique capabilities, equipment, and manpower to perform them.

In addressing these operational requirements, it is also necessary to consider whether or not the military is capable of performing these tasks without substantial increases in personnel, resources, and training. This facet is becoming increasingly critical as military forces engage in numerous overseas operations that threaten to overextend all branches of the armed forces. With these constraints, the DoD must determine if the PCA will have any detrimental effect on their ability accomplish homeland defense missions in a timely manner and legally under the provisions of the law?

There is precedence for the use of military forces as a *posse comitatus*. Forces have provided support to civilian law enforcement agencies in this country throughout its existence. As recent examples, military aircraft assisted in the search for the Beltway sniper suspects in 2002. The ongoing efforts of Joint Task Force Six for border control and drug interdiction, and the assistance provided by CBRNE teams in reaction to anthrax laced envelopes sent through the United States Postal system also involved military resources. These are just a few examples of the many ways the military is employed in the security of the nation.

The precedence for use of military forces exists. With the changes in the world situation and the threats that exist to the United States, is the intent of the PCA still applicable today? Albeit misguided or misunderstood at times, the intent of this law is

applicable as it provides some of the checks and balances that help to prevent misuse of military forces and infringement of civil liberties of the civilian population, both of which are vital to the interests of the United States. The utility of this thesis is not in arguing these points, but rather in identifying how to meet the intent of the law without hindering the homeland defense mission in the realm of terrorism and border control.[7]

History of *Posse Comitatus*

The Revolutionary Period

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.
>
> Preamble, the Constitution of the United States of America

The guiding principles of the PCA are as old as the nation itself. A general distrust of a standing peacetime army existed at this time among many of the founders of the United States. This distrust stemmed from memories of abuses by the British Army, which were still all too familiar to allow for a military to wield unchecked power over the civilian populace.[8] However, of equal or greater concern to the Framers of the Constitution was an inability of the government to protect life, liberty and property. These concerns "acted as an effective counterbalance to the fears of the use of federal military force in domestic emergencies."[9] Because of this realization, these men purposely rejected any strict prohibition on the use of the military in a law enforcement role.

Posse comitatus stems from the authority given to United States Marshals by Congress in the 1787 Judiciary Act to employ common law in executing their duties.[10]

This practice involved the use of able-bodied men in a particular area as well as the use of the standing army on occasion to enforce the law and maintain general order and discipline.

The use of the military as a *posse comitatus* thus continued, largely unchallenged, and its use was affirmed in 1854 when Attorney General Caleb Cushing stated:

> A Marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority to summon the entire able-bodied force of his precinct, as a *posse comitatus*. The authority comprehends, not only bystanders and other citizens generally, but any and all organized armed forces, whether militia of the state, or officers, soldiers, sailors, and marines of the United States.[11]

This opinion upheld the use of the federal forces as a *posse comitatus* in maintaining law and order and also served to uphold the Fugitive Slave Act.[12] Southern slave owners widely supported this process as it helped to return runaway slaves to their labor pool. However, the Southern support of the military acting as a *posse comitatus* would not last.

Reconstruction Era

In the years immediately following the Civil War, a deep resentment developed on the part of white Southerners who had experienced the occupation of the Union army following the war. In the aftermath of the conflict, the Army had a direct hand in the enforcement of civil law, civil rights, and Reconstruction-era policies,[13] which were necessary to maintain the peace and uphold the state governments. The use of black soldiers, although limited, only heightened the sensitivity of the use of the Army as a *posse comitatus*. Their presence and actions not only challenged the beliefs and practices of white Southerners, it effectively created a role reversal between blacks and whites. Indignities, either real or perceived, suffered by former slave owners, in conjunction with

the humiliation of varying states being under martial law, embittered the population towards the use of the Army as a *posse comitatus*.[14]

The institution of Republican governments in the former Confederate States as a condition of regaining admission to the Union created additional friction. These imposed governments possessed very little, if any, real power since they lacked the funding, support and legal authority to raise an organized militia. This often led to a general instability during which racial terrorism and general unrest threatened the very existence of these state governments.[15] Only the instinctive actions of military commanders in conjunction with requests from state governors for intervention by the Army enabled the return of some semblance of order. As part of this new authority, the Army's duties came to include the establishment of order at polling locations during elections at the behest of President Grant.[16]

The problems regarding use of the Army as a police force came to a head during the presidential elections of 1876. Rutherford B. Hayes won with highly contested electoral votes in South Carolina, Louisiana, and Florida. In those states, President Ulysses S. Grant sent troops to monitor the polling facilities and maintain the peace as a *posse comitatus* in support of federal marshals.[17] In this election the controversy arose from the "supervision of elections, a practice that many Democrats believed had stolen the presidency from their candidate, Samuel Tilden."[18]

Born out of the Reconstruction Era following the Civil War, the PCA became law on 18 June 1878. Primarily cited to end the perceived injustice of controlling polling places, the PCA also traces its origins to racial tensions. Once in existence however, the PCA rarely surfaced as a significant issue until the 1970s when the Act again "emerged

from obscurity as creative defense counsel attempted to develop new exclusionary rules based on the Act."[19]

Clarification Leads to Confusion; Empowerment of the DoD Leads to Self-Imposed Restriction

Attempts to clarify the PCA and increase the roles and cooperation allowed by and with the DoD have fallen far short in practical application. Court authorities in cases where supposed infractions of the PCA formed the basis of argument for defendants improperly applied or misinterpreted the act altogether.[20] Attempts at clarifying legislation also served to cause additional confusion as they too were incorrectly applied either purposely or accidentally.[21] The misapplication of legislative intent served to create further misinterpretations and restrictions within the DoD. This has perhaps been due to the DoD having no desire to accept an increased role in the enforcement of civil law and further expenditure requirements of limited resources. These legislative acts, designed to increase military involvement and cooperation were effectively overridden by self-imposed DoD regulations that translated specific limitations into blanket restrictions and expanded the law to include the Navy and Marine Corps as a matter of DoD policy.[22]

As history shows, the PCA has been the subject of much debate. The basis of these arguments is as much on a misunderstanding of the true foundations of the law as it is on the continued discussion and writings that exist today. Unfortunately, much of the ongoing dialogue is also based upon misunderstandings of the law, its application, and the many exceptions that allow the use of military forces as a *posse comitatus* as well.[23] Because of this widely varied interpretation and the controversial nature of military involvement in civil law enforcement, a wide array of views exist about the law ranging from intense support for further restrictions of the law to support for a complete repeal of

the law. A review of some of this available literature and the varying points of view provide the basis for chapter two.

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[1]Gary Felicetti and John Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before any More Damage is Done," *Military Law Review* 175 (March 2003): 87.

[2]Eric V. Larson and John E. Peters, *Preparing the U.S. Army for Homeland Security: Concepts, Issues, and Options* (Santa Monica, CA: RAND Corporation, 2001), 1.

[3]Felicetti and Luce, 87.

[4]The White House, *The National Security Strategy of the United States of America* (Washington, DC: The White House, 2002), "Introduction."

[5]United States Northern Command, Mission Statement [web page]; available from http://www.northcom.mil/index.cfm?fuseaction=s.who_mission; Internet; accessed 15 October 2003.

[6]Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* (Washington, DC: Center of Military History, 1988), 314.

[7]Although not specifically addressed in this document, border control activities are significant in the counterterrorism and antiterrorism missions.

[8]Declaration of Independence, para 13-14 (1776).

[9]Coakley, *7*.

[10]Donald J. Currier, *The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?* (Carlisle Barracks, PA: U.S. Army War College, 2003), 2.

[11]Coakley, 132.

[12]Felicetti, 99.

[13]Ibid., 100.

[14]Ibid., 100-102.

[15]Coakley, 297.

[16]Ibid., 299.

[17]Matthew C. Hammond, "The Posse Comitatus Act: A Principle in Need of Renewal," *Washington University Law Quarterly* 75, no. 2 (summer 1997): 3.

[18]Paul S. Stevens, *U.S. Armed Forces and Homeland Defense: The Legal Framework* (Washington, DC: Center for Strategic and International Studies, 2001), 23.

[19]Felicetti, 144.

[20]Ibid., 144-145.

[21]Ibid., 148-149.

[22]US Department of Defense, Directive 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 20 December 1989), 1.

[23]John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," *Journal of Homeland Security*, February 2002, 6 [journal on-line]; available from http://www.homeland security.org/journal/Articles/brinkerhoffpossecomitatus.htm; Internet, accessed 12 September 2003.

CHAPTER 2

LITERATURE REVIEW

> Seldom has so much been derived from so little. Few articles written about the act and its implications cite the law as it is written, leading one to believe that the authors have never taken the trouble to go to the U.S. Code and see for themselves or to look up the legislative history of the act or to read the exceptions in the law. As a result, much of what has been said and written about the Posse Comitatus Act is just plain nonsense.[1]
>
> John R. Brinkerhoff

The controversy surrounding the PCA is in no small part due to the vast number of court rulings, debates, and writings concerning the subject. Adding to the confusion, some books, articles, and interpretations are fraught with misinterpretation, misunderstanding, and a general lack of inclusion of key facts, whether by neglect or convenience. This creates an environment in which it is difficult to clarify the meaning and intent of the law.

Many authors on the subject of the PCA tend to follow three primary lines of thought in the writings about the law. These are: (1) leave the PCA as it exists today, (2) revise the PCA (more stringent or for clarification), or (3) revoke the PCA completely. All make valid points and arguments supporting their stance on the PCA, but, the central question for all three is, simply: What, if anything, should be done with the PCA? Furthermore, how can the law fully support and maintain the civil liberties of the people of the United States while simultaneously granting the power and authority to the President and Secretary of Defense to enable a timely and appropriate response to a national crisis?

These arguments over what to do with the PCA are nearly as old as the law itself, and each view provides worth in its examination. However, it is also necessary to determine if these observations are still viable in a day and age of an all-volunteer and educated force that is sensitive to protecting the rights of United States citizens. The PCA arguably has the necessary exceptions that allow timely commitment of a military force, and rather than addressing the PCA itself, the answer may lie in providing clarification to the military and civil authorities through the revision of DoD Directives.

Line of Thought 1: Leave the PCA as it Exists Today

Many authors believe the PCA should remain as it exists today. They recognize the value of a law that prohibits civil authorities from actively involving direct military action in civilian law enforcement without appropriate checks and balances as a common sense approach to upholding the intent of the law, protecting civil liberties, and protecting the military. Although the authors take slightly different approaches, each of the following believe the PCA is sufficient as it exists today.

In Paul S. Stevens' article, "U.S. Armed Forces and Homeland Defense: The Legal Framework" he argues that the PCA provides the latitude necessary for the use of military forces within the Homeland Defense strategy given the latitude of presidential authority that currently exists.[2] In writing this, Stevens clearly sets forth the flexibility the law provides through the exceptions and authorities provided through the legislation supporting the PCA. He also cites other statutes that provide additional legal authority necessary to use the military in the defense of the United States.[3] Specifically addressing the impact of the PCA, he concludes, "The act would not limit the president's options in

using the armed forces in response to a catastrophic terrorist attack on the United States."[4]

David Isenberg's short article, written in response to the Homeland Security Strategy, titled "Posse Comitatus: Caution is Necessary" weighs the pros and cons of possible PCA revision from several different points of view. In this approach, Isenberg not only lends credibility to his argument by objectively discussing the effects of different possible actions involving the PCA, he ultimately strengthens his opinion against unnecessary change that may potentially weaken its intent. However, he does not rule out the need to review and possibly revise the law[5] to support the security of the United States.

Colonel Nolon J. Benson's research project: "The Posse Comitatus Act: Is There a Need For Change?" and Major David W. Chase's monograph: "Posse Comitatus: A Nineteenth Century Law Worthy of Review For the Future?"[6] both discuss numerous examples of the PCA's use and the arguments for and against changing the law. Both authors conclude the necessary change is in the policies directing the application of military forces in civil operations[7] and not a change in the PCA as they believe the law and the statutes supporting it are credible and sufficient as they exist.

In the short article "The Posse Comitatus Act: Can We Maintain American Freedom Without It?" by C. T. Rossi, the author defends the PCA against proposed changes in support of homeland security. Rossi views any change potentially relaxing the PCA as an invitation to reestablish abuses of military power that would threaten the civil liberties of the American people. He argues that changes, if made, would provide no measurable increase in the safety of the American public.[8] His approach in this article

perhaps oversimplifies the views of the Department of Homeland Security (DHS) Secretary Tom Ridge's comments[9] and discussions of the need to review the PCA. In his article, Rossi appears more inclined to incite an emotional reaction to a sensitive issue than he does to present the facts and allow his readers to interpret them.

Line of Thought 2: Revise the PCA

Many authors also believe the PCA is valid in its intent and purpose but see a need for clarification, revision (either more or less stringency), or specificity. Many of these authors also make recommendations for the changes which range from the PCA as a whole to the PCA's use for very specific applications.

One of the most comprehensive works found during research is the article by Commander Gary Felicetti and Lieutenant John Luce titled "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before any More Damage is Done." Citing a complete chronological development of the PCA using legal and historical reference, this article provides the best source of clarity concerning the law from pre-inception to current day. It explains the origins,[10] implementation, precedence, and the foundations of the misunderstanding and misinterpretation of the law. The authors continue by recommending specific revisions to the PCA to make clear the meaning of the law,[11] while simultaneously making recommendations for revisions to DoD directives to provide greater clarity for the use of military force in defending the United States.

In Matthew C. Hammond's article, "The Posse Comitatus Act: A Principle in Need of Renewal," the author takes a firm stance in reaffirming the PCA to prevent the overzealous introduction of the military as a first responder to the war on drugs,

terrorism, and deter illegal immigration. He also recognizes the need and likelihood of calling upon the armed forces in times of emergency but believes there is a great danger in the continued blurring of civil control over the military. He also understands the importance of not undermining the intent of the law and the President's ability to call upon the military in a time of crisis. Hammond recommends repealing the PCA and reintroducing it into Title 10 where it would align with its intent to regulate the armed forces. Additionally, he recommends expounding the law[12] in its application to the military and defining when and how exceptions could be made, through the use of specific criteria which would allow the use of the armed forces as a *posse comitatus*.

In the article "Posse Comitatus and Nuclear Terrorism," author Chris Quillen specifically addresses the unique capabilities of the DoD in dealing with nuclear weapons as they pertain to potential terrorist methods of attack. He argues the existing laws and regulations are too stringent in dealing with this particular scenario[13] while still realizing the necessity in monitoring and controlling DoD authority in civil law enforcement. Quillen recommends leaving the PCA restrictions as they exist while including expanded authority for the military that applies to emergency situations involving nuclear devices.[14] Furthermore, he recommends these additional authorities are "fully vetted" in the federal courts to ensure they are properly applied, defined, and in place prior to an increasingly probable nuclear incident requiring the involvement of military personnel.

Commander Daniel A. Neptun wrote in his article, "Posse Comitatus: Some Thoughts on Loosening Its Restrictions Within the Department of Defense,"[15] the need for specific revision of the PCA to eliminate restrictions against the Navy's ability to board vessels on the "high seas." Since the PCA, as written, does not apply outside of the

United States and its territories or to the Navy, Neptun's recommendation is to revise the DoD and Department of the Navy adopted directives and regulations that increased the scope of the PCA to apply to the Navy and to actions world wide. These proposed changes would facilitate the ability of the Navy to interdict vessels in an effort to secure the borders of the United States.

Offering a different view of the origins of the PCA as a law meant to protect the military from misuse by civilians[16] rather than protecting civil liberties of Americans from the military, John R. Brinkerhoff's article "The Posse Comitatus Act and Homeland Security," argues the PCA is in need of complete revision. He believes the law is outdated and so widely misunderstood and misinterpreted[17] that it is nearly impossible to recover its original meaning and intent. Brinkerhoff recommends revoking the current law and instituting new legislation which clearly defines "the rules for using military forces for homeland security and for enforcing the laws of the United States."

Taking a similar stance to Brinkerhoff, Colonel Gerald J. Manley's essay "The Posse Comitatus Act Post-9/11: Time for a Change?"[18] contends the PCA, in its current convoluted state has lost its meaning and strength. He addresses the issue from many different viewpoints and recommends rescinding the current law and all of its exceptions and replacing it with a law that coherently lays out what is permissible by the DoD. In addition to this change in the law, Manley also recommends preventing further circumventions of the law as a method of utilizing military assets as a readily accessible manpower base while reducing current and limiting further roles and missions held by the DoD as they relate to homeland security.

Line of Thought 3: Revoke the PCA

Some authors believe a complete revocation of the PCA is the correct path to follow. This viewpoint relies heavily upon the need to free up the ability of the military to respond to threats to the United States and the professional nature of today's military that would prevent overstepping the bounds of infringing upon civil liberties a near impossibility.

Donald J. Currier's article "The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?" asserts the PCA should be repealed. He emphasizes that it represents the wrong ideals and places civilian leaders and soldiers in compromising situations,[19] causing tentative reactions on the part of the military[20] and civilian leadership when implementing the use of military forces in a time-constrained situation. Currier views the PCA as an unnecessary legal barrier that is conveniently sidestepped when needed and interferes with the ability to defend the nation in a new asymmetric threat environment.

In Paull C. Burnett's thesis "A Historical Analysis of the Posse Comitatus Act and Its Implications For the Future," the author argues the PCA should be repealed. Similar to Currier's view, Burnett believes the Act serves as an unnecessary legal barrier to DoD's ability to assist civil law enforcement authorities.[21] Burnett also cites changing circumstances and technologies that make the law obsolete and emphasizes the misapplication and misinterpretation of the law.

Department of Defense Directives

Some of the confusion surrounding the PCA is attributable to the sheer number of DoD Directives that govern the involvement of the armed forces in civil operations where

the possibility exists for military personnel to engage in civil law enforcement, training programs and response plans military commanders must have in place to deal with emergency situations, and training support for civil authorities. Unfortunately, the differences in the subjects each covers in many cases seem to overlap, further blurring the understanding of the law and the intent of its application.

DoD Directive 3020.26, *Continuity of Operations (COOP) Policy and Planning*, defines the responsibilities of DoD agencies for completing critical missions and continuing mission essential functions during times of emergency. Specifically, this document emphasizes the need for planning to facilitate continuity of government[22] missions and continuity of operations[23] focusing on those operations that support the maintenance of "military effectiveness, readiness, and survivability."

DoD Directive 3025.1, *Military Support to Civil Authorities (MSCA)*, addresses the responsibility of DoD agencies to conduct missions for and provide assistance[24] to State and local governments for the purpose of consequence management following a natural or manmade disaster or other emergency situations.[25] The emphasis in this type of support is placed on protection of the civilian population and critical infrastructure. This directive also emphasizes prior planning and coordination with civil authorities to ensure effective management of DoD resources.

DoD Directive 3025.12, *Military Assistance for Civil Disturbances (MACDIS)*, addresses the use of military forces to assist State and local authorities in quelling insurrections, rebellions, and domestic violence that threaten life, property, and the general welfare of the United States. This document mandates DoD forces will only be used in this type of situation by the authority of a Presidential Executive Order that

defines a specific jurisdiction and circumstances unless an emergency situation occurs that local officials are unable or unwilling to deal with and prior Presidential approval is not feasible.[26]

DoD Directive 3025.15, *Military Assistance to Civil Authorities*, speaks to the requesting process, approval authorities, and evaluation criteria[27] used to validate military support to civil authorities in both emergency situations and for projected requirements.

DoD Directive 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, expands the meaning of the PCA to include the Navy and Marine Corps[28] and defines exceptions to the PCA based on military status.[29] It also describes and defines the requesting process of DoD assets by authorized agencies, provides a list of permissible direct assistance activities that are not restricted by the PCA[30] as well as a list of actions that are prohibited by the PCA.[31] This directive also provides guidelines for performing training,[32] providing expert advice,[33] using DoD personnel to maintain and operate equipment,[34] and other allowed permissible assistance.[35]

In Gerald J. Manley's essay, he sums up many of the problems facing a commander who references these directives in an attempt to decipher the meaning and impacts of the law, when and if he is able to take action, and determining approval authorities when he discusses DoD Directive 5525.5, stating:

> Any commander reviewing the Directive and hoping to find clear, concise instructions regarding implementing the PCA will be disappointed. The Directive contains a verbatim transcript of the PCA itself, but then in an attempt to explain what the PCA permits and prohibits, the Directive provides an eleven page convoluted mass of legalese that continuously cross references not only within itself but also to numerous criminal statutes. [36]

This same confusing nature is readily apparent in the other Directives mentioned and adds to the uncertainty of the PCA's impact on the DoD.

Historical Texts

Two primary sources worth review both come from the United States Army Center of Military History. These works provide a comprehensive, chronological overview of the historical development of the PCA, legal cases in which the PCA is cited, personalities involved with the development and changes of the law, and the impacts of the law upon the military and society. The first of these is Robert W. Coakley's *The Role of Federal Military Forces in Domestic Disorders, 1789-1878*[37] in which he covers the maturing use of military forces in a domestic role of enforcing civil laws, legislative actions in the development of the PCA, and the issues that compelled the passage of the Act. The second book is Clayton D. Laurie and Ronald H. Cole's *The Role of Federal Military Forces in Domestic Disorders, 1877-1944*. This volume continues the analysis of the commitment of the military in domestic situations, discussing the successes and failures of each. The authors also summarize the consequences of the PCA during this time period, stating: "Although the passage of the 1878 Posse Comitatus Act had had a seminal effect on domestic interventions by placing restrictions on how and when federal troops could be used, and by whom, in times of crisis it was often ignored by both civil and military officials alike, was superseded by emergency, executive or general orders, or otherwise circumvented for what was interpreted at the time as being the public good."[38]

Each of these works discusses the PCA and the effects the law had on specific domestic operations but stop short of making recommendations about any revision to the Act. The value in these documents lies in the understanding of the maturation of the development of the PCA, the relationships between government officials, the civilian

populace, and the military and how these relationships affected civil-military operations, and the precedents for use of the military in domestic operations.

Other Works

Significant to determining the Army's role in homeland security is the report by Eric V. Larson and John E. Peters, titled *Preparing the U.S. Army for Homeland Security: Concepts, Issues, and Options*.[39] This pre-11 September 2001 RAND Corporation study discusses the likely military involvement in the Homeland Security mission, the issues the military will face, and recommendations for how to deal with these evolving roles. In their analysis the authors address the PCA and its impacts on these missions.

The Center for Strategic and International Studies Homeland Defense Working Group study *"Defending the U.S. Homeland: Strategic and Legal Issues for DoD and the Armed Services"* by Fred C. Ikle discusses the proliferation of nuclear, chemical, and biological weapons and the likely employment or threat of employment within the United States. Ikle argues the defensive measures required to counter a threat of this nature or a reaction to such an attack resides squarely with the DoD.[40] He says the DoD is not prepared for these missions and fundamental shifts in United States strategic policies and planning will be required in order for DoD to execute them.[41] He also cites the need for the DoD to realistically consider and plan for taking on lead agency responsibilities in such an incident.[42] He also addresses the PCA and other legal statutes that impact the ability of the DoD to act and concludes, that although confusing and somewhat cumbersome, the required legal authorities are currently in place.[43]

The U.S. Army Field Manual 3-07 *Stability Operations and Support Operations*,[44] provides doctrinal reference for stability operations within the United States. This manual briefly discusses the PCA, its application and exceptions as well as other legislation that potentially impacts the use of the Army within the nation's borders. Likewise, Joint Publication 3-07.4, *Joint Counterdrug Operations*, briefly discusses the PCA without adding clarity to its true meaning and states: "There are a number of exceptions to the statute that, with proper authorization, allow military support to civilian law enforcement (emphasis added). The Staff Judge Advocate (SJA) must review all operations to ensure that they comply with the Act." [45]

These references do not provide a commander with the information he needs to execute missions subject to the PCA, without again consulting legal advice.

These documents provide a small sample of the available works referencing the PCA. The diverse views evident concerning the status of the PCA add to the confusion and debates surrounding the law as all provide valid points and commentary. However, many of the works address the PCA primarily from a legal standpoint and not from the view of an operational commander. This is the gap this thesis is attempting to fill. The next chapter discusses the research methodology used in the development of this thesis as the PCA is discussed and analyzed from an operational commander standpoint.

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[1]John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," *Journal of Homeland Security*, February 2002, 1 [journal on-line]; available from http://www.homeland security.org/journal/Articles/brinkerhoffpossecomitatus.htm; Internet, accessed 12 September 2003.

[2]Paul S. Stevens, *U.S. Armed Forces and Homeland Defense: The Legal Framework* (Washington, DC: Center for Strategic and International Studies, 2001), 4-14. Through the use of historical case examples, legislative initiatives, and judicial

rulings, Stevens concludes it is well within the authority of the president to legally employ military assets in essential domestic missions.

[3]Ibid., 15-22. The author specifically addresses the Insurrection Act, the Stafford Act, the National Emergencies Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Federal Public Health Statutory Authority. Citing the language in each of these, Stevens shows that all support or extend the authority of the president to use military forces within the United States.

[4]Ibid., 22.

[5]David Isenberg, *Posse Comitatus: Caution is Necessary*, (Center for Defense Information, 2002); available from http:// www.cdi.org/terrorism/pcomitatus-pr.cfm; Internet, accessed 11 September 2003. Isenberg addresses the issues of civil liberty infringements by an untrained [military] force and operational tempo constraints facing the DoD today. He also cites legislation that "give the president authority to use the military in most conceivable emergency situations. There is little reason to do more, and, indeed, there are reasons to be concerned about any further military involvement in homeland security."

[6]David W. Chase, *Posse Comitatus: A Nineteenth Century Law Worthy of Review For the Future?* (Fort Leavenworth, KS: School of Advanced Military Studies, U.S. Army Command and General Staff College, 2001).

[7]Nolon J. Benson, *The Posse Comitatus Act: Is There a Need For Change?* (Carlisle Barracks, PA: U.S. Army War College, 1998). In reference to military involvement in curtailing the flow of illegal drugs into the United States, Benson discusses situations and incidents that support both an increased and decreased military involvement in this mission.

[8]C. T. Rossi, *The Posse Comitatus Act: Can We Maintain American Freedom Without It?*, (Free Congress Foundation, 29 July 2002): 2; available from http:// www.freecongress.org/ commentaries/020729.asp; Internet, accessed 11 September 2003. "The federal government has yet to prove that it can properly interpret the intelligence that leads them to deploy the anti-terrorist commandos in the right place at the right time."

[9]Ibid., 2. The scenarios used by Secretary Ridge to describe potential terrorist actions and the necessary associated preparations to protect the United States are attacked twice in this article by Rossi who describes the scenarios with contempt.

[10]Gary Felicetti and John Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before any More Damage is Done," *Military Law Review* 175 (March 2003): 90. The authors argue the origins of the PCA are actually based upon Reconstruction Era friction and racial hatred; both of which they contend were effectively dismissed in the debates leading to the creation of the law.

[11]Ibid.,164. In reference to the specific changes the authors propose, they submit the following changes and explanation:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,
>
> (1) intentionally and with a bad purpose to either disobey or disregard the law
>
> (2) uses any part of the Army or Air Force
>
> (3) within the United States
>
> (4) upon the demand of, and in subordination to, the sheriff, U.S. marshal, or other law enforcement official
>
> (5) to directly enforce civilian law in a way that U.S. citizens are subject to the exercise of military power which is regulatory, proscriptive, or compulsory in nature, or at a polling place
>
> (6) without first obtaining permission of the President to do so shall be fined under this title or imprisoned not more than two years, or both.
>
> This more focused and historically accurate interpretation offers several advantages over many others:
>
> (1) It applies a "cardinal" rule of statutory construction to interpret the words "as a posse comitatus or otherwise," which Congress deliberately left in the law, rather than ignoring these words;
>
> (2) It applies a historically accurate definition of posse comitatus to interpret the law as written and accounts for the Cushing Doctrine's central role in motivating the Act;
>
> (3) It applies another recognized rule of statutory construction, ejusdem generis, to define the words "or otherwise" in context; and
>
> (4) Unlike almost all others, this interpretation accounts for the fact that a significant portion of the Act expired in the nineteenth century.

[12]Matthew C. Hammond, "The Posse Comitatus Act: A Principle in Need of Renewal," *Washington University Law Quarterly* 75, no. 2 (summer 1997): 10-11. Hammond recommends rewriting the PCA and establishing criteria as reflected in the following:

> a) Any part of the armed forces, excluding the Coast Guard, is prohibited from acting as a *posse comitatus* or otherwise to execute the laws, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(b) Exceptions to paragraph (a) allowing use of the armed forces must meet the following criteria:

(1) the use must be triggered by an emergency, which is defined as any occasion or instance for which Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe-generally a sudden, unexpected event;

(2) the use must be beyond the capabilities of civilian authorities; and

(3) The use must be one limited in duration and not one which addresses a chronic, continuing issue or problem.

(c) Clarifications to prohibitions in subsection (a) are to be made by regulations to be published in the Federal Register and printed in the Code of Federal Regulations.

(d) This section is an affirmation of the fundamental precept of the United States of separating the military and civilian spheres of authority.

(e) Nothing in this section shall be construed to affect the law enforcement functions of the United States Coast Guard.

[13]Chris Quillen, "Posse Comitatus and Nuclear Terrorism," *PARAMETERS, U.S. Army War College Quarterly*, (spring 2002): 60-74; available from http://carlisle-www.army.mil/usawc/Parameters/02spring/quillen.htm; Internet, accessed 11 September 2003. Specifically Quillen recommends increasing the president's authority to declare a National Defense Area.

[14]Ibid., 1. Quillen quotes Juliette Kayyem when she says: "In a terrorist attack, this confusion could produce at least two unwanted outcomes. First, it could cause institutional inertia, leading ultimately to more deaths and even greater destruction. Second, it could give rise to overreaction and fear, resulting in unnecessary uses of power."

[15]Daniel A. Neptun, *Posse Comitatus: Some Thoughts on Loosening Its Restrictions Within the Department of Defense* (Newport, RI: U.S. Naval War College, 1999).

[16]Brinkerhoff, 2. He states that the impetus for much of the confusion surrounding the law is the reason for enactment itself. He opines that authors often cite the law was enacted "to prevent members of the military services from acting as a national police force." This is incorrect in Brinkerhoff's view.

[17]Ibid., 6-7. Brinkerhoff offers four distinct reasons for the misunderstanding and misinterpretation of the PCA. These are (1) an unwillingness of the DoD to get involved

in domestic actions; (2) a "general antipathy" to the use of troops as police by the American public; (3) confusion and inconsistency resulting from court rulings, case law, and the misguided additions of DoD directives and military regulations, many of which are based upon incorrect interpretations of the PCA itself; and (4) poor research by authors writing about the PCA that propogates continual misunderstandings.

[18]Gerald J. Manley, *The Posse Comitatus Act Post-9/11: Time for a Change?* (Washington, DC: National Defense University, National War College, Unpublished Essay, 2003).

[19]Donald J. Currier, *The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?* (Carlisle Barracks, PA: U.S. Army War College, 2003), 16. Currier believes that a further continuation to ignore the law when the use of military forces necessitate it exposes civilian leaders to political harm and soldiers to potential civil and criminal liability.

[20]Brinkerhoff, 6. Partially countering the views of Currier, Brinkerhoff states:

> If there were violations of the act, the culprits would not be members of the Army and Air Force who assisted local law enforcement agencies but rather the local law enforcement officials who required the troops to assist in the enforcement of laws or local military commanders who did so without obtaining Presidential authority.

[21]H.W.C. Furman, "Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act," *Military Law Review* 7 (January, 1960), 97; quoted in Paull C. Burnett, *A Historical Analysis of the Posse Comitatus Act and Its Implications For the Future* (University of South Carolina, 1996),4. Furman states:

> Because the passage of the Posse Comitatus Act did not halt all operations of the Army in law enforcement, but merely erected a maze to be threaded by each Commander at each request for troops, it behooves his legal counsel to become familiar with its ins and outs.

[22]U.S. Department of Defense, Directive 3020.26, *Continuity of Operations (COOP) Policy and Planning* (Washington, DC: Government Printing Office, 26 May 1995), 2. This directive states DoD COOP planning policy will "Enhance DoD Continuity of Government planning."

[23]Ibid., 2. This directive identifies continuity of operations as:

> The capability of a DoD Component to continue mission-essential functions without unacceptable interruption. COOP planning includes preparatory measures, response actions, and restoration activities planned or taken to ensure continuation of these functions to maintain military effectiveness, readiness, and survivability.

[24]U.S. Department of Defense, *Military Support to Civil Authorities (MSCA)* (Washington, DC: Government Printing Office, 15 January 1993), 3. Excluding support to civil law enforcement.

[25]Ibid., 3. Addresses the assignment and allocation of resources during peace, transition to war, and war time operations.

[26] U.S. Department of Defense, *Military Assistance for Civil Disturbances (MACDIS)* (Washington, DC: Government Printing Office, 4 February 1994), 5.

[27]U.S. Department of Defense, *Military Assistance to Civil Authorities* (Washington, DC: Government Printing Office, 18 February 1997), 6. The criteria used to evaluate requests from civil authorities are: legality (compliance with laws), lethality (potential use of lethal force by or against DoD forces), risk (safety of DoD forces), cost (who pays, impact on DoD budget), appropriateness (whether the requested mission is in the interest of the Department to conduct), and readiness (impact on the DoD's ability to perform its primary mission).

[28]U.S. Department of Defense, *DoD Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 20 December1989), 1. “The term “Military Service,” as used herein, refers to the Army, Navy, Air Force, and Marine Corps.”

[29]Ibid., 20-21.

[30]Ibid., 14-17.

[31]Ibid., 17.

[32]Ibid., 17.

[33]Ibid., 18.

[34]Ibid., 18.

[35]Ibid., 20.

[36]Ibid., 5-6.

[37]Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* (Washington, DC: Center of Military History, 1988).

[38]Clayton D. Laurie, and Ronald H. Cole, *The Role of Federal Military Forces and Domestic Disorders, 1877-1945* (Washington, DC: Center of Military History, 1997), 422.

[39]Eric V. Larson and John E. Peters, *Preparing the U.S. Army for Homeland Security: Concepts, Issues, and Options* (Santa Monica, CA: RAND Corporation, 2001).

[40]Fred C. Ikle, *Defending the U.S. Homeland: Strategic and Legal Issues for DoD and the Armed Services* (Center for Strategic and International Studies, Homeland Defense Working Group, 1999), 1.

[41]Ibid., 1.

[42]Ibid., 2.

[43]Ibid., 2.

[44]U.S. Department of the Army, FM 3-07 (FM 100-20), *Stability Operations and Support Operations* (Washington, DC: Government Printing Office, 20 February 2003).

[45]U.S. Department of Defense, Joint Publication 3-07.4, *Joint Counterdrug Operations* (Washington, DC: Government Printing Office, 17 February 1998).

CHAPTER 3

RESEARCH METHODOLOGY

The purpose of this chapter is to describe the research methodology used in the analysis of the PCA in this thesis as it pertains to the operational commander's role in homeland defense operations.

In doing this, an examination of the following questions will facilitate the analysis, discussion, and recommendations of these issues: (1) What are the operational requirements expected or required of the military to support homeland defense? (2) What are the potential impacts of allowing the DoD to exercise additional authority over citizens of the United States? (3) Does the PCA facilitate the military operational requirements in respect to homeland defense? and (4) How does other legislation, directives, and regulations affect the application of the armed forces in the homeland defense mission?

Research Method

The primary research methods used in this thesis are content analysis and historical research. The use of these methods in unison will support the analysis, recommendations, and conclusions in chapters four and five of this document.

Due to the diverse nature of opinions and arguments about the PCA, the content analysis method lends itself to this study. Content analysis is defined as a method of research that allows the study of human behavior in an indirect way through their communications such as textbooks, articles, essays, etc. and is most often used in conjunction with other methods.[1] The second research technique, historical research, is also very beneficial to this examination because of the considerable number of cases and

circumstances in which the PCA became a central issue in the debate. The selection of these methods will facilitate the analysis of the abundant and varied information available that presents much of the confusion facing the operational commander today.

Description of the Study

The design of this study focuses on determining the impact of the PCA on operational commanders who execute the missions associated with homeland defense. The misunderstanding and confusion surrounding the PCA will support the necessity of the DoD to clarify the meaning and intent of provided through DoD Directives to support these missions. In doing so, it is necessary to address current doctrine and guidance associated with homeland defense and assesses how the PCA enhances capabilities or exposes vulnerabilities of the armed forces in a homeland defense role.

This thesis examines these impacts and potential revisions and consolidation of the DoD Directives that address the PCA by addressing several areas of concern, and often the sources confusion for operational commanders. These areas include the determination of who the PCA applies to, an examination of the exceptions to the PCA, determining when and if a domestic operation warrants military involvement, discussion of the absence of convictions under the auspices of the Act, coordination requirements, and issues with civilian law enforcement agencies, and establishing likely mission requirements in the homeland defense role.

Further development of these same issues by means of using situational vignettes will assist in clarifying operational impacts and common misunderstandings of the PCA on likely homeland defense missions. These vignettes will address precedents, concerns,

and considerations for commanders in the use of DoD assets in a homeland defense mission.

An examination of the effects of the PCA as it applies in today's environment will also be used as an impetus of discussion of possible revisions to the DoD guidance. DoD policy provides the criteria of legality, lethality, risk, cost, appropriateness, and readiness for evaluating all requests for military assistance by civil authorities.[2] This document employs the same six criteria due to the familiarity DoD approval authorities have with this terminology, the comprehensive nature of these criteria, and as a test of validity of the analysis, conclusions, and recommendations contained in the following chapters.

A second approach and ensuing set of criteria used in examination of the PCA are the legal standards used in determining whether a violation of the PCA has taken place. The courts have adopted three tests in considering potential violations of the PCA. These tests are used to determine whether activities and involvement of military personnel were in an active or passive role; resolving if the actions of the military pervaded the authority and duty of civilian law enforcement; and whether military activities subjected the civilian population to military authority that was regulatory, proscriptive, or compulsory.[3] These tests will also assist in the discussion of the PCA and its effects on military organizations conducting homeland defense missions.

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[1]Jack R. Frankel and Norman E. Wallen, *How to Design and Evaluate Research in Education,* 4th ed. (St. Louis, MO: McGraw-Hill Higher Education, 2000), 469-470.

[2]U.S. Department of Defense, Directive 3025.15, *Military Assistance to Civil Authorities* (Washington, DC: Government Printing Office, 18 February 1997), 3.

[3]U.S. Department of the Army, *Operational Law Handbook* (Charlottesville, VA: International and Operational Law Department, The Judge Advocate General's School, 2003).

2003.327; United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975); United States v. Casper, 541 F.2d 1274 (8th Cir. 1976), *cert. denied*, 30 U.S. 970 (1977). United States v. Yunis, 681 F. Supp. 891, at 895-6 (D.D.C. 1988); United States v. Kahn, 35 F.3d 426 (9th Cir. 1994).

CHAPTER 4

ANALYSIS

The purpose of this chapter is to provide an analysis of the impacts of the PCA on the conduct of military missions from an operational commander's point of view. The ever-increasing likelihood of DoD involvement in the homeland security mission makes the discussion extremely relevant. Commanders today must prepare for these missions and dedicate the intellectual energy to understand their roles, requirements, and the implications resident in the conduct of these missions. Accordingly, this analysis includes a series of illustrative vignettes to highlight domestic missions military commanders may encounter. These issues involve matters of readiness, protection from legal consequences,[1] protection of the public and their civil liberties, and the protection of state and federal governments of the United States. These are great burdens, many of which are normally not associated with the military, which DoD commanders at all levels must realize and appreciate.

Whom Does the PCA Apply To?

The PCA applies to the Army and the Air Force and imposes prohibitions on their enforcement of federal, state, and local laws. The law is not as simple as it seems, however, and merits further explanation. Although the PCA only specifically proscribes the willful use of any part of the Army or the Air Force,[2] DoD policy extended the law to the Navy and Marine Corps in the 1980's through DoD Directives expanding the definitions and terminology of application.[3] Ambiguity and the need for clarification lie in the many exceptions to the application of the Act. Exceptions include those applying to the Reserve Component when not on active duty or active duty for training, National

Guard personnel when they are not federalized, members of the Coast Guard during peacetime, federal military personnel who are off-duty, and civilian employees of the DoD who are not under the direct control of a military officer.[4]

Understanding whom the law applies to is inherently important, especially to active duty commanders. Because active duty units are generally centrally located and possess the ability to respond much faster than National Guard and Reserve component forces, it is reasonable to assume they will, at some time, provide initial response forces in the advent of an unforeseen incident or emergency. However, though the circumstances may merit the response of an active component force, the intrinsic restrictions of the PCA may mean, at times, that a National Guard or Reserve component force is better suited to perform the required duties. Simply understanding the scope of the law's application will greatly assist the on-scene commander in making logical decisions and recommendations to the development and refinement of the force package involved in a homeland defense mission.

While understanding the scope of the law, it is also important to note that whenever DoD forces deploy in support of civil authorities they will nearly always act in a supporting role. Military forces remain under control of their respective military chains of command, while the civilian agency in charge will have directive authority but not command authority over these forces.[5] However, this subordination of military forces to civilian authorities is also in question. As stated in the 2000 Report of the National Commission on Terrorism (NCT):

> But, in extraordinary circumstances, when a catastrophe is beyond the capabilities of local, state, and other federal agencies, or is directly related to an armed conflict overseas, the President may want to designate DoD as a lead federal

> agency. This may become a critical operational consideration in planning for future conflicts. Current plans and exercises do not consider this possibility.[6]

The transition to a lead agency role seems, in theory, a natural shift that DoD forces are well suited to perform given its experiences with joint task forces and other similar command, control, and planning structures. However, the NCT goes on to explain several anticipated issues that must be dealt with to execute effectively these duties and responsibilities. These issues include policy and legal repercussions, resource constraints, and potential conflicts with existing contingency plans. The report also noted an organizational structure that results in a duplication of effort by many agencies residing in the DoD.[7] The consolidation of existing missions under the United States NORTHCOM in 2002 may, perhaps, alleviate many of these issues.[8]

The differentiation of the role a military force fulfills is also an important distinction to consider when determining the applicability of the PCA. Military support to civil authorities is unquestionably subject to the Act that strictly prohibits any law enforcement actions by the military unless legally authorized.[9] However, when the military is acting in a traditional national defense mission, their actions are not subject to the PCA.[10] The determination of when the PCA applies rests largely upon whether or not the classification of the mission is one of homeland defense or homeland security. In an attempt to alleviate confusion, NORTHCOM makes a distinct effort to differentiate between homeland security and homeland defense, providing the following definitions:

> Homeland security is the prevention, preemption, and deterrence of, and defense against, aggression targeted at U.S. territory, sovereignty, domestic population, and infrastructure as well as the management of the consequences of such aggression and other domestic emergencies.
>
> Homeland defense is the protection of U.S. territory, domestic population and critical infrastructure against military attacks emanating from outside the United

> States. In understanding the difference between HLS [Homeland Security] and HLD [Homeland Defense], it is important to understand that NORTHCOM is a military organization whose operations within the United States are governed by law, including the Posse Comitatus Act that prohibits direct military involvement in law enforcement activities. Thus, NORTHCOM's missions are limited to military homeland defense and civil support to lead federal agencies. [11]

However, the intentional exclusion of dedicated homeland security missions from NORTHCOM's definition of scope and the subsequent inclusion of the less significant civil support mission, demonstrates the underlying reluctance to put DoD in a lead agency role. Understandably, the DoD defers homeland security requirements when other agencies are capable of fulfilling these roles due to the current operational tempo and related available forces. However, DoD nonetheless must also consider if this is the preferred or logical approach in the current threat environment when a preponderance of capabilities and assets could realistically come from the military services. Although the executing commander will not determine the definition of his roles, they are important characteristics that affect the legality and abilities of the forces involved.[12] If not clearly understood, these distinctions may place a commander and his subordinates well within or more importantly, completely outside their legal boundaries.

Emergency Situations and the "Common Sense" Factor

One of many accepted exceptions to the PCA is the ability of military forces to act during extraordinary situations under immediate response authority provisions detailed in several of the DoD Directives.[13] Circumstances that present probable loss of life, destruction of property or infrastructure, or loss of government functions,[14] combined with an inability of local authorities to deal with the situation, allow a military commander to take action[15] without first consulting legal advice or gaining Presidential approval prior to acting.[16] This emergency authority is little more than common sense,

but once again, critically important for commanders to understand. While commanders may act under these circumstances, they must still report the military response to higher headquarters, maintain documentation of all facets of the operation, limit military involvement to the minimum force necessary, and retain authority of military forces through a military chain of command.[17] As a practical matter, commanders should make every effort to consult with their detailed staff judge advocate or equivalent legal advisor prior to taking action. Similarly, modern communications capabilities greatly reduce the impracticality of gaining intermediate notification and timely Presidential approval.

To further the understanding of a commander's role in crisis response, the 2003 Interim Federal Response Plan (FRP) offers a practical explanation of the role federal agencies play in a terrorist incident in its explanation of crisis management and consequence management. Although not specifically directed at the DoD, this explanation and the associated definition are useful tools for a commander in understanding the conditions under which he can take action in response to a terrorist event. The FRP defines crisis and consequence management as:

> "Crisis management" refers to measures to identify, acquire, and plan the use of resources needed to anticipate, prevent, and/or resolve a threat or act of terrorism. The Federal Government exercises primary authority to prevent, preempt, and terminate threats or acts of terrorism and to apprehend and prosecute the perpetrators; State and local governments provide assistance as required. Crisis management is predominantly a law enforcement response. "Consequence management" refers to measures to protect public health and safety, restore essential government services, and provide emergency relief to governments, businesses, and individuals affected by the consequences of terrorism. State and local governments exercise primary authority to respond to the consequences of terrorism; the Federal Government provides assistance as required.[18]

The FRP also provides an explanation of the expected actions during crisis and consequence management. As indicated in Figure 1, these functions greatly overlap and

allow a federal law enforcement role primarily during the crisis management phase of the incident. This clarification provided by the FRP in terrorist events provides additional support for the commander to understand his roles and functions in protecting the civilian population, as well as how and when his roles will change over time in response to a specific incident.

Figure 1. Relationship Between Crisis Management and Consequence Management
Source: Department of Homeland Security, *Interim Federal Response Plan*, (Washington, DC: Government Printing Office, 2003), TI-2, figure TI-1.

DoD support to safeguard the American public from the consequences of a terrorist tragedy is not only understood, but also rightfully expected by the American public. In 1986, New York Times journalist William Safire went so far as to ask the question of why the military would fail to respond to a terrorist threat when he wrote:

> The day can easily be foreseen when one of our cities is held hostage by a terrorist group or a terrorist state; the stuff of novels can quickly become reality. At that point, we would be asking: how did they get the bomb into our country? Whose

> job was it to stop the incoming weapon at our border? Why have we spent trillions on defense when any maniac can fly in a bomb that can destroy a city?[19]

Former Senator Gary Hart reaffirmed this opinion in 2002, when he observed that, "in the event of a catastrophic attack of some kind, obviously, every asset of this country is going to come into play. Nobody's going to be worrying about the niceties of the Posse Comitatus Act."[20] Not only are military forces legally protected in these situations, the necessity of action due to the threat of immediate danger will far outweigh any concerns of infringement upon the civil liberties of American citizens. Evidence of public acceptance appeared following the attacks on 11 September, 2001, when the NCA authorized the shoot-down of civilian airliners failing to comply with immediate landing instructions, or presenting a threat to personnel and property. Although this action has never come to fruition, the absence of a public outcry suggests the acceptance of a far-reaching military action in exceptional circumstances.

Determining if Actions Are Warranted

Although emergency situations significantly reduce the immediate impacts of the PCA, commanders must have a method to logically understand and develop how the law pertains to a situation so they can employ their forces in the best roles possible and prepare themselves for missions involving civil-military cooperation. Because much of the confusion surrounding the PCA lies in a misunderstanding of the Act and how it actually applies to a commander and his organization, this evaluation method must be readily available and easily understood by the commander who may not have a legal representative readily available. Ultimately, this process must facilitate the ability of the commander to determine if the situation warrants action.

The first means available to the commander needs to measure his actions against the criteria outlined in DODD 3025.15. DoD approval authorities and judge advocate representatives use these criteria to measures all requests for military assistance by civil authorities. These criteria are legality, lethality, risk, cost, appropriateness, and readiness.[21]

Legality is the root problem facing the field commander who finds he needs to determine his ability to act in a given domestic operation. Determination of this criterion legitimately requires a complete understanding of the PCA, all exceptions to the Act, other statutes that may apply to the situation, and legislative and executive authorities. This depth of understanding is not a fair expectation for commanders; however, by examining the remaining criteria, a commander can realistically arrive at a solution that will allow him to operate within the boundaries of the law. Ultimately, this standard is what drives the commander to examine all remaining measures.

Lethality is a determination of the potential use of lethal force by or against DoD forces.[22] In the examination of this condition, the commander must weigh the likelihood of the use of lethal force against the urgency of the situation. If the situation indicates any real potential of lethality, the commander must determine the true necessity of military forces and the incident should meet the criteria of an emergency in order to support the dedication of military personnel and assets to the mission.

Risk is a measure of safety of DoD forces[23] and also relies heavily upon the urgency of the situation. In any mission, there is some form of inherent risk that commanders must consider. In domestic operations risk mitigation in the form of protective equipment, training, supervision, and integration with local authorities will all

facilitate the reduction of unnecessary risks. In addition to this, understanding the PCA and its impacts on the conduct of operations will allow the commander to make confident decisions and take decisive action thereby reducing the risks associated with timid and uncertain leadership.

Appropriateness is simply a measure of whether or not military action is the right thing to do. The commander must determine if the incident merits the use of military force, whether local civil authorities can deal with the situation, the urgency of the crisis, the training level of his forces, and if military involvement will achieve the desired effects. In the end, if the commander can justify his actions based on the situation and available information, a military response is most likely appropriate.

The last criterion provided in DoDD 3025.15 is the consideration of the implications of authorizing and undertaking a domestic support mission in response to a terrorist incident on the war fighting readiness of the force. If the involvement of the military in domestic operations produces a subsequent degradation in the ability of that force to deploy, conduct combat operations, or complete mission essential tasks, the use of military assets must be weighed very closely against the requirements of the situation.

A second approach and ensuing set of criteria a commander must understand are the legal standards used in determining whether a violation of the PCA has taken place. The courts have adopted three tests in considering potential violations of the PCA. These tests are used to determine: whether activities and involvement of military personnel were in an active or passive role; resolving if the actions of the military pervaded the authority and duty of civilian law enforcement; and whether military activities subjected the

civilian population to military authority that was regulatory, proscriptive, or compulsory.[24]

In determining the difference between an active and passive role,[25] the commander must verify the function his personnel will play regarding law enforcement activities. Examples of active participation are the physical involvement in the screening, apprehension, and detainment of civilian personnel. Passive involvement includes providing expert advice, training, and the loan of equipment to civilian law enforcement agencies. The PCA generally forbids active participation by the military[26] and the commander must either be operating under emergency authority that necessitates active law enforcement or have specific authorization from an appropriate approval authority. In any active law enforcement operation, the importance of timely legal counsel cannot be overemphasized.

In determining whether military forces pervaded civil law enforcement activities,[27] the commander must establish the practicality of any existing law enforcement agency to enforce the law in a given situation. If this law enforcement agency and capability exists, the commander is obliged to avoid any involvement in a law enforcement role barring specific authorization and direction by an approval authority.

The final test applied by the courts in deciding violations of the PCA is to establish whether American citizens were subject to military acts that were regulatory, proscriptive, or compulsory. By definition, any traditional law enforcement role includes at least one of these factors and potentially all three. Of the three applicable judicial tests, this one is by far the most interpretive and arguably, the most misunderstood. This is the case because military forces may not necessarily be in a law enforcement role and still

violate these principles of the PCA. The mere presence of military personnel and their recognized authority, in the proximity of civilians is inherently regulatory, proscriptive, or compulsory to some extent.

By understanding these criteria, the commander can reasonably determine if the situation warrants the involvement of his forces. While these measures are certainly applicable during an emergency involving terrorist activity, they also remain relevant during non-emergency situations. An appreciation of these factors facilitates the ability of the commander to make useful recommendations through his military chain of command and to lead agencies responsible for the operation, and how best to utilize military forces.

Lack of Convictions: What Does It Mean?

The PCA, in effect for almost 126 years, has yet to be the basis for a criminal conviction. Why is this? More importantly, why should this matter to commanders today? The purpose of this discussion is not to produce a mind-set of complete freedom or disregard for the law, or that the legal framework has limitless boundaries allowing commanders to operate at will. Rather, the purpose for bringing the absence of criminal conviction to light is twofold.

First, the lack of criminal enforcement is central for many who view the PCA as a law in need of revocation or revision. They believe the law is so outdated, misapplied, or misunderstood that it serves no practicable purpose, or that it is so fraught with loopholes and convenient circumvention that the law no longer serves a useful purpose, or operates only as a legal barrier, or both.[28] Rightfully so, the law seems to be more of an impediment to timely action when circumstances merit the use of military forces and is often side-stepped to meet the needs of the situation at hand. However, from a

commander's perspective, the second and third order effects of the law's limitations may show that they are just as beneficial as they are detrimental.

In reality, these legal barriers may do nothing more than ease the number of missions the military receives simply because the NCA and other approval authorities know the PCA constrains their employment of the armed services in a domestic role. The PCA therefore sets a high standard for the use of the military in domestic affairs. For those missions that are approved for military involvement, the mere existence of the law forces the continuous examination of the duration of every domestic mission and in effect limits the time any military force will be involved in a domestic situation.

Bearing witness to the effects of loosening restrictions was the 1982 Department of Defense Authorization Act, which relaxed laws allowing the increased use of military assets in a counter-drug role. Touted as a success story in the new levels of cooperation achieved between the armed forces and civilian law enforcement, by 1984 the DoD honored 10,000 requests for assistance.[29] Despite this interagency success, the military services, DoD, and legislators must determine if the armed services can afford any additional increase in the scope of homeland defense responsibilities prior to any additional liberalization of the PCA.

The DoD should not avoid the responsibilities of homeland defense associated with the inherent capabilities of the United States military. However, limitations on the types and duration of domestic operations also serve to shield the armed forces from becoming the first responders of choice when a domestic crisis arises. These constraints assist the military to remain focused on its core mission of waging and winning America's wars. The significance of these considerations continue to amplify as the

nation's military conducts overseas missions threatening to extend the services to an indeterminable breaking point.[30]

Second, the fact that there are no convictions of a party under the auspices of the PCA should provide some level of comfort to military commanders. This lack of conviction is not due to lack of use of the military in a domestic role. Although not specifically defined, when the DoD and military organizations deploy in a domestic role, the public and judicial systems generally accept that they operate in good faith in support of civil authorities. The professional nature of the military, an all-volunteer force, and its awareness of the responsibilities to the American people discredit many of the arguments of civil libertarians. In many cases where a potential violation of the PCA was raised, the courts found that the parties simply did not exhibit a willful negligence or detrimental intent in the execution of their duties.[31] Rather, they were attempting to perform a professional duty and simply trying to do the best they could in the given circumstances.

The Time-Distance Factor

Military commanders must appreciate the public's view, understanding, and the perception of their actions in domestic operations. When acting in an emergency situation, or at the behest of civil authorities, the farther military forces move away from their home installation and the longer they maintain a presence in a mission of civil-military cooperation, the more likely it is their actions will be interpreted as possibly infringing on civil liberties and the greater the possibility of having violations of the PCA raised as an issue.

The American people are generally willing to accept extreme action by the military when the situation dictates such actions. However, the American public is also

very quick to forget and many are disdainful of inconvenience. The tolerance threshold for the presence of military forces and the demand for action in a time of extenuating circumstances will diminish quickly. It also varies widely dependant on the factors of location, mission, threat potential, and the explanation and interpretation the actions receive from media outlets, local and national politicians, and the public in general.

Commanders who find themselves in a protracted domestic mission must consider their role in easing the concerns of the affected civilian population. These efforts may come in the form of media interviews,[32] information dissemination in conjunction with civil authorities, or simply getting out and talking to the public. This interaction will function to not only educate the local population concerning the efforts of the military, but will also facilitate mission accomplishment through building trust, rapport, and understanding.

Preparation Through Coordination

The development of trust, rapport, and understanding with civilian law enforcement agencies are vital considerations in preparing for the employment of military forces in support of civil authorities. Much of what the military does focuses on the planning and coordination prior to mission execution. This practice is no different concerning the coordination and planning with local, state, and federal law enforcement agencies required to facilitate a timely and appropriate military response in support of civil authorities in an emergency or any other situation. This requirement for synchronizing military and civil forces is recognized and doctrinally based. Army Field Manual 3-07 states “DSO [Domestic Support Operations] require extensive coordination and liaison among interagency, joint, multijurisdictional (state and local), and active and

reserve component entities. In all DSO, federal military forces remain under the federal military chain of command."[33]

There is enormous potential and opportunity in the development of these habitual working relationships, and commanders should actively cultivate them. These associations facilitate the mutual flow of information to remain cognizant of identified threats, identification of the capabilities, limitations, and constraints each organization has, and recognition of how each party can compliment one another to maximize effects while minimizing duplication of effort. These endeavors are far reaching, and not only will facilitate responses during an incident requiring civil-military cooperation but will enhance daily operations as well.

Out of necessity and due to identified vulnerabilities, the coordination effort with civilian law enforcement agencies has improved considerably since 11 September 2001. The emphasis on interagency coordination provides renewed interest in the development and review of memorandums of agreement and understanding between military organizations and law enforcement agencies intended to reduce confusion in the event of an incident.[34] The challenge for commanders now is to prevent a regression in civil-military cooperation due to a lack of overt enemy action on United States soil and competing operational and mission essential demands.

Determining Operational Requirements

The examination of roles and missions commanders may face in operations involving terrorism are innumerable. Unfortunately, a specific list of these roles and missions does not exist in any doctrine, regulation, directive, or statute. The National Strategy for Homeland Security does propose the following potential mission categories:

> Military support to civil authorities pursuant to a terrorist threat or attack may take the form of providing technical support and assistance to law enforcement; assisting in the restoration of law and order; loaning specialized equipment; and assisting in consequence management.[35]

Still, commanders must infer what they are able to accomplish based on an assessment of their own capabilities, intuition, and judgment. Although the specific planning guidance does not exist, commanders may look at the 2002 NSS[36] and the 2002 National Strategy for Homeland Security[37] to determine the prospective realities of military involvement[38] in homeland security and homeland defense within the borders of the United States.

In the absence of specific mission sets defining the operations military forces will conduct, these broad categories must suffice as a short-term form of planning guidance. Unfortunately, these categories vary between sources and are insufficient as the military transitions to increased activity in counter-terrorism roles. Although a precise list of threats, locations, and missions would certainly facilitate a reasonable preparedness of military forces, the threats the United States now faces have shown this is not feasible.[39] Accordingly, and despite their limitations, these broad categories must suffice as the basis for contingency planning. Training and readiness of the DoD to conduct missions in support of homeland defense must primarily rely on the training designed to support wartime mission requirements. Therefore, commanders must, at a minimum examine and understand the scope of domestic missions they will likely perform.

Terrorism and the Military Role

> Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, that task has changed dramatically. Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a

> single tank. Terrorists are organized to penetrate open societies and to turn the power of modern technologies against us.[40]
>
> The White House, The National Security Strategy

Undeniably, terrorism and homeland security rose to the forefront of the national agenda on 11 September 2001. A new asymmetric threat emerged proving itself a capable and deadly foe. The words of President Bush show recognition of this threat and an acknowledgment that military forces will play a role in combating and defeating this threat when he stated: "To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing."[41] This military role is evident abroad in both Operations Iraqi and Enduring Freedom. However, the roles and missions within the United States, while not as evident or as publicized, remain a top national priority. These seemingly inconspicuous missions range from guards protecting the gates of military installations, combat air patrols flying over the Nation's cities, and emergency response teams assisting in the training of civil authorities as they stand ready to react to an attack within the nation's borders.[42]

While these routine operations take place largely unnoticed, the potential for a much larger role plainly exists. To illustrate the issues and concerns of these increased roles, the following vignettes provide the basis for examining some of the potential missions commanders may expect to execute in support of the government and homeland defense.[43] This analysis will also include discussion of some of the issues commanders need to be aware of and a measure of the tasks against the applicable criteria established in DoD Directive 3025.15.[44]

Vignette 1: Federal Installation--Chemical Attack

In response to news reports of the Division's imminent commitment in support of Operation Iraqi Freedom, terrorist agents plan an attack to disrupt this deployment. After smuggling chemical agents and dispersal equipment onto the installation under rail cars moving to stage on the installation in preparation for the deployment, operatives, dressed in military uniforms, gain access to the installation by walking through uncontrolled areas. Recovering their equipment, these personnel proceed to attack covertly railhead and airfield facilities and marshaled unit equipment with persistent chemical agents.

Initially, approximately fifty soldiers and DoD civilians are killed when they are overcome by the chemicals. Responding medical personnel and military police, unaware of the threat, are exposed and succumb to the agents as well. Realizing the presence of an unknown existing threat and responding in accordance with local emergency response standard operating procedures and anti-terrorism programs, [45] military police cordon the area and begin the immediate evacuation of personnel who are down wind from the affected sites. The commanding general orders an immediate closure and securing of the post and the continued evacuation of all non-essential personnel while continuing mission essential tasks.[46]

This scenario provides the distinction of the first of two physical localities that concern the use of military forces within the United States. The incident, involving a terrorist act on a federal installation, provides a commander much greater flexibility and latitude in what he is able to do with respect to the PCA.[47] In this case, the command responsibilities of protecting his soldiers and personnel and the installation itself, in conjunction with the immediacy of the emergency allow the commander to take action

without further approval. The commander in this situation will still meet the requirements of reporting to appropriate chains of command and prepare to accept and integrate personnel and equipment to assist in the management of the emergency. He must also anticipate requests for assistance from the surrounding communities to provide assistance in evacuation operations, securing areas around the installation in immediate danger of contamination to prevent additional casualties, and possibly decontamination operations.

The preparation, planning, coordination, and rehearsals prior to an event similar to this will ultimately determine the true measure of success or failure. The PCA will not apply to this commander within the confines of the installation and evaluation of the actions he takes will not be measured against the criteria of legality, but rather preserving the lives of his personnel and protecting the civilian population living near the installation.

Vignette 2: Intelligence Gathering

During a routine off-post training exercise, an aircrew taking part in the exercise reported seeing personnel loading a large truck with barrels at a remote building site. They also reported the vehicle and personnel hurriedly left the scene when their aircraft flew over. Due to the suspicious behavior of the individuals involved, the aircrew followed the vehicle for a brief period while they recorded a vehicle description and license plate number.

These reports are forwarded to the Provost Marshall, who, noting a correlation to recent reports of an explosive threat in the local area, forwards them to the regional Federal Bureau of Investigations (FBI) office. The FBI confirms this information and substantiates a suspected threat against a local agricultural fertilizer plant. Based on the

information provided to the FBI, the truck is located and stopped resulting in the arrest of the driver and four additional suspects. A search of the vehicle found that it contained several thousand pounds of explosive material and detonating devices.

The commander in this situation provided information to authorities that led to the apprehension and detainment of the bombing suspects. Ultimately, in an indirect manner, it appears he participated in the enforcement of domestic law, in contradiction to the PCA. However, closer consideration reveals that this information sharing is not only allowable, but also actually encouraged.[48] Although DoD cannot routinely gather information on United States citizens, information gathered during the course of a legitimate investigation or as an unintentional result of training is perfectly acceptable. Furthermore, DODD 5525.5 provides latitude in the planning of training exercises, stating "The planning and execution of compatible military training and operations may take into account the needs of civilian law enforcement officials for information when the collection of the information is an incidental aspect of training performed for a military purpose."[49] Although the sharing of information is encouraged and the needs of civilian law enforcement is an allowable consideration, this does not allow the development of training with the primary purpose of supporting civil law enforcement officials or routine collection of information about citizens of the United States.[50] Even though this scenario does not meet the screening requirements of the DoDD 3025.15 due to origins of the information obtained, the scrutinizing of any specific intelligence gathering requests from civil authorities against of the measures of legality and appropriateness is necessary.

While actionable information is the primary consideration of information sharing between civilian and military organizations, the development of habitual information

sharing practices concerning such things as after action reviews and lessons learned merits consideration. As an example, commanders are tasked with developing and executing an antiterrorism training program, the exercises that support this training provide a prime illustration of an information source that could assist civil authorities. The lessons resulting from these training scenarios could range from response techniques to a nuclear, biological, or chemical attack, equipment capabilities, and identified training requirements. This type of information is easily transferable and potentially quite beneficial to civilian law enforcement and emergency response personnel.

Recent developments in capabilities facilitate the flow and sharing of information within the DoD. According to a 3 March 2004 NORTHCOM press release, this new capability: "Known as the Joint Protection Enterprise Network (JPEN), the system allows authorized subscribers to immediately share antiterrorism and force protection events with Department of Defense installations, operations centers and intelligence activities enabling them to make more timely and informed decisions."[51]

This new system allows and facilitates more timely information sharing within the DoD, and will likely facilitate the sharing of information with agencies outside the DoD as well. By providing an increased situational awareness this capacity for information sharing has great promise in easing the ability of military commanders and civilian law enforcement agencies to prevent instead of reacting to an existing threat.

Vignette 3: Emergency Situations

A truck laden with explosive materials detonated and destroyed the radiological research center at a local university. Initial reports indicate the explosion fractured the reactor, which is subsequently leaking contaminated water and fumes at the site. Because

of the radiological threat, and believing that this is the result of a terrorist incident, the Governor mobilized State emergency personnel and requested federal assistance. Notification of the Federal Bureau of Investigations,[52] Federal Emergency Management Agency (FEMA), Department of Energy (DOE), and National Guard Weapons of Mass Destruction Civil Support Teams (WMD-CST) is complete and these agencies are in the process of responding. However, it is anticipated that it will take from four to eight hours before any substantial state or federal response force can arrive on scene.

Due to this delay and the severity of the circumstances, local law enforcement agencies, unable to deal with the matter with available resources, request immediate assistance from a nearby post to assist in securing the site, evacuating personnel from the area, and decontamination procedures for affected personnel.[53] In determining a response to this request, the primary concern in the committing of forces that the commander must bear in this event is the risk associated with exposure to the radiological threat.[54] He determines that the use of basic protective equipment and maintaining a safe distance from the affected area mitigates the risk to an acceptable level. Following this analysis, the post provides an infantry battalion to assist with the operations while also providing chemical officers and decontamination teams who report to the civil authorities' incident command post to provide advice and assistance in dealing with the decontamination of personnel.

Responding to an event that clearly meets the criteria of an emergency effectively negates the PCA as a concern for the civil authorities and the military organization. The military commander in this incident not only has the authority to act without a request for assistance if he determines it is necessary,[55] his capabilities in the form of personnel,

training, and equipment nearly dictate his response to alleviate the undo loss of civilian life. However, in dedicating forces to this domestic emergency, the commander must comply with the reporting, documentation, command and control, and limitation in force requirements detailed in the *2003 Operational Law Handbook*[56] while also seeking legal advice from his SJA representative.

In this scenario, the committed force will initially possess the legal authority to conduct these operations and, if necessary, enforce civil laws. However, this ability will rapidly decrease with the arrival of additional state and federal agencies as the military transitions to a supporting role. As civil authorities assemble the law enforcement and emergency services personnel to deal with the situation the military commander no longer has the authority to commit forces, as the circumstances no longer meet the definition of an emergency.[57]

The commander in this scenario will find himself operating through the full spectrum of the PCA. As he begins this operation, the restrictions of the PCA will not apply as the military and civil authorities are working in an emergency environment. As the presence of civil authorities and their capability to contend with the circumstances increases, the limitations of the PCA coincidently increase as well. Understanding this shift in the application of the law and his continuously decreasing authority to act is essential for the commander to make correct recommendations in the use of his organization and for civil authorities to realize when it is no longer practical to use military forces.

In this scenario, the involvement of military forces will suddenly begin, rapidly peak, and quickly end. The hours the commander will have to complete this mission seem

somewhat insignificant. However, the standards of measure for success are the application of personnel and equipment to prevent the unnecessary loss of life and personal suffering.

Vignette 4: Transportation Security

Attacks on rail, road, and airline transportation nodes in countries around the world in conjunction with threats against American infrastructure heighten the likelihood of similar incidents taking place inside the United States. To prevent similar actions from occurring within the United States, the DHS requests assistance from DoD in providing manpower to secure key rail transportation and airline infrastructure. Due to the large number of National Guard and Reserve unit deployments in support of ongoing operations, it is readily apparent that active duty forces must also take part in these security operations until a viable alternative is developed. Because of the more frequent military and public interface, National Guard organizations report to airports and critical road infrastructure while active duty forces concentrate their efforts on key rail infrastructure sites.

In this case, the active duty commander can expect to act within specific guidelines found in his deployment orders while reporting directly to a lead federal agency other than DoD. Although the assignment minimizes the interaction between active duty military forces and the civilian population, it is important for the commander to understand that he is currently not operating in an emergency situation and that the PCA applies to his force. Operating in this preemptive role seemingly provides a straightforward operating environment that reduces the impacts of the mission at hand. Whereas this is true from a military operations standpoint in this role, the complications

of the PCA gain significance and must be understood to prevent infractions of the law while remaining focused on mission accomplishment.

The factors in this mission will arise from an analysis of whether the military response is regulatory, proscriptive, or compulsory[58] in nature. To minimize these concerns the commander must understand what the purpose of his operation is and determine how he will accomplish his mission while remaining within the confines of the law. In this scenario, the security of the rail infrastructure would easily lend itself to connotations of security patrols, checkpoints, and the presence of armed soldiers. These are standard operating practices familiar to operational commanders However, each of these options could, without difficulty, be interpreted as being regulatory, proscriptive, or compulsory if the local population were subjected to the effects of these actions. Although these techniques are familiar and certainly effective, the examination of a non-traditional approach may provide an alternative solution that meets the intent and prevents any violation of the PCA.

The commander in this scenario determines that his key task is to maintain a visible presence to deter a terrorist threat. To accomplish his mission he directs the execution of a training exercise in his assigned area of responsibility. In approaching the problem in this manner the commander is able to accomplish his mission while capitalizing on a training opportunity. Although a training exercise is not a feasible solution for every situation, developing alternative methods for mission accomplishment that preclude a law enforcement role and a subsequent negative impact on the civilian population are paramount for commanders in this environment.

Vignette 5: Training

Local law enforcement officials request assistance in training special reaction teams within their force to defeat a terrorist threat. Specifically they want to conduct rappelling, sniper, surveillance techniques, and room-clearing procedures training with the assistance of the Special Forces Group located on post. When this individual and small unit training is complete, they also want to conduct a training exercise in the post's military operations on urban terrain (MOUT) site using military personnel to act as a terrorist organization occupying the MOUT facility and Special Forces personnel to evaluate and critique the performance of the law enforcement teams.

DoDD 5525.5 addresses the conduct of training in support of civilian law enforcement officials as an authorized DoD activity. This directive provides broad guidelines for allowable training, stating "Such assistance may include training in the operation and maintenance of equipment."[59] Of greater significance to the operational commander, DoDD 5525.5 merely provides interpretable definitions for training that are not authorized when it states, "This does not permit large scale or elaborate training."[60] This is based on conditions that the training could not feasibly be conducted by non-DoD agencies and does not have a negative impact on military readiness, does not place military personnel in direct law enforcement role, and that the training does not take place in a location where there is a high probability of a law enforcement conflict.[61] Based on this information, the requested training could logically be justified as appropriate and beneficial to both the military and civil authorities.

Regrettably, this conclusion is not correct. Even though DoDD 5525.5 is directive in nature, it is not a stand-alone document that provides a reliable source for decision

making. In this scenario, governing directives and regulations strictly forbid all but possibly the rappelling training. In order to derive this answer, the commander and his staff must turn to other sources such as the *2003 Operational Law Handbook*. This reference provides additional details based on specific DoD policy guidance[62] that prohibits nearly every aspect of the requested training.

The type of training proposed in this scenario could be extremely beneficial to all parties involved while strengthening the cooperation and coordination between civil and military authorities. However, if left unchecked, the request for military training resources to support civilian agencies quickly could adversely affect the ability of the military to conduct essential mission training. This issue is not the limitation in scope or type of training provided by the military, but rather, the lack of a resource readily available to a commander that inform him of his operating parameters.

Conclusion

Many exceptions exist in the PCA giving the commander the authority and latitude to act. Although this authority exists, the number of references and other applicable laws combined with the uncertainty of when, how, and if the law applies provides a vague environment for DoD Forces and civil authorities to operate in. In order for commanders to take effective action in dealing with the consequences of a terrorist action or defeat a terrorist threat, there must be a source of information available that defines the application and intent of the law. The next chapter of this thesis is dedicated to providing the derived conclusions based on the research conducted for this paper. This chapter also provides recommendations for providing clarity and understanding of the

PCA to operational commanders as they provide forces and conduct missions in support of homeland security and homeland defense to defeat existing terrorist threats.

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[1]Department of Homeland Security, *The National Strategy for Homeland Security* (Washington, DC: 2002). This strategy continues the ongoing debate of legislation versus the application of military force in recognizing a need for legislative review and states:

> The threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how.

[2]Title 18 *U.S. Code*, Section 1385, *Use of Army and Air Force as Posse Comitatus*.

[3]U.S. Department of Defense, *Directive 5525.5, DoD Cooperation with Civilian Law Enforcement Officials* (Washington, DC: Government Printing Office, 15 January 1986), 1.

[4]U.S. Department of the Army, JA-221, *Law of Military Installations Deskbook* (Administrative & Civil Law Department, The Judge Advocate General's School, September, 1996), 3-11 - 3-13.

[5]The Department of Defense acknowledges this issue in Department of Defense Directive 3025.12, *Military Assistance For Civil Disturbances*, para. 4.1.5 (4 Feb.1994).

[6]Congress, Senate, Report of The National Commission on Terrorism, *Countering the Changing Threat of International Terrorism.* 106th Cong., 2nd sess., 7 June 2000 (Washington, DC: Government Printing Office, 2000), 39; Fred C. Ikle, *Defending the U.S. Homeland: Strategic and Legal Issues for DoD and the Armed Services* (Center for Strategic and International Studies, Homeland Defense Working Group, 1999), 2.

[7]Ibid., 39-40.

[8]United States Northern Command [web page]; available from http://www. northcom.mil/ index.cfm?fuseaction=s.who_mission; Internet; accessed 11 September 2003. The site states: "The Department of Defense established U.S. Northern Command in 2002 to consolidate under a single unified command existing missions that were previously executed by other military organizations."

[9]Title 18 *U.S. Code*, Section 1385, *Use of Army and Air Force as Posse Comitatus*.

[10]William Sells [electronic mail]; *RE: Rumsfeld Approved Domestic 'Rapid Reaction' Units for Major Attacks*, 15 January 2004. The author, in discussing the distinction between military missions and military assistance, states:

> The issue of federal military forces protecting critical national infrastructure was staffed through the NORTHCOM JAG shop last summer. Our consensus was that preventing or resisting an attack on critical national infrastructure (1) arguably, is a national defense mission, not law enforcement; (2) as such, it may be directed by the President as Commander-in-Chief of the U.S. Armed Forces; and (3) being a traditional military mission, not law enforcement, the Posse Comitatus Act (PCA) does not apply.
>
> It is important to distinguish between a traditional military mission (carried out for national defense, which is not subject to the Posse Comitatus Act at all) and military assistance to local, state, or federal law enforcement agencies in performing law enforcement functions (which can only be done if the military assistance is exempted from the Posse Comitatus prohibition).

[11]United States Northern Command [web page]; available from http://www.northcom.mil/index.cfm?fuseaction=s.homeland; Internet; accessed 11 September 2003.

[12]William Sells [electronic mail]; *RE: RE: Posse Comitatus*, 8 March 2004. In response to questions from the author in reference to the actual differences between homeland security and homeland defense, COL Sells offers the following (layman's) explanation:

> 1. Armed Forces protect nations from external military threats. NORAD, whose mission is air supremacy over the US and Canada is an example. Air supremacy is a military mission, not law enforcement. In the air supremacy/national defense role, the armed forces shoot down the bad guys. Regulation of commercial use of airspace is a regulatory (and occasionally a law enforcement) function. So is who and what can be carried on commercial aircraft. Passengers cannot take certain items on a commercial aircraft. TSA screeners check them to make sure they are not carrying prohibited items. They may be denied passage on the aircraft, detained and/or arrested. As a result, "homeland security" is preserved.
>
> Conversely, if an unidentified aircraft enters U.S. airspace, with apparent hostile intent, USAF carries out its national defense (homeland defense) mission, and blows it out of the sky.
>
> 2. On the other hand, the armed forces do not screen those passengers at the airport. That is a law enforcement function, to enhance "homeland security." Why doesn't the armed forces screen passengers? Because it would be DIRECT, ACTIVE use of military personnel to enforce the law. The soldiers have "subsumed" or taken over the role of civilian law enforcement personnel; and the

military actions are REGULATORY, PROSCRIPTIVE, and/or COMPULSORY. Therefore prohibited by the Posse Comitatus Act.

[13]U.S. Department of Defense, Directive 3025.1, *Military Support to Civil Authorities (MSCA)* (Washington, DC: Government Printing Office, 15 January 1993), 7-9; Department of Defense, Directive 3025.12, 5; Department of Defense, Directive 3025.15, 4.

[14]U.S. Department of Defense, Directive 5525.5, 15. This directive, in similar fashion to all other cited DoD Directives that address emergency situations, addresses emergency situations in general and interpretable definitions, stating: "…sudden and unexpected civil disturbances, disaster, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situation." By maintaining a level of ambiguity and a need for interpretation, these definitions provide additional latitude to commanders by allowing their on-scene determination of what constitutes an emergency and at the same time provide some level of protection from legal liability; Department of the Army, FM 3-07 (FM 100-20), *Stability Operations and Support Operations* (Washington, DC: Government Printing Office, 20 February 2003), 6-2. This manual defines the term domestic emergency as including one or more of the following emergency conditions: a civil defense emergency, civil disturbances, a major disaster, and a natural disaster.

[15]U.S. Department of Defense, Directive 3025.12, *Military Assistance for Civil Disturbances (MACDIS)* (Washington, DC: Government Printing Office, 4 February 1994); Department of the Army, FM 3-07 (FM 100-20), *Stability Operations and Support Operations* (Washington, DC: Government Printing Office, 20 February 2003) 6-11. In addressing this issue, doctrine addresses the ability of the commander to respond to a disaster situation and the need for legal review, stating:

> Commanders may provide immediate response to domestic and foreign disaster situations under provisions of DODD 3025.1. This immediate assistance does not take precedence over ongoing combat and support missions. Any commander or DOD official acting under immediate response authority should quickly advise the DOMS through command channels and seek approval or additional authorization as needed from the respective chain of command.

[16]U.S. Department of Defense, Directive 5525.5, 15.

[17]U.S. Department of the Army, *Operational Law Handbook* (Charlottesville, VA: International and Operational Law Department, The Judge Advocate General's School, 2003), 316. Note: The *Operational Law Handbook* is not a regulatory document. This reference is a periodical written at the Judge Advocate General school for training purposes. The value of this document is that it is readily available and relatively easy to read as a starting point for legal basis.

[18]Department of Homeland Security, *Interim Federal Response Plan* (Washington, DC: Government Printing Office, 2003), TI-1.

[19]William Safire, "Thataway, Posse Comitatus," *New York Times* (28 February 1986), available from Lexis-Nexis Academic Universe (News; General News; Major Newspapers) http://www.lexis-nexis.com/universe; Internet; accessed 5 January 2003.

[20]Congress. Senate. Committee on Governmental Affairs, *The Homeland Security Department: Hearing before the Committee on Governmental Affairs*, 107th Cong., 2nd sess., 20 June 2002., 63.

[21]U.S. Department of Defense, Directive 3025.15, *Military Assistance to Civil Authorities* (Washington, DC: Government Printing Office, 18 February 1997), 3.

[22]Ibid., 3.

[23]Ibid., 3.

[24]U.S. Department of the Army, *Operational Law Handbook*, 327; United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975); United States v. Casper, 541 F.2d 1274 (8th Cir. 1976), *cert. denied*, 30 U.S. 970 (1977). United States v. Yunis, 681 F. Supp. 891, at 895-6 (D.D.C. 1988); United States v. Kahn, 35 F.3d 426 (9th Cir. 1994).

[25]Ibid., 327; United States v. Red Feather, 392 F. Supp. 916, at 921 (W.D.S.D 1975); United States v. Yunis, 681 F. Supp. 891, at 892 (D.D.C. 1988); United States v. Rasheed, 802 F.Supp. 312 (D. Hawaii 1992).

[26]Many sources state that the PCA specifically prohibits direct military involvement in civil law enforcement without noting the many exceptions or presidential approval that allow law enforcement operations.

[27]U.S. Department of the Army, *Operational Law Handbook*, 327; United States v. Hartley, 678 F.2d 961, 978 (11th Cir. 1982) *cert. den*. 459 U.S. 1170 (1983); United States v. Hartley, 796 F.2d 112 (5th Cir. 1986); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990)

[28] Donald J. Currier, *The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?* (Carlisle Barracks, PA: U.S. Army War College, 2003), 13-16; H.W.C. Furman, "Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act," *Military Law Review* 7 (January, 1960), 97. Furman, an Army JA states:

> Because the passage of the Posse Comitatus Act did not halt all operations of the Army in law enforcement, but merely erected a maze to be threaded by each Commander at each request for troops, it behooves his legal counsel to become familiar with its ins and outs.

[29]Nolon J. Benson, *The Posse Comitatus Act: Is There a Need For Change?* (Carlisle Barracks, PA: U.S. Army War College, 1998). 8.

[30]Jeffrey Record, *Bounding The Global War On Terrorism* (Strategic Studies Institute, U.S. Army War College, December 2003), available from http://www.carlisle.army.mil/ssi/ pubs/2003/bounding/bounding.pdf; Internet; accessed 15 February 2004, 39-41.

[31]Gary Felicetti and John Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before any More Damage is Done," *Military Law Review* 175 (March 2003): 163-164.

[32]Commanders will likely experience intense media interest and scrutiny during any domestic operation. A proactive approach in media relations will not only allow the commander to manage the tempo of media operations to some extent, but also allow him to distribute the message(s) that will facilitate the mission while portraying the military in a positive light.

[33]U.S. Department of the Army, FM 3-07 (FM 100-20), *Stability Operations and Support Operations* (Washington, DC: Government Printing Office, 20 February 2003), 6-1.

[34]U.S. Department of the Army, *Operational Law Handbook*, 315; Department of Defense, Directive 5525.5, 10.

[35]Department of Homeland Security, *The National Strategy for Homeland Security*, 44; Eric V. Larson and John E. Peters, *Preparing the U.S. Army for Homeland Security: Concepts, Issues, and Options* (Santa Monica, CA: RAND Corporation, 2001), 21-22. The authors identify five homeland security task areas. These areas are weapons of mass destruction domestic preparedness and civil support, continuity of government, continuity of operations, border and coastal defense, and national missile defense. The first three link directly to preemptive operations or actions pursuant to a weapons of mass destruction and / or terrorist attack. The fourth, border and coastal defense, has direct linkage to the viewpoint of this thesis dealing with border control issues. The fifth task area, although a potential terrorism delivery means, will not be included in the discussion; Department of Defense, Directive 5525.5. This directive describes two categories of assistance. These are use of information collected during military operations and the use of military equipment and facilities.

[36]The White House, *The National Security Strategy of the United States of America* (Washington, DC: The White House, 2002). Numerous references throughout this document discuss utilization of military power in conjunction with other sources of national power to deter and defeat terrorist threats. While the NSS does not specifically address using the military within the borders of the United States, it just as importantly does not rule this use out.

[37]Department of Homeland Security, *The National Strategy for Homeland Security*. References to the application of military force within the United States in this document focuses on the need to review numerous initiatives including military support to civil authorities for emergency preparedness and response, legislative review authority for military assistance in domestic security, discussion of the circumstances in which the military would contribute to homeland security, roles in emergency response, counterterrorist capabilities, and integration of NORTHCOM into civil emergency response plans.

[38]Paul S. Stevens, *U.S. Armed Forces and Homeland Defense: The Legal Framework* (Washington, DC: Center for Strategic and International Studies, 2001), 1. Stevens quotes President Bush in his address to Congress on 21 September 2001 concerning the creation of the Office of Homeland Security, where he states: "Today, dozens of federal departments and agencies, as well as state and local governments, have responsibilities affecting homeland security." Stevens continues by adding, one of these departments, surely, is the Department of Defense (DOD).

[39]The asymmetric threat the United States faces today is limited only by his imagination as evidenced by the 1995 attack on the Murrah Federal Building using home made explosives, the 2001 use of civilian airliners to attack the World Trade Center and Pentagon, and the use of anthrax laced envelopes as a biological agent attack. Although military and civilian agency planners can develop scenarios to cover every possible terrorist attack situation, resource constraints will not allow the development of security measures to defeat every threat.

[40]The White House, *The National Security Strategy of the United States of America*, "Introduction."

[41]Ibid., "Introduction."

[42]Title 50 *U.S. Code*, Section 2314a, *Department of Defense rapid response team*; U.S. Department of the Army, *Operational Law Handbook*, 335. In addressing Weapons of Mass Destruction and military response capabilities, the handbook states:

> In 1996, Congress passed the Defense Against Weapons of Mass Destruction Act, commonly known as the Nunn-Lugar-Domenici Act. Public Law 104-201. The intent of the Act was to enhance the capability of the Federal Government to prevent and respond to terrorist incidents involving weapons of mass destruction. Funding is provided to DoD to develop and maintain domestic terrorism rapid response teams to aid federal, state, and local officials and responders. There are currently 35 response teams, composed of full time Army and Air National Guard members. These teams are federally resourced, trained, evaluated, and operating under federal doctrine. They perform their mission, however, primarily under command and control of state governors. If the teams are federalized, they fall under the command and control of Joint Task Force, Civil Support (JTF-CS); Department of the Army, FM 3-07, 6-14.

[43]Although not all inclusive, the following missions are likely due to the unique capabilities within the DoD in manpower, training, and equipment: (1) intelligence gathering and sharing; (2) reconnaissance; (3) interdiction; (4) border and coastal defense; (5) Chemical, Biological, Nuclear, Radiological, and/or Explosive (CBNRE) detection, decontamination, and containment; (6) transportation; (7) security; (8) evacuation; (9) search and rescue; (10) quarantine; (11) providing expert advice; (12) training; (13) medical and logistics support; (14) command, control, and communications; and (15) displaced civilian control.

[44]U.S. Department of Defense, Directive 3025.15, 3. This directive mandates that DoD will evaluate all requests for military assistance by civil authorities using the criteria of legality (compliance with laws), lethality (potential use of lethal force by or against DoD forces), risk (safety of DoD forces), cost (who pays, impact on DoD budget), appropriateness (whether the requested mission is in the interest of the Department to conduct), and readiness (impact on the DoD's ability to perform its primary mission).

[45]U.S. Department of Defense, Directive 2000.12, *DoD Antiterrorism (AT) Program* (Washington, DC: Government Printing Office, 18 August 2003), 4.

> The AT program shall be a collective, proactive effort focused on the prevention and detection of terrorist attacks against DoD personnel, their families, facilities, installations, and infrastructure critical to mission accomplishment as well as the preparation to defend against and planning for the response to the consequences of terrorist incidents. Although not elements of AT, plans for terrorism consequence management preparedness and response measures as well as plans for continuing essential military operations are important adjuncts to an effective AT program.

[46]U.S. Department of Defense, Directive 3020.26, *Continuity of Operations (COOP) Policy and Planning* (Washington, DC: Government Printing Office, 26 May 1995), 2.

[47]U.S. Department of Defense, Directive 2000.12, 3. References in this document state in part that DoD policy allows commanders to implement security measures to ensure the protection of DoD personnel (to include dependent family members) under their control; U.S. Department of the Army, JA-221, *Law of Military Installations Deskbook*, 3-35 - 3-36 (describing the non-statutory authority to protect federal property).

> The rights of the United States to protect federal property or functions by intervention with federal military forces is an accepted principle of our government. The right extends to all federal property and functions wherever located. This form of intervention is warranted, however, only where the need for protection exists and local civil authorities cannot or will not give adequate protection. To maintain law and order and protect his installation and the activities thereon, the commander may take such actions as are reasonably necessary and lawful. Such actions may include ejection from, or denial of access

to, the installation of individuals who threaten a civil disturbance upon or directed against the installation or its activities.

[48]U.S. Department of Defense, Directive 5525.5, 9; U.S. Department of the Army, JA-221 *Law of Military Installations Deskbook*, 3-22.

[49]Ibid., 9.

[50]U.S. Department of the Army, JA-221, *Law of Military Installations Deskbook*, 3-23.

> Collected information. Army organizations are encouraged to furnish information collected in the normal course of military operations to the civilian law enforcement agency having jurisdiction over the violation of federal, state, or local law to which such information is reasonably relevant. The release of such information is controlled by the provisions of AR 500-51 and the authorities cited therein. Military training and operations may be planned and executed in a way that is compatible with the needs of civilian law enforcement officials for information when the collection of information is an incidental aspect of training performed for a military purpose. This would not, however, permit planning or creating missions or training for the primary purpose of aiding civilian law enforcement officials. It would also not permit conducting training or missions for the purpose of routinely collecting information about U.S. citizens.

[51]United States Northern Command [web page]; available from http://www.northcom.mil/; Internet; accessed 7 March 2004.

[52]U.S. Department of the Army, United States Marine Corps, FM 100-19 FMFM 7-10, *Domestic Support Operations* (Washington, DC: Government Printing Office, 1 July 1993), 7-14. The manual discusses the lead and supporting agency roles, saying "Since the FBI has the lead role in most matters concerning terrorism in the US, the Army's function in AT is essentially to reduce the vulnerability of Army personnel and property to terrorist attack."

[53]Ibid., 7-14. In discussion of developing military antiterrorism responses in support of civil authorities, the manual states:

> Army organizations may develop memorandums of understanding with civilian agencies for mutual support in the event of a terrorist incident. Such agreements may include arrangements for firefighting or EOD support, providing assistance in site isolation, security engineering and assisting in hostage negotiation.

[54]U.S. Department of Defense, Directive 3025.15, 3.

[55]U.S. Department of the Army, *Operational Law Handbook*, 316.

[56]Ibid., 316.

[57]Ibid., 316. Although authorized to commit forces, commanders must also "Limit military involvement to the minimum demanded by necessity." Once civil authorities are able to control the situation or the incident is resolved, the immediate response authority no longer exists.

[58]Ibid., 319.

[59]U.S. Department of Defense, Directive 5525.5, 17.

[60]Ibid., 17.

[61]Ibid., 17.

[62] U.S. Department of the Army, *Operational Law Handbook*, 329-330. This document cites similar information as provided in DoDD 5525.5 but continues to expand the definitions of authorized and restricted training by citing a 29 June 1996 Deputy Secretary of Defense Memorandum, Subject: DoD Training Support to U.S. Civilian Law Enforcement Agencies. After providing discussion of the information detailed in DoDD 5525.5, the handbook states:

> (1) Note that the Deputy Secretary of Defense has provided policy guidance in this area, which limits the types of training U.S. forces may provide. (Deputy Secretary of Defense Memorandum of 29 June 1996, Subj: DoD Training Support to U.S. Civilian Law Enforcement Agencies, reproduced as an appendix to this Chapter.) The policy is based on prudential concerns that advanced training could be misapplied or misused by CLEAs, resulting in death or injury to non-hostile persons. The memo permits basic military training such as basic marksmanship, patrolling, medical/combat lifesaver, mission planning, and survival skills. It prohibits what it terms "advance military training," which is defined as "high intensity training which focuses on the tactics, techniques, and procedures (TTPs) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists." Examples of such training are sniper training, Military Operations in Urban Terrain (MOUT), Advanced MOUT, and Close Quarter Battle/Close Quarter Combat (CQB/CQC) training.
>
> (2) A single general exception exists to provide this advanced training at the U.S. Army Military Police School. In addition, USCINCSOC may approve this training, on an exceptional basis, by special operations forces personnel.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

The purpose of this thesis was to show that it is necessary to improve clarity in DoD interpretation and guidance of the PCA so that operational commanders at all levels are able to understand and support fully the homeland defense of the United States of America as it relates to terrorist activities.

The terrorist threats faced by the United States are very real concerns. The nation's military forces have taken an active supporting role in combating these threats and in all likelihood will continue to do so in ever-increasing ways. As the military performs these missions, it is important to remember that DoD is not only a significant contributor in homeland defense, but is also a core element of national power at home and abroad. It therefore has a responsibility to protect and secure its own forces and capabilities. This thought, summarized in the *2003 Operational Law Handbook*, illustrates this well when it states:

> The Department of Defense (DoD) is not the lead agency for combating terrorism. However, DoD does play a significant supporting role in several areas. DoD is responsible for providing technical assistance or forces when requested by the President of the United States and/or the Secretary of Defense. Moreover, DoD is also responsible for protecting its own personnel, bases, ships, deployed forces, equipment and installations. Every commander at every level has the inherent responsibility of planning for and defending against terrorist attacks.[1]

Because these missions are inherent to the military, it is important to provide commanders the understanding and scope of the PCA so they can react without hesitation when called upon. The ability of DoD to respond to a terrorist threat is expected, and "As a matter of public policy, America does not want commanders to question their orders to assist civil authorities. The PCA interjects an unnecessary degree of confusion into

already confusing situations."[2] To meet these requisite expectations, commanders must be as comfortable in their appreciation of operations within the United States as they are with conventional missions.

The PCA, a law in existence for almost 126 years, finds itself in the center of controversy surrounding the use of the armed forces within the United States. Much of this controversy is attributable to the misunderstanding of the Act that has subsequently led to an exceptionally diverse interpretation of when, how, and to whom the law applies. This ongoing debate is a genuine concern in its impacts on the ability of the armed forces to conduct homeland defense missions and potentially stands in the way of executing these missions in a timely manner.

To alleviate these concerns, and provide commanders the information needed to ease operations within the United States, revision to DoD Directives is crucial. This is required to provide the clarity and understanding needed for military forces to provide a more immediate and appropriate response to homeland defense requirements. Although the law itself provides the legal basis, the vast majorities of commanders are not legal experts and will not refer to law when determining their operational requirements, constraints, and considerations. This fact argues for revision to DoD Directives vice the PCA. Commanders, as potential executors of homeland defense missions, understand the necessity of referencing directives and regulations when assimilating problems. Even though legal representatives are readily available to most commanders through their detailed Staff Judge Advocates, many lawyers do not possess legal expertise of the PCA[3] while the existing relationships, expectations, and knowledge may not cause

commanders, especially subordinate commanders, to ask the right questions, if they ask at all.

The many exceptions that exist in the application of the Act today provide the necessary latitude for commanders to act. However, a general misunderstanding of the exceptions largely negates much of the authority that commanders currently possess to react to a terrorist event. Again, clarification of these exceptions will greatly improve the response of the United States' armed forces to a terrorist threat.

The intent of the law to minimize use of the Armed Forces within the United States is still relevant and useful. Protection of the military from becoming overburdened with additional missions is also a viable concern at a time when approximately one-half of the available military forces are deployed overseas in support of ongoing operations. The presence of the PCA and the current definitions of lead agency responsibilities will continue to lessen the use of the military as a first choice in response to national emergencies. Still commanders must expect and prepare for domestic operations due to the unique expertise, training, equipment, and deployment capabilities resident in military organizations.

Recommendations

In order to maximize the use and capabilities of the United States' military, it is necessary to accomplish several objective tasks. Each of these steps must work toward the fundamental goal of increasing the awareness and understanding of the PCA for military commanders at all levels.

First, it is necessary to consolidate and revise DoD Directives relating to the use of the military within the United States into one document that provides as much

definition and clarity to commanders as possible. This new DoD Directive should address the capabilities, limitations, and constraints commanders will face as they execute a broad spectrum of missions ranging anywhere from training civilian law enforcement agencies to destroying a positively identified terrorist threat. This directive must be comprehensive in nature and written in a manner easily understood by personnel who do not possess a legal education. In doing this, commanders will have a common baseline reference on which to base their actions. This common reference will also facilitate the production of easily understood service regulations that further define the roles of specific branches of the military. The NORTHCOM commander should take the lead in this action due to his role as the supported commander in homeland defense and homeland security missions. This, supported by the necessity of supporting military organizations to understand their legal limitations in domestic operations should provides the relevance. Finally, as a combatant commander, he possesses the inherent capacity associated with his rank and position to influence the DoD to make revision of the Directives a priority task.

The second recommendation to improve the clarity of the PCA's impact is to introduce the Act in the formal institutional education process. Currently within the United States Army, only the Judge Advocate General and Military Police Corps receive any PCA training. These branches are logical choices for this formal education of the PCA and its many exceptions. However, because all branches of the military and services may become involved with homeland defense at some point in time, all DoD leaders need to have a basic understanding of the PCA and what it means to them, as the soldier, sailor, airman, or marine serving in a homeland defense capacity.

The intent of this training should not be to produce legal experts, but rather to provide the basic knowledge of the Act and an awareness of how it applies. The introduction of this training could easily take place in service academies, officer basic courses, staff courses, war colleges, and non-commissioned officer basic, advanced, and academy courses. This fundamental education process, reinforced through repetition at each subsequent level of instruction will dispel much of the confusion and misunderstanding of the PCA and allow these leaders to make sound decisions and make substantiated recommendations to civil authorities concerning the suitable use of military forces. This knowledge will not lessen the importance of commanders seeking counsel from their Judge Advocate representative to explain the PCA when the situation permits. It will allow commanders to make informed decisions and ask their legal representation the 'right' questions when seeking elucidation of the law.

The third and last recommendation for improving the understanding of the PCA is to repeal the law and all of its exceptions in their current form and reinstate the law in an understandable, consolidated, and modern format. This proposal has no statutory basis, but may be the essential step in removing the confusion surrounding the law. The necessity of this proposal lies in the clarification of the law needed within the legal community. Due to the number of exceptions, overlapping laws, and the inclusion of archaic references the legal community often struggle to effectively interpret and explain the meaning and intent of the law as it exists today.[4] Because of this confusion, attempts to craft a useful and understandable DoD Directive may not be feasible until legislative bodies take this untested approach.

This thesis is merely a starting point for these issues. Because of the broad scope of the PCA, many other areas need addressing in order to make this a worthwhile effort. This will require additional research in the areas of civil disturbances, disaster relief, and any other potential missions involving the use of the armed forces within the United States prior to making any meaningful revisions to the DoD Directives governing this issue or the law itself.

Any proposed revisions to DoD Directives or the PCA can expect to, and should meet intense scrutiny. The law exists because practical experiences demonstrated there was a need for interdiction to prevent further abuses by both civil and military authorities. These concerns still require careful consideration to prevent them from reoccurring through a gradual increase of authority that allows acceptable activities to shift to one extreme or another. Properly preparing the military will alleviate many of these concerns. Paul S. Stevens summarized this well when he stated: "As a practical matter, the better we have anticipated and properly prepared DoD to play its unique and necessary role in response to a catastrophic terrorist attack, the less concerned we need be that the military will exceed its proper functions."[5] By providing clarity through DoD guidance and intent, educating the leaders and military commanders at all levels, and potentially revising the law completely can only improve the ability of the armed forces to contribute effectively to the defense of the United States.

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[1]U.S. Department of the Army, JA-221, *Law of Military Installations Deskbook* (Administrative & Civil Law Department, The Judge Advocate General's School, September, 1996), 312.

[2]Donald J. Currier, *The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?* (Carlisle Barracks, PA: U.S. Army War College, 2003), 13.

[3]William Sells [electronic mail]; *RE: RE: RE: Posse Comitatus*, 8 March 2004. In this correspondence, COL Sells argues that the numerous exceptions and interpretations of the law cause lawyers to experience a great deal of confusion about the PCA.

[4]Ibid.

[5]Paul S. Stevens, *U.S. Armed Forces and Homeland Defense: The Legal Framework* (Washington, DC: Center for Strategic and International Studies, 2001), 8.

GLOSSARY

Antiterrorism. Defensive measures used to reduce the vulnerability of individuals and property to terrorist acts, to include limited response and containment by local military forces.

Civil Authorities.Nonmilitary Federal, State, or local government agencies.

Civil Disturbance. Group acts of violence and disorders prejudicial to public law and order in the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. possessions and territories, or any political subdivision thereof.

Civil Emergency. Any natural or manmade disaster or emergency that causes or could cause substantial harm to the population or infrastructure. This term can include a "major disaster" or "emergency," as those terms are defined in the Stafford Act, as amended, as well as consequences of an attack or a national security emergency. The terms "major disaster" and "emergency" are defined substantially by action of the President in declaring that extant circumstances and risks justify his implementation of the legal powers provided by those statutes.

Consequence Management. Those measures taken to protect public health and safety, restore essential government services, and provide emergency relief to governments, businesses, and individuals affected by the consequences of a chemical, biological, nuclear, and/or high-yield explosive situation. For domestic consequence management, the primary authority rests with the States to respond and the Federal Government to provide assistance as required.

Counterterrorism. Operations that include the offensive measures taken to prevent, deter, preempt, and respond to terrorism.

Crisis Management. Measure to resolve a hostile situation and investigate and prepare a criminal case for prosecution under federal law. Crisis management will include a response to an incident involving a weapon of mass destruction, special improvised explosive device, or a hostage crisis that is beyond the capability of the lead federal agency.

Federal Property. Property that is owned, leased, possessed, or occupied by the Federal Government.

Homeland Defense. The protection of U.S. territory, domestic population and critical infrastructure against military attacks emanating from outside the United States.

Homeland Security. The prevention, preemption, and deterrence of, and defense against, aggression targeted at U.S. territory, sovereignty, domestic population, and infrastructure as well as the management of the consequences of such aggression and other domestic emergencies.

Immediate Response. Any form of immediate action taken by a DoD Component or military commander, under the authorities outlined in DoD Directive 3025.12, to assist civil authorities or the public to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions occurring where there has not been any declaration of major disaster or emergency by the President or attack.

Terrorism. The calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.

Terrorist. An individual who uses violence, terror, and intimidation to achieve a result.

United States. Includes the land area, internal waters, territorial sea, and airspace of the United States, including the following: a. US territories, possessions, and commonwealths; and b. Other areas over which the US Government has complete jurisdiction and control or has exclusive authority or defense responsibility.

BIBLIOGRAPHY

Books

Coakley, Robert W. *The Role of Federal Military Forces in Domestic Disorders, 1789-1878*, Washington, DC: Center of Military History, 1988.

Delk, James D. *Fires and Furies: The Los Angeles Riots of 1992*, Palm Springs, CA: ETC Publications, 1995.

Frankel Jack R., and Norman E. Wallen, *How to Design and Evaluate Research in Education*, 4th ed. St. Louis, MO: McGraw-Hill Higher Education, 2000.

Larson, Eric V., and John E. Peters. *Preparing the U.S. Army for Homeland Security: Concepts, Issues, and Options*. Santa Monica, CA: RAND Corporation, 2001.

Laurie, Clayton D., and Ronald H. Cole. *The Role of Federal Military Forces and Domestic Disorders, 1877-1945*. Washington, DC: Center of Military History, 1997.

Articles, Essays, and Papers

Allen, Charles B. "Tightening America's Borders: An Increased Drug Interdiction Role for the U.S. Military." Carlisle Barracks, PA: U.S. Army War College, 1998.

Anderson, Donnie P. "The Army's Commitment to Supporting the Homeland Security Chemical, Biological, Radiological, Nuclear, and High-Yield Explosive Weapon Terrorist Threat: Can the Reserve Components Meet the Requirement by Themselves?" Carlisle Barracks, PA: U.S. Army War College, 2001.

Baranzini, Richard D. "Military Support to Law Enforcement and Posse Comitatus: Is the Search for Nontraditional Missions on a Collision Course with Operational Readiness?" Newport, RI: Naval War College, 1993.

Barnes, Joseph R. "Despite the Posse Comitatus Act, Are Federal Soldiers About to Deploy as Deputized Border Patrol and Customs Agents?" *Journal of Homeland Security*, (February 2002); available from http://www.homelandsecurity.org/journal/Commentary/barnes.htm; accessed 12 September 2003; Internet.

Bender, Bryan. "U.S. DOD Clamps Down on Threats Over the Internet." *Jane's Defence Weekly* 32, no. 9, 1 September 1999.

Benson, Nolon J. "The Posse Comitatus Act: Is There a Need For Change?" Carlisle Barracks, PA: U.S. Army War College, 1998.

Brinkerhoff, John R. "The Posse Comitatus Act and Homeland Security." *Journal of Homeland Security*, (February 2002); available from http://www. homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm; accessed 12 September 2003; Internet.

Bunch, Jason Michael. "United States Military Law Enforcement Use and Narcotics Interdiction: A Test of the Posse Comitatus Law." M.A. thesis, Vermillion, SD: University of South Dakota, 1995.

Burnett, Paull C. "A Historical Analysis of the Posse Comitatus Act and Its Implications For the Future." M.S. thesis, University of South Carolina, 1996.

Carter, Ashton B., John M. Deutch, and Philip D. Zelikow. "Catastrophic Terrorism: Elements of a National Policy." Cambridge, MA: Harvard University Press, 1988.

Chase, David W. "Posse Comitatus: A Nineteenth Century Law Worthy of Review For the Future?" Monograph, Fort Leavenworth, KS: School of Advanced Military Studies, U.S. Army Command and General Staff College, 2001.

Chipman, Dana K. "Countering Terrorism in the Heartland – Can We Afford Posse Comitatus any Longer?" Carlisle Barracks, PA: U.S. Army War College, 2003.

Cox, Steven J. "Role of SOF in Paramilitary Operations." Monterey, CA: Naval Postgraduate School, 1995.

Currier, Donald J. "The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?" Carlisle Barracks, PA: U.S. Army War College, 2003.

Diehl, James G. "The Cop and the Soldier: An Entangling Alliance?: The Posse Comitatus Act and the National Security Strategy of Engagement and Enlargement." Carlisle Barracks, PA: U.S. Army War College, 1997.

Felicetti, Gary and John Luce. "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before any More Damage is Done." *Military Law Review* 175 (March 2003): 86-183.

Gallavan, Christopher G. "Fast Guns and the Posse Comitatus Act." Carlisle Barracks, PA: U.S. Army War College, 1999.

Grange, David L., and Rodney L. Johnson. "Forgotten Mission: Military Support to the Nation." *Joint Forces Quarterly*, no. 15, (spring 1997): 108-115.

Hammond, Matthew, "The Posse Comitatus Act: A Principle in Need of Renewal." *Washington University Law Quarterly* 75, no. 2, U.L.Q. 953 (summer 1997): 32.

Ikle, Fred C. *Defending the U.S. Homeland: Strategic and Legal Issues for DoD and the Armed Services*, Center for Strategic and International Studies, Homeland Defense Working Group, 1999.

Isenberg, David. *Posse Comitatus: Caution is Necessary*, Terrorism project, Center for Defense Information, 6 August 2002; available from http://www.cdi.org/terrorism/pcomitatus-pr.cfm; accessed 11 September 2003; Internet.

Maher, Christopher. "Combating International Organized Crime: A Proposal for Expanding Our National Military Strategy and Amending Title 10 of the United States Code." Carlisle Barracks, PA: U.S. Army War College, 2001.

Manley, Gerald J. "The Posse Comitatus Act Post-9/11: Time for a Change?" Essay, Washington, DC: National Defense University, National War College.

Miller, Steven L. "The Military, Domestic Law Enforcement and Posse Comitatus: A Time for Change." Research report. Maxwell Air Force Base, AL: Air Command and Staff College, 2000.

Miniter, Brendan. "The Posse Comitatus Problem: An 1878 anti-Reconstruction Law Makes it Harder to Fight Terror." *The Wall Street Journal Opinion Journal* (12 August 2002)

Neptun, Daniel A. "Posse Comitatus: Some Thoughts on Loosening Its Restrictions Within the Department of Defense." Newport, RI: U.S. Naval War College, 1999.

O'Shaughnessy, James P. "The Posse Comitatus Act: Reconstruction Politics Reconsidered." *American Criminal Law Review* 13, no. 4 (spring 1976): 703-735.

Quillen, Chris. "Posse Comitatus and Nuclear Terrorism." *PARAMETERS*, U.S. Army War College Quarterly, (spring 2002): 60-74, accessed 11 September 2003; available from http://carlisle-www.army.mil/usawc/Parameters/02spring/quillen.htm; Internet.

Record, Jeffrey. *Bounding The Global War On Terrorism*, Strategic Studies Institute, U.S. Army War College, December 2003; available from http://www.carlisle.army.mil/ssi/pubs/2003/bounding/bounding.pdf; accessed 15 February 2004; Internet.

Rossi, C. T. *The Posse Comitatus Act: Can We Maintain American Freedom Without It?* Free Congress Foundation, 29 July 2002; available from http://www.freecongress.org/commentaries/020729.asp; accessed 11 September 2003; Internet.

Safire, William. "Thataway, Posse Comitatus." *New York Times*, (28 February 1986); available from Lexis-Nexis Academic Universe (News; General News; Major Newspapers) http://www.lexis-nexis.com/universe; accessed 5 January 2003; Internet.

Stevens, Paul S. *U.S. Armed Forces and Homeland Defense: The Legal Framework*. Washington, DC: Center for Strategic and International Studies, 2001.

Toner, Robin. "Trust in the Military Heightens Among Baby Boomers' Children." *New York Times*, (27 May 2003); available from http://query.nytimes.com/search/restricted/article?res=F10C15FF3B550C748EDDAC0894DB404482; accessed 5 January 2004; Internet.

Toomer, Jeffery K. "A Strategic View of Homeland Security: Relooking the Posse Comitatus Act and DOD's Role in Homeland Security." Monograph, Fort Leavenworth, KS: School of Advanced Military Studies, U.S. Army Command and General Staff College, 2002.

Trebilcock, Craig T. "The Myth of Posse Comitatus." *Journal of Homeland Security*, (February 2002); available from http://www.homelandsecurity.org/journal/Articles/Trebilcock.htm; accessed 12 September 2003; Internet.

Visco, Eugene P. "More Than You Ever Wanted to Know About Posse Comitatus." In Analysis for Assessment, Evaluation and Crisis Management *Proceedings of Cornwallis VI*, 134-163, Alexander Woodcock and David Davis, editors, The Canadian Peacekeeping Press of the Lester B. Pearson Canadian International Peacekeeping Training Centre, Nova Scotia, Canada, 2002.

Military Directives, Regulations and Manuals

U.S. Department of the Army, Army Regulation 500-50, *Emergency Employment of Army and Other Resources: Civil Disturbances*. Washington, DC: Government Printing Office, 21 April 1972.

_____. Army Regulation 500-51, *Emergency Employment of Army and Other Resources: Support to Civilian Law Enforcement*. Washington, DC: Government Printing Office, 1 July 1983.

_____. Army Regulation 500-60, *Emergency Employment of Army and Other Resources: Disaster Relief*. Washington, DC: Government Printing Office, 1 August 1981.

_____. *Domestic Operational Law (DOPLAW) Handbook for Judge Advocates*. Center for Law and Military Operations, Charlottesville, VA, 15 April 2001.

_____. FM 3-07 (FM 100-20), *Stability Operations and Support Operations*. Washington, DC: Government Printing Office, 20 February 2003.

_____. *Installation Commanders' Blueprint: Installation Preparedness for Weapons of Mass Destruction*. Washington, DC: Government Printing Office, May 2001.

_____. *Operational Law Handbook*, Charlottesville, VA, International and Operational Law Department, The Judge Advocate General's School, 2003.

_____. United States Marine Corps, FM 100-19 FMFM 7-10, *Domestic Support Operations*. Washington, DC: Government Printing Office, 1 July 1993.

_____. Pamphlet 27-100-7, Furman, H. W. C., *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, Military Law Review 7 (January 1960): 85-129.

U.S. Department of Defense, Directive 1100.20, *Support and Services for Eligible Organizations and Activities Outside the Department of Defense*. Washington, DC: Government Printing Office, 30 January 1997.

_____. Directive 2000.12, *DoD Antiterrorism (AT) Program*. Washington, DC: Government Printing Office, 18 August 2003 (Certified Current as of 21 November 2003).

_____. Directive 2000.16, *DoD Antiterrorism Standards*. Washington, DC: Government Printing Office, 14 June 2001.

_____. Directive 3020.26, *Continuity of Operations (COOP) Policy and Planning*. Washington, DC: Government Printing Office, 26 May 1995.

_____. Directive 3025.1, *Military Support to Civil Authorities (MSCA)*. Washington, DC: Government Printing Office, 15 January 1993.

_____. Directive 3025.12, *Military Assistance for Civil Disturbances (MACDIS)*. Washington, DC: Government Printing Office, 4 February 1994.

_____. Directive 3025.15, *Military Assistance to Civil Authorities*. Washington, DC: Government Printing Office, 18 February 1997.

_____. Directive 3150.5, *DoD Response to Improvised Nuclear Device (IND) Incidents*. Washington, DC: Government Printing Office, 24 March 1987.

_____. Directive 3150.8, *DoD Response to Radiological Accidents*. Washington, DC: Government Printing Office, 13 June 1996.

_____. Directive 5100.78, *United States Port Security Program*. Washington, DC: Government Printing Office, 25 August 1986.

_____. Directive 5160.54, *Critical Asset Assurance Program (CAAP)*. Washington, DC: Government Printing Office, 20 January 1998.

_____. Directive 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*. Washington, DC: Governme nt Printing Office, 20 December1989.

_____. Joint Publication 3-07.4, *Joint Counterdrug Operations*. Washington, DC: Government Printing Office, 17 February 1998.

_____. *Quadrennial Defense Review Report*, Washington, DC: Government Printing Office, 2001.

U.S. Department of Homeland Security, *Interim Federal Response Plan*, Washington, DC: Government Printing Office, 2003.

United States Northern Command. Web page; available from http://www.northcom.mil/; accessed 11 September 2003 and 7 March 2004, Internet.

Government Reports, Documents, and Laws

Department of Defense rapid response team. *U.S. Code* Title 50, sec. 2314a (1996).

Office of Homeland Security. *The National Strategy for Homeland Security*. Washington, DC: 2002.

Perl, Raphael. *Issue Brief for Congress: Terrorism, the Future, and U.S. Foreign Policy*. Congressional Research Service, The Library of Congress, 2003.

Posse Comitatus Act. U.S. Code, Title 18, sec. 1385 (1878).

U.S. Congress. Senate. Committee on Governmental Affairs, *The Homeland Security Department: Hearing before the Committee on Governmental Affairs*, 107th Cong., 2nd sess., 20 June 2002.

_____. Committee on Armed Services. *The Role of the Department of Defense in Homeland Security*. Hearing before the Committee on Armed Services, 107th Cong., 1st sess., 25 October 2001.

_____. Senate. Report of the National Commission on Terrorism, *Countering the Changing Threat of International Terrorism.* 106th Cong., 2nd sess., 7 June 2000.

The White House. *The National Security Strategy of the United States of America*. Washington, DC: 2002.

Correspondence

Sells, William. *RE: Rumsfeld Approved Domestic 'Rapid Reaction' Units for Major Attacks*, electronic mail, 15 January 2004.

_____. *RE: RE: Posse Comitatus*, electronic mail, 8 March 2004.

_____. *RE: RE: RE: Posse Comitatus*, electronic mail, 8 March 2004.

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