

# Strategy Research Project

## Use of the Armed Forces for Domestic Law Enforcement

by

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United States Army War College  
Class of 2013

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**REPORT DOCUMENTATION PAGE**Form Approved  
OMB No. 0704-0188

The public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. **PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.**

<b>1. REPORT DATE (DD-MM-YYYY)</b> xx-03-2013		<b>2. REPORT TYPE</b> STRATEGY RESEARCH PROJECT		<b>3. DATES COVERED (From - To)</b>	
<b>4. TITLE AND SUBTITLE</b> Use of the Armed Forces for Domestic Law Enforcement				<b>5a. CONTRACT NUMBER</b>	
				<b>5b. GRANT NUMBER</b>	
				<b>5c. PROGRAM ELEMENT NUMBER</b>	
<b>6. AUTHOR(S)</b> Lieutenant Colonel Craig E. Merutka United States Army				<b>5d. PROJECT NUMBER</b>	
				<b>5e. TASK NUMBER</b>	
				<b>5f. WORK UNIT NUMBER</b>	
<b>7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)</b> Colonel Roger McFadden Department of Military Strategy, Planning, and Operations				<b>8. PERFORMING ORGANIZATION REPORT NUMBER</b>	
<b>9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)</b> U.S. Army War College 122 Forbes Avenue Carlisle, PA 17013				<b>10. SPONSOR/MONITOR'S ACRONYM(S)</b>	
				<b>11. SPONSOR/MONITOR'S REPORT NUMBER(S)</b>	
<b>12. DISTRIBUTION / AVAILABILITY STATEMENT</b> Distribution A: Approved for Public Release. Distribution is Unlimited.					
<b>13. SUPPLEMENTARY NOTES</b> Word Count: 6,995					
<b>14. ABSTRACT</b> The Armed Forces have always provided support to civil law enforcement. It is a legitimate, lawful mission authorized by the Constitution and supported by centuries of precedent. Accordingly, the Armed Forces must be prepared to support domestic law enforcement. This requires an understanding of the historical background, societal concerns, and legal authorities involved when the military operates within the Homeland. Not only is this understanding required to maximize effectiveness and efficiency, it is also required to avoid abuse when the Armed Forces are called upon to support domestic law enforcement. This paper assists with that understanding by outlining the societal concerns Americans have regarding the use of the Armed Forces domestically and by explaining the legal basis for the support to domestic law enforcement mission. It concludes by identifying current deficiencies in training and offering some suggestions on how to improve preparedness in this area.					
<b>15. SUBJECT TERMS</b> Defense Support to Civil Authorities (DSCA), Civil Support, Posse Comitatus Act, Insurrection Acts					
<b>16. SECURITY CLASSIFICATION OF:</b>			<b>17. LIMITATION OF ABSTRACT</b>  UU	<b>18. NUMBER OF PAGES</b>  40	<b>19a. NAME OF RESPONSIBLE PERSON</b>
<b>a. REPORT</b> UU	<b>b. ABSTRACT</b> UU	<b>c. THIS PAGE</b> UU			<b>19b. TELEPHONE NUMBER (Include area code)</b>



USAWC STRATEGY RESEARCH PROJECT

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## **Abstract**

Title: Use of the Armed Forces for Domestic Law Enforcement

Report Date: March 2013

Page Count: 40

Word Count: 6,995

Key Terms: Defense Support to Civil Authorities (DSCA), Civil Support, Posse Comitatus Act, Insurrection Acts

Classification: Unclassified

The Armed Forces have always provided support to civil law enforcement. It is a legitimate, lawful mission authorized by the Constitution and supported by centuries of precedent. Accordingly, the Armed Forces must be prepared to support domestic law enforcement. This requires an understanding of the historical background, societal concerns, and legal authorities involved when the military operates within the Homeland. Not only is this understanding required to maximize effectiveness and efficiency, it is also required to avoid abuse when the Armed Forces are called upon to support domestic law enforcement. This paper assists with that understanding by outlining the societal concerns Americans have regarding the use of the Armed Forces domestically and by explaining the legal basis for the support to domestic law enforcement mission. It concludes by identifying current deficiencies in training and offering some suggestions on how to improve preparedness in this area.





## **Use of the Armed Forces for Domestic Law Enforcement**

The Armed Forces of the United States have supported domestic law enforcement efforts since the very beginning of the nation. From George Washington's use of federalized state militia in 1794 to put down the Whiskey Rebellion in Western Pennsylvania to George H.W. Bush's use of the 7<sup>th</sup> Infantry Division in 1992 to quell the Los Angeles race riots, the Armed Forces have been used for domestic law enforcement well over 100 times.<sup>1</sup> While most uses complied with the Constitution and the law, some did not. Every use, however, seems to have drawn praise and criticism, either supported or opposed as legal or illegal by significant parts of the citizenry. One only has to look at public reaction when U.S. Northern Command (NORTHCOM) was stood up in 2002 to realize the use of the Armed Forces domestically— at least for domestic law enforcement purposes – remains controversial. The societal and legal issues that arise and the limits that are imposed whenever the military supports civil law enforcement are significant. The origins of these limits range from deep seeded American tradition, to the Constitution and other federal law, to Department of Defense (DOD) regulation.

While it has been over twenty years since the President used the Armed Forces in such a significant law enforcement role as President Bush did in Los Angeles, the Armed Forces must always be ready to perform the mission. In times of domestic crisis the military remains a viable option with its disciplined manpower, effective command and control, and ready resources. The Armed Forces option becomes even more viable as the availability of military forces increase with the end of overseas engagements in Iraq and Afghanistan and the domestic economy stagnates thus reducing the amount of law enforcement assets local and state governments can afford. Additionally, political

clashes between the federal government and its citizens over individual rights, and the federal government and its states over states rights, only raise the specter that federal involvement in traditionally individual and state affairs will increase. This could mean more frequent calls for the Armed Forces to support domestic law enforcement as either individuals or states oppose such moves, implicitly or explicitly, causing strife in the Homeland.

Accordingly, the Armed Forces must be prepared to support domestic law enforcement. This requires an understanding of the historical background, societal concerns, and legal authorities involved when the military operates within the Homeland. Not only is this understanding required to maximize effectiveness and efficiency, it is also required to avoid abuse when the Armed Forces are called upon to support domestic law enforcement. This paper assists with that understanding by first outlining the societal concerns Americans have regarding the use of the Armed Forces domestically. Historically based, these concerns are still prevalent and can impact how the military is used today. The paper then explains the legal basis for the support to domestic law enforcement mission so leaders will understand the legal authorities and limits involved. As will be shown, the military has been misused in the past and the possibility of its misuse still exists. The paper concludes by offering some suggestions on how to improve preparedness in this area. With so much attention paid to overseas contingency operations during the past decade, most of the Armed Forces may be ill-prepared to operate domestically.

Background: Defense Support to Civil Authorities - Support to Law Enforcement

Joint Publication 3-28, *Civil Support*, identifies three domestic military mission sets DOD can perform – Homeland Security, Homeland Defense, and Defense Support

to Civil Authorities (DSCA). Homeland Security is a DOD anti-terrorism mission that supports a “concerted national effort to prevent terrorist attacks within the United States; reduce America’s vulnerability to terrorism, major disasters, and other emergencies; and minimize the damage and recover from attacks, major disasters, and other emergencies that occur.”<sup>2</sup> The Department of Homeland Security (DHS) is the lead federal agency for Homeland Security while DOD supports. Homeland Defense entails, “[t]he protection of United States sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression or other threats as directed by the President”<sup>3</sup> While similar to Homeland Security, Homeland Defense envisions a more traditional foe, typically another nation’s armed forces. The DOD is the lead federal agency for this mission while all other federal agencies are in support. The third mission is Defense Support to Civil Authorities (DSCA). As defined by joint doctrine, DSCA entails the, “[s]upport provided by US Federal military forces... and National Guard forces ... in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities...”<sup>4</sup> DSCA is provided under the auspices of the National Response Plan.<sup>5</sup> DHS or the Department of Justice (DOJ) leads the federal response in these activities but DOD often provides significant support. This paper focuses on the law enforcement support mission of DSCA.

### Historical Background and Societal Concerns

There is an American tradition of non-interference by the Federal Government in state and local matters that impacts how military forces are used domestically. This is based upon American federalism. The American federalist form of government is a tiered system consisting of local, state, and federal governments, each with distinct

authority, responsibility, and function. This is explicitly codified throughout the Constitution but particularly in the Tenth Amendment: “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The Tenth Amendment clearly stands for the proposition that the powers granted to the federal government in the Constitution are the only ones it enjoys. All others remain with the States or the people. A great example of this system of tiered government in action is the manner in which the United States responds to an emergency, such as a domestic disturbance or natural disaster, within its borders. Primary authority and responsibility rests with local and state governments. Only if the emergency exceeds their ability to respond will the Federal Government get involved. This is referred to as “tiered response.”<sup>6</sup>

Local and state governments successfully address a vast majority of emergencies every year. Whether by themselves or with the assistance of other communities or states through mutual aid agreements and similar mechanisms such as the Emergency Management Assistance Compact,<sup>7</sup> they are well prepared to respond. While the Federal Government certainly must be ready as well, their role should be limited in all but the most significant or catastrophic events.

Not only has this been the historical approach to dealing with domestic emergencies but it also is the current policy as stated in the National Response Framework. The Framework is a national policy that “presents the guiding principles that enable all response partners to prepare for and provide a unified national response to disasters and emergencies - from the smallest incident to the largest catastrophe.”<sup>8</sup> The National Response Framework calls for increased cooperation among the different

levels of government but clearly places the most burden, from initial response to final actions, upon local and state governments. This is based on American tradition that requires the sharing of power and responsibility among the different levels of government. This of course impacts how federal Armed Forces will be used.

Another tradition that impacts how the Armed Forces are used domestically is the American tradition, “born in England and developed in the early years of our nation, that abhors military involvement in civilian affairs, at least under ordinary circumstances.”<sup>9</sup> This tradition demonstrates a healthy skepticism against using military forces for domestic law enforcement. The origins of this tradition can be traced to the nation’s founding documents.

Among the Colonists’ list of grievances cited in the Declaration of Independence were several dealing with the quartering and maintaining of armed troops within the Colonies. These troops operated outside the jurisdiction of Colonial authority and were quartered amongst the people in order to enforce British law. This did not sit well with some Colonists as evidenced by the Boston Massacre of 1770, which by most accounts was instigated by Bostonians angered by the presence of British Soldiers among them. The Constitution itself also reflects American disfavor of standing armies and thus purposely divides the power to command, regulate, and fund the military between the executive and legislative branches of government. This bifurcation of authority serves two purposes – ensuring that potentially significant military power does not fall into singular hands and ensuring that the military itself does not become so powerful that it can threaten the ideals of the country itself. Nowhere can this potential power be more felt – or potentially abused – than domestic law enforcement.

American history is replete with examples of military forces, primarily the Army, being used in a domestic law enforcement role.<sup>10</sup> While this includes suppressing rebellion and quelling domestic violence, it also includes voter intimidation, breaking labor strikes, and seizing and operating industrial facilities. While there certainly are instances where domestic use of the military is required, it is subject to abuse.

During World War II, the Armed forces played a significant role in the forced removal and detention of approximately 110,000 individuals of Japanese descent, two-thirds of whom were loyal American citizens.

Military control of the Western Defense Command Area (Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington) was established in March 1942 by Executive Order 9066. The WDC was in charge of the initial evacuation of Japanese-Americans to temporary Assembly Centers, the operation of the centers, and the transfer of Japanese-Americans to permanent Relocation Centers operated by the War Relocation Authority.<sup>11</sup>

This detention of loyal American citizens was later declared unlawful by the Supreme Court<sup>12</sup> and called a grave injustice by a later Congress and President.<sup>13</sup> During World War I, “federal troops were employed to assist in putting down labor disputes and other minor disturbances 29 times,” all without following congressionally mandated procedures.<sup>14</sup> During Reconstruction, the Army was accused of intimidating voters in several Southern states, possibly affecting the outcome of a Presidential election.<sup>15</sup> The imposition of Army enforced martial law in loyal states during the Civil War was deemed unconstitutional by the Supreme Court.<sup>16</sup>

More recent examples demonstrate that there still are legitimate concerns about the inappropriate use of the Armed Forces. In 2002, President George W. Bush was urged by senior government officials to use military forces to arrest civilian terrorist suspects located in the United States.<sup>17</sup> While this course of action was wisely rejected

and the Federal Bureau of Investigation used to arrest the “Lackawanna Six” outside of Buffalo, New York, its consideration demonstrates that significant disagreements over the proper domestic role of the Armed Forces still exists. Congress likewise, has demonstrated disagreement over this role. The 2007 National Defense Authorization Act granted the President additional authority under the Insurrection Act to use military forces to enforce the law or to mobilize the National Guard in response to a domestic disaster *without* a request from the effected state’s governor – a significant departure from over 230 years of precedent.<sup>18</sup> After complaints from state governors regarding usurpation of state authority, this provision was wisely repealed the following year. In 2008, legitimate concerns were raised when a brigade combat team was first allocated to NORTHCOM as part of a regional alignment program.<sup>19</sup> Specifically, fears were expressed that the U.S. military will patrol U.S. streets or engage in domestic law enforcement. Recently, a provision within the 2012 National Defense Authorization Act allows the President to order the indefinite military detention of persons – including U.S. citizens – suspected of being involved in terrorism.<sup>20</sup> This controversial provision directly implicates an American citizen’s rights under the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> Amendments<sup>21</sup> and is already the subject of judicial challenges. Finally, according to a legal “white paper” produced by the DOJ in 2013, the President supposedly has the legal authority under certain conditions to order a lethal drone strike against American citizens abroad who are suspected of high level leadership in Al Qaeda or their affiliated forces.<sup>22</sup> While the paper does not purport to authorize such action domestically, there is no authority cited that would prohibit such a strike either. This raises unique issues of law enforcement, the ethics of warfare, and technology, and understandably, it has raised real concerns.<sup>23</sup>

Each of these demonstrate that there is continual pressure to increase the role of the Armed Forces in civil law enforcement and that there is a blurring of the line between national security, anti-terrorism operations, and law enforcement as it concerns U.S. citizens. Some of these efforts raise significant Constitutional issues and causes legitimate concerns over where this can be heading.

In an intriguing 1992 article entitled, “The Origins of the American Military Coup of 2012,”<sup>24</sup> then LTC Charles Dunlap uses a future coup as a literary device to dramatize his “concern over certain contemporary developments affecting the Armed forces.” In the paper, LTC Dunlap cites the increasing role of the military in non-traditional missions, particularly law enforcement (starting with DOD’s role in federal anti-drug efforts), as a warning sign and distracter that contributes to the conditions susceptible for a coup. While both, LTC Dunlap’s article and this paper, do not suggest that the U.S. military is engaging in any illegal activity or that a military coup is likely any time soon, they do advocate the need for service members, particularly the officer corps, to understand history, civics and politics, and most of all the Constitution, lest they become unwitting tools of abuse. Officers must be ready and willing to speak up when they see civilian or military superiors executing policies that are wrong or illegal. Care must be taken not to misconstrue exhortations by senior leaders to steer clear of politics as an excuse not to be politically astute or civic minded. Recent emphasis on the sacrosanct tradition of civilian control over the military must not result in an officer corps too afraid to confront illegal or improper uses of the military. Failing to speak up when appropriate would violate the officer corps’ ultimate responsibility to serve the country and defend the Constitution.<sup>25</sup>



## Legal Basis

### U.S. Constitution

The legal foundation for the law enforcement DSCA mission is found in the United States Constitution. Article IV, Section 4 *guarantees* the States a republican form of government and *promises* that the Federal Government will protect them against invasion and domestic violence. While the Constitution does not spell out exactly how the Federal Government would deliver on this promise, the use of the Armed Forces to do so was anticipated. According to Alexander Hamilton in Federalist #29, “[i]n times of insurrection, or invasion, it would be natural and proper that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition.”<sup>26</sup> Additionally, Article I, Section 8 specifically grants Congress the authority to call forth the “state militias” to “execute the Laws of the Union, suppress Insurrections [sic] and repel Invasions [sic].” The President is charged in Article II to ensure that the laws “be faithfully executed.” As the chief executive and commander-in-chief of the active military forces this arguably includes the authority to use the Armed Forces to do so.

This authority, however, is shared with Congress which has the authority to make the laws the President must enforce; the power to establish, maintain, and regulate the Armed Forces; and the power to dictate the circumstances under which the National Guard may be called into federal service as stated in Article 1, Section 8. Since Congress’ authority is a check on executive power, the President’s authority to use the military to enforce civilian law requires coordination with Congress. The Supreme Court has shed some light on how these powers correlate.

The Court has pointed out that the President's power under the Guarantee Clause of Article IV, Section 4, which guarantees the states protection against domestic violence, is only provisionally effective until such time as Congress acts. And the President may not always use the Armed Forces to meet a domestic emergency when Congress has previously resisted an invitation to sanction their employment. Finally, even when Congress has disclaimed any intent to limit the exercise of the President's constitutional powers, the President's inherent and incidental powers will not always trump conflicting, constitutionally grounded claims.<sup>27</sup>

Thus, while the President remains responsible for the execution of federal law, Congress has the authority to proscribe when and how military forces can be used in that endeavor. Most, if not all, of the authority the President possesses in this regard has been given him by Congress. This is important to consider when contemplating support to civil law enforcement. While the President enjoys tremendous authority as commander-in-chief, he does not have unfettered authority to use military forces domestically. With limited exception, he only has that authority granted to him by Congress.

Congress started granting such authority as soon as they first convened in a series of acts collectively referred to as the Militia Acts (passed in 1792, 1795, 1807, 1861, and 1871, and presently codified at 10 U.S.C. §§ 331-335 (The Insurrection Acts)).<sup>28</sup> In those statutes, Congress gave the President various authority to use military force (initially just state militias but later expanded to include the Regular Army) to enforce federal law and respond to domestic crisis. The President did so almost immediately. In 1794, President Washington relied upon a 1792 law, to call forth the militias of four states to quell the Whiskey Rebellion in Western Pennsylvania. In doing so, Washington relied exclusively upon the powers delegated him by the statute rather than claim any inherent authority he may have as the chief executive or commander-in-chief.<sup>29</sup> Over time, the Federal Government used the military – primarily the Army –

pursuant to the Militia Acts on numerous occasions.

### U.S. Law - The Posse Comitatus Act

In addition to being used pursuant to the Militia Acts, the Army was also frequently used by civilian law enforcement officials as a posse comitatus. Latin for “power of the county” or “the force of the county,” the posse comitatus dates back in English law to the Fifteenth Century.<sup>30</sup> It allowed local law enforcement officials to call on all citizens above a certain age to assist in maintaining order. Since there is nothing in the U.S. Constitution that prohibits Soldiers from serving as a posse comitatus, civilian law enforcement officials started recruiting Soldiers, and then eventually Army units, to serve.<sup>31</sup> Congress even authorized the use of the Army as a posse comitatus in a later version of the 1789 statute that established the office of the United States Marshal<sup>32</sup> and in other statutes such as the 1850 Fugitive Slave Act.<sup>33</sup> When the Army was used as such, however, they were subordinate to the civilian official organizing the posse. Use of the Army as a posse comitatus came to its apex during Reconstruction when the Army was frequently used to assist federal marshals enforce civil rights laws newly enacted to protect freed slaves. It was during this time that accusations of Army meddling in the presidential election of 1876 were made and Southern complaints of Army interference in state affairs increased.<sup>34</sup>

To assuage Southern concerns about the use of the Army to enforce the law, as well as to address concerns military leaders had regarding the overuse of their forces for law enforcement missions, Congress passed the Posse Comitatus Act (PCA) in 1878. The PCA limited the use of the Army as a posse comitatus, thus curbing its role in domestic law enforcement. Though amended several times, most notably to add the Air Force in 1956, the basic tenet of the 1878 law remains the same today.

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.<sup>35</sup>

The PCA directly prohibits the Army and the Air Force from conducting law enforcement missions within the United States unless otherwise authorized by the Constitution or statute. In 1981, Congress further directed the Secretary of Defense to prohibit by regulation “direct participation by a member of the Army, Navy, Air Force, or Marine Corps” in law enforcement matters “unless participation in such activity by such member is otherwise authorized by law.”<sup>36</sup> The Secretary did so in DOD Directive (DODD) 5525.5, *DOD Cooperation with Civilian Law Enforcement Officials*, which essentially extends the PCA prohibition to the Navy and Marine Corps though the Secretary of the Navy has authority to grant exceptions under certain circumstances, most notably for anti-drug operations conducted cooperatively with the Department of Justice.<sup>37</sup> The overall impact of the PCA is that unless a Constitutional or statutory exception exists, the federal Armed Forces<sup>38</sup> are prohibited from engaging in direct law enforcement activities within the U.S. To fully realize the scope of the PCA, it’s important to understand a few particulars.

#### The PCA: “Civilian” Law Enforcement

The PCA only prevents use of the Armed Forces to execute *civilian* laws. It does not limit the authority to perform military duties and has no impact on a commander’s ability to ensure good order and discipline of the commander’s unit or installation.<sup>39</sup> Time and time again, courts have determined that as long as the primary purpose of an activity is to address a military purpose, the PCA is not violated, even if civilian law enforcement incidentally benefits. This is referred to as the “military purpose doctrine.”<sup>40</sup>

Thus a military unit can readily share information with local law enforcement officials that was obtained while conducting a military mission – for example, a pilot flying a mission who spots a field of marijuana can relay that information to a local sheriff. Directive 5525.5 provides additional examples of law enforcement activities that would not violate the PCA if “undertaken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities.”<sup>41</sup> These include investigations and other actions related to enforcement of the Uniform Code of Military Justice; protection of classified military information or equipment; protection of DOD personnel, DOD equipment, and official guests of the Department DOD; and such other actions that are undertaken primarily for a military or foreign affair's purpose.

#### The PCA: “Direct” Law Enforcement

The PCA only prohibits *direct* involvement in civilian law enforcement activities. *Indirect* assistance is authorized and both regulation and case law provide guidance to determine which activities are prohibited. In accordance with the 1981 mandate from Congress, Directive 5525.5 prohibits the following direct assistance: interdiction of a vehicle, vessel, aircraft, or other similar activity; a search or seizure; an arrest, apprehension, stop and frisk, or similar activity; and use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.<sup>42</sup> These are typical activities associated with law enforcement and require no further explanation except to emphasize that there is no prohibition against conducting these types of activities in accordance with the military purpose doctrine on or off a military installation as discussed above or when a federal statute otherwise authorizes direct involvement.

Domestic courts have also weighed in on the issue of direct or indirect involvement and over time three separate tests have emerged to determine whether the involvement of military personnel in an activity has violated the PCA. If the conduct fails any of these tests, the assistance is direct and thus prohibited by the PCA.<sup>43</sup> These tests are: (1) *Whether the action of the military personnel was “active” or “passive.”* Passive involvement does not violate the PCA. (i.e., direct participation by an active duty Air Force helicopter and crew in a search for an escaped civilian prisoner would be considered “active,”<sup>44</sup> while loaning military equipment to civilian law enforcement agencies would be considered “passive.”)<sup>45</sup> (2) *Whether use of the armed forces pervaded the activities of civilian law enforcement officials.* The military may not assume activities rightly belonging to civilian law enforcement. (i.e., a military investigation targeting a civilian where there is no verified connection to military personnel or a military installation would violate the PCA;<sup>46</sup> as would the use of armed military policemen off the installation to operate checkpoints and direct traffic during a search for a civilian accused of a mass slaying in a nearby town.)<sup>47</sup> (3) *Whether military personnel subjected citizens to the exercise of regulatory, proscriptive, or compulsory military power.* The military may not regulate, forbid, or compel some type of conduct. (i.e., the Navy does not subject individuals to military power when it provides backup support in a Coast Guard operation and does not participate in the search of the ship or the arrest and interrogation of the suspects;<sup>48</sup> nor is it an exercise of military power to house, transport, and care for a defendant arrested by the Federal Bureau of Investigation.)<sup>49</sup>

The PCA: “Expressly Authorized by the Constitution”

The PCA does not prohibit direct assistance to civilian law enforcement if such assistance is “expressly authorized by the Constitution.” If the Constitution authorizes

the use of military force, the PCA cannot prohibit its use. This type of authorization is extremely limited and can be somewhat controversial since, as discussed above, the authority to use military forces in a domestic setting is based upon competing powers granted by the Constitution to the President and to Congress. DOD Directive 5525.5 acknowledges, however, that there are actions that can be taken under the inherent right of the Federal Government to ensure the preservation of public order and to carry out governmental operations within its territorial limits. This authority, reserved for extraordinary emergency circumstances, can be exercised by local commanders when necessary to quell large-scale, unexpected civil disturbances in the following circumstances.

(1) Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or,

(2) When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions. Federal action, including the use of Federal military forces, is authorized when necessary to protect the Federal property or functions.<sup>50</sup>

Presidential approval is required prior to providing this type of support unless the extraordinary circumstances preclude obtaining prior authorization. In those cases, seeking consent should be simultaneous with providing support.

The PCA: “Expressly Authorized by an Act of Congress”

The PCA does not prohibit direct assistance to civilian law enforcement if such assistance is “expressly authorized by an Act of Congress.” If a statute authorizes the use of military force, the PCA does not prohibit its use. As of 2012, there were at least 33 statutory authorizations that serve as exceptions to the PCA.<sup>51</sup>

The Insurrection Acts (10 U.S.C. §§ 331-335) stand as the “clearest statutory exceptions to the Posse Comitatus Act.”<sup>52</sup> The Acts trace their roots to the original Militia Acts of the early Nineteenth Century and have been used, correctly and incorrectly, many times throughout U.S. history. They authorize the President to use the Armed Forces to quell civil disturbances and enforce federal law in three situations – to suppress insurrection or protect a state or territory from domestic violence upon the request from a state or territory (§331),<sup>53</sup> to enforce federal authority (§332);<sup>54</sup> or to protect constitutional rights (§333).<sup>55</sup>

The last President to invoke the Insurrection Acts was President Bush in 1992 after race riots in Los Angeles grew beyond the ability of local and state authorities to control.<sup>56</sup> He acted under Section 331 at the request of the Governor of California. The last significant use of Sections 332 and 333 were during the 1950’s and 60’s when Southern governors refused to enforce federal court-ordered school desegregation<sup>57</sup> and when local and state authorities refused to protect civil rights marchers in Alabama.<sup>58</sup> Unlike Section 331, Sections 332 and 333 do not require a request or even the permission of the governor of the affected state before the President can send in the Armed Forces. Nor does it require widespread rebellion or domestic violence of a significant nature like Los Angeles in 1992. All it requires is some sort of concerted effort, such as an “unlawful combination, or conspiracy,” that makes it “impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings” (§332), or deprives any part of the citizenry of a “right, privilege, immunity, or protection named in the Constitution” or “opposes or obstructs the execution of the laws of the United States” (§333). Before the President uses any of the authority



delegated to him by the Insurrection Acts, Section 334 requires him to issue a proclamation ordering the insurgents to “disperse and retire peaceably to their abodes within a limited time.”<sup>59</sup>

As stated above, there are numerous other statutes that serve as exceptions to the PCA. When acting pursuant to any of these exceptions, military personnel are allowed to engage in direct law enforcement, essentially serving as a national police force. Examples of other exceptions where Congress has authorized the use of military forces include emergency situations involving chemical or biological weapons of mass destruction, removal of trespassers from Indian treaty lands, removal of unlawful enclosures from the public lands, and the execution of state quarantines and health laws.<sup>60</sup>

Congress has also specifically authorized the Armed Forces to provide more locally oriented and certainly more common forms of assistance (10 U.S.C. §§ 371-382).<sup>61</sup> This includes providing information collected during military training operations or training; making equipment and facilities available to federal, state, and local law enforcement operations; and training federal, state, and local law enforcement officials to operate and maintain such equipment.<sup>62</sup>

### DOD Regulation

When considering a request for support from a civilian law enforcement agency, DOD regulation provides criteria against which all requests for support must be evaluated. DOD Directive 3025.18, *Defense Support of Civil Authorities (DSCA)*, requires any request for support to be evaluated for the following: Legality (compliance with the law), Lethality (potential use of lethal force by or against DOD forces), Risk (safety of DOD forces), Cost (who pays and the impact on DOD’s budget),

Appropriateness (whether it is in the interest of DOD to provide the requested support), and Readiness (impact on DOD's ability to perform its primary mission).<sup>63</sup> While each criteria is important, special attention is called to cost.

It is an established rule and overarching principle of fiscal law that "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."<sup>64</sup> In other words, unless Congress has specifically authorized DOD to spend funds on a particular activity, DOD may not conduct that activity. With limited exception, such as the DOD counter-drug and border security missions, DOD is not funded for domestic law enforcement missions. "Because DOD functions primarily in a support role in domestic operations, most military assistance to civil authorities is provided on a reimbursable basis."<sup>65</sup> Providing support when not authorized to do so may run afoul of federal fiscal law. It is critical then that the Armed Forces not engage in domestic law enforcement activities unless duly authorized to do so in accordance with appropriate Constitutional authority or applicable statute such as one that serves as an exception to the PCA.

#### The PCA: Summing Up the Impact

The final word on the PCA and its impact on support to civil law enforcement is that the PCA is not an impediment to protecting the homeland. With numerous exceptions designed to protect the U.S. against current threats (i.e., weapons of mass destruction, large scale violence), and the ability of local commanders to provide limited support to civil law enforcement (i.e., sharing information, loaning equipment, training) and to respond immediately to serious threats (e.g., the commanders emergency authority), the PCA serves as a great compromise between those who fear the increased presence of military forces on U.S. streets and those who welcome such

presence. Calls for the PCA's repeal are shortsighted and do not seem to take into account what authority the Federal Government still has regarding the use of its Armed Forces in support of civil law enforcement. When the PCA and the related statutes are considered alongside agency regulations, it's very clear that they advance the American ideal and tradition that the military's main mission is to protect the U.S. from outside threats and that they should only be used within the U.S. in extreme emergencies.

#### Possible Issues: Strife and Terrorism in the Homeland

True to this tradition, during the past several decades the Armed Forces have not participated significantly in civil law enforcement other than the counter-drug and border security missions. Even the use of the military within the U.S. for counter-terrorism purposes (which some argue is a military and not a law enforcement mission) has been negligible.<sup>66</sup> This could all easily change, however, so leaders must be prepared.

For example, in today's increasingly hyper-political, divisive environment, it is easy to imagine a situation arising that is similar to the one that occurred in the 1950's and 60's in the South over civil rights and school desegregation. Instead of civil rights, however, this time the catalyst could be current hot-button topics such as taxes, medical care, gun control, or immigration. In the 1950's and 60's the Insurrection Acts were invoked to use the Armed Forces to directly enforce the Civil Rights Act and the Voting Rights Act, both of which were extremely unpopular in parts of the South. Imagine if an unpopular federal law is passed now (or an executive order signed) that restricts possession of certain firearms and, believing such law (or order) is unconstitutional, local law enforcement officials refuse to enforce it.<sup>67</sup> If someone alleges that the result of the non-enforcement is the denial of a right, privilege, immunity, or protection named in

the Constitution, a situation similar to the civil rights cases could ensue and an argument made that the Armed Forces could be used to enforce that federal law.

Or imagine the President ordering the indefinite military detention of a U.S. citizen suspected of terrorist group affiliation. Ostensibly, under certain conditions, the 2012 NDAA would allow such a thing. Or what would happen if the Office of Legal Counsel once again advised DOD that combating domestic terrorism is a clear military mission and not a law enforcement mission?<sup>68</sup> Would the PCA then become meaningless and the Armed Forces authorized to perform such law enforcement activities as making arrests, searching persons, and seizing property, all in the name of counter-terrorism?

As can be imagined, all of these would be controversial. Yet they are not outside the realm of possibility. What then, should a military leader do? To answer this, leaders must be prepared by being familiar with the various legal authorities involved and by understanding the issues surrounding support for domestic law enforcement.

### Being Prepared

Unfortunately, being adequately prepared to address the hypotheticals above requires some self-study – at least in the Army. (Since an examination of all of the Services' emphasis on support to law enforcement is beyond the scope of this paper, this section focuses on the Army as an example). Even though Army doctrine identifies “civil support” as one of the four elements of full spectrum operations (the others being offense, defense, and stability),<sup>69</sup> not much focus is placed on this particular topic. This could be attributed to the similarities between domestic civil support and overseas stability operations and a misplaced belief that since the Army has engaged in stability operations for the past 11 years, the Army can perform civil support.<sup>70</sup> This is erroneous

thinking since the “domestic operational environments are quite different in terms of law, military chain of command, use of deadly force, and interagency process.”<sup>71</sup>

Accordingly, different training and skill sets are required. For example, the rules on the use of force during domestic operations are considerably less aggressive than the rules of engagement used while engaged in overseas combat.<sup>72</sup> Also, the interagency in the Homeland involves agencies and organizations not found on foreign battlefields. Civil support simply warrants more attention than it currently is getting.

The Army’s Training and Doctrine Command dedicates a little more than half a page to the mission in its 69 page training pamphlet, *The United States Army Operating Concept*.<sup>73</sup> This document “describes how future Army forces conduct operations as part of the joint force to deter conflict, prevail in war, and succeed in a wide range of contingencies in the future operational environment.”<sup>74</sup> Formalized training is limited as well. The Army War College devotes three hours of the core curriculum (though it does offer several electives) to DSCA (another three to Homeland Defense and Homeland Security) and the Army’s Command and General Staff College and Sergeant’s Major Academy each provide one lesson on civil support in their ten-month courses.<sup>75</sup> There is no annual training requirement for any topics related to civil support in the current AR 350-1, *Army Training and Leader Development*, even though there are annual requirements for such subjects as “safe home computing” and “combating trafficking in persons.”<sup>76</sup> While there is annual training required on the Law of Land Warfare which governs conduct in foreign lands, there is none that governs operations within the Homeland. Rather, relevant training seems to be left to local commanders on an ad hoc basis.

Some may point to the creation of NORTHCOM in 2002 as a step in the right direction, and the allocation of a brigade combat team in 2007 as another. The danger there is that units not allocated to NORTHCOM may not train under the belief that NORTHCOM has the mission. This may result in the brigade combat team allocated to NORTHCOM being the only active duty Army unit specifically trained for the civil support mission. Of the four elements of full spectrum operations, civil support would be the only one where a very limited segment of the Army will be fully trained to perform it. Consider the impact if only three or four brigades were trained for offense, and a few more for defense, and yet a couple more for stability.

This article does not advocate for more military involvement in domestic law enforcement. However, since it is an official mission of the Armed Forces, supported by historical precedence and authorized by the Constitution, Soldiers, Sailors, Marines, and Airmen must be trained and ready to support domestic law enforcement just as they would any other mission assigned to the DOD. But they must do so with the additional caveat that such missions can be controversial and politically sensitive.

Examples of important training include: the cultural and legal limits of domestic operations, the standing rules on the use of force, the importance of civilian control of domestic missions, and expert level skill with non-lethal force techniques. Formal leader training should include robust study and discussion on the historical use of the Armed Forces domestically and how issues can emerge in the future. Leaders also need to know how to coordinate with interagency and intergovernmental organizations, and must be able to accurately communicate to the citizenry in order to assuage legitimate fears when units train for domestic operations and more importantly when operations do

occur. Most importantly, however, leaders must absolutely know when a civil support mission would cross the line.

### Conclusion

The Armed Forces have always engaged in domestic law enforcement. Providing support to civil law enforcement is a legitimate, lawful mission authorized by the Constitution and supported by precedent. Leaders must embrace it, understand it, and when called upon, execute it correctly. A key part of understanding it, is understanding the PCA. The PCA does not prohibit all use of military forces for domestic law enforcement. There are numerous federal statutes that serve as exemptions, chief among them are the Insurrection Acts. Additionally, there is inherent authority under the Constitution that allows the use of military force domestically. Within DOD, this authority is described as a commander's emergency response authority. While some support is authorized under the Constitution and federal law, the PCA does prohibit *carte blanche* authority to support civil law enforcement. As a result, there may be situations where leaders want to support a situation but will not be able to. Understanding the historical and cultural background of support to law enforcement and being familiar with the various laws involved will assist leaders to explain why support cannot be provided, and in situations where it is provided, explain why it is appropriate.

Once authorized to participate in domestic law enforcement, the Armed Forces will do so under the direction of a civilian law enforcement official but will remain under military command, and once direct support is authorized, the Armed Forces can engage in all aspects of law enforcement such as search, seizure, and arrest unless otherwise limited. Therefore, they must be able to execute the mission within the limits of the Constitution (i.e., 4<sup>th</sup> Amendment protection against unreasonable searches and

seizures, 5<sup>th</sup> Amendment right to remain silent). The domestic law enforcement mission, while similar to overseas stability operations has unique cultural and legal requirements and limitations. Chief among them being the rules on the use of force and the rights afforded U.S. citizens by the Constitution. Therefore, the military should dedicate additional study, education, and training to address these and other unique aspects.

As the availability of military forces increase due to the end of large scale operations overseas, the economic conditions of local and state government stagnates, and domestic social and political divisions widen, the pressure to use active duty forces domestically is bound to increase. It is important then, for both the leaders and the led, to understand and appreciate the societal concerns and the legal basis for using military forces to support civil law enforcement. Doing so will ensure that the Armed Forces are as successful within the Homeland as they have been overseas, and will ensure that the American people retain their respect and admiration for the U.S. military.

## Endnotes

<sup>1</sup> John R. Brinkerhoff, "The Role of Federal Military Forces in Domestic Law Enforcement Title," *Center for Army Lessons Learned Newsletter* 10-16, (December 2009), [http://usacac.army.mil/cac2/call/docs/10-16/ch\\_11.asp](http://usacac.army.mil/cac2/call/docs/10-16/ch_11.asp) (accessed January 12, 2013).

<sup>2</sup> U.S. Joint Chiefs of Staff, *Civil Support*, Joint Publication 3-28 (Washington, DC: U.S. Joint Chiefs of Staff, September 14, 2007), GL-8.

<sup>3</sup> Ibid.

<sup>4</sup> Joint Publication 1-02, DOD Dictionary of Military and Associated Terms, 08 November 2010, as amended through 15 November 2012. (The term "Civil Support" was changed to "Defense Support to Civil Authorities" after the publication of JP 3-28 in September 2007.)

<sup>5</sup> Joint Publication 3-28, *Civil Support*, GL-7.

<sup>6</sup> *The Federal Emergency Management Agency Homepage*, <http://www.fema.gov/national-response-framework> (accessed January 19, 2013).



<sup>7</sup>The Emergency Management Assistance Compact (EMAC) is a “national interstate mutual aid agreement that allows states to share resources across state lines during disasters and emergencies.” It has been ratified by Congress and all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. *The Emergency Management Assistance Compact Home Page*, <http://www.emacweb.org> (accessed December 13, 2012).

<sup>8</sup>*The Federal Emergency Management Agency Homepage*, <http://www.fema.gov/national-response-framework> (accessed January 19, 2013).

<sup>9</sup>Charles Doyle and Jennifer K. Elsea, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* (Washington, DC: U.S. Library of Congress, Congressional Research Service, August 16, 2012), 1.

<sup>10</sup>For excellent summaries of the historical uses of the U.S. military for domestic law enforcement, see, *Ibid.*, 5-19; Matt Mathews, *The Posse Comitatus Act and the United States Army: A Historical Perspective*, Global War on Terrorism Occasional Paper 14 (Fort Leavenworth, KS: Combat Studies Institute Press, 2006), 5-35.

<sup>11</sup>*The National Archives Homepage*, Military Records related to the Relocation and Internment of Japanese-Americans during World War II, <http://www.archives.gov/research/japanese-americans/military.html#wdc> (accessed January 8, 2013).

<sup>12</sup>Mitsuye Endo, a loyal American citizen of Japanese descent, was forcefully removed from her Sacramento, California home and detained in a relocation facility for over two years. In 1944, a unanimous U.S. Supreme Court held that the government could not continue to detain a citizen who is determined to be loyal to the United States. *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

<sup>13</sup>In 1988, Congress passed and the President signed the Civil Liberties Act of 1988, which authorized reparations to be paid to Japanese Americans who were forcefully removed and detained in relocation camps during WWII. Three purposes for the legislation were to “acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II,” “apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens,” and to “discourage the occurrence of similar injustices and violations of civil liberties in the future.” *Civil Liberties Act of 1988*, Public Law 100-383, 100th Cong., (August 10, 1988).

<sup>14</sup>Doyle and Elsea, *The Posse Comitatus Act and Related Matters*, 33.

<sup>15</sup>Mathews, *The Posse Comitatus Act and the United States Army*, 31.

<sup>16</sup>In 1864, Lambdin P. Milligan and four others were convicted and sentenced to death by a military court for planning to steal Union weapons and invade Union prisoner-of-war camps in Indiana. In 1866, the Supreme Court declared such use of military courts in loyal states to be unconstitutional. If civil courts are open and functioning, military tribunals to try civilians is inappropriate. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>17</sup>Mark Mazzetti and David Johnston, "Bush Weighed Using Military in Arrests," *New York Times*, July 24, 2009, [http://www.nytimes.com/2009/07/25/us/25detain.html?\\_r=3&hp&](http://www.nytimes.com/2009/07/25/us/25detain.html?_r=3&hp&) (accessed February 1, 2013).

<sup>18</sup>Eric Alterman and George Zornick, "Think Again: The Invisible Battle Over Posse Comitatus," October 23, 2008, <http://www.americanprogress.org/issues/media/news/2008/10/23/5081/think-again-the-invisible-battle-over-posse-comitatus/> (accessed February 12, 2013).

<sup>19</sup>Gina Cavallaro, "Brigade homeland tours start Oct. 1," *Army Times*, September 30, 2008, [http://www.armytimes.com/news/2008/09/army\\_homeland\\_090708](http://www.armytimes.com/news/2008/09/army_homeland_090708); Michael Boatner and Matthew Rothschild, "Is Posse Comitatus Dead? US Troops on US Streets," interview by Amy Goodman, *Democracy Now*, October 7, 2008, <http://www.democracynow.org/2008/10/7/> (accessed February 2, 2012).

<sup>20</sup>Jennifer K. Elsea and Michael John Garcia, *The National Defense Authorization Act for FY2012: Detainee Matters*, (Washington, DC: U.S. Library of Congress, Congressional Research Service, December 11, 2012); David Nakamura, "Obama signs defense bill, pledges to maintain legal rights of U.S. citizens," *Washington Post*, December 31, 2011, [http://articles.washingtonpost.com/2011-12-31/politics/35288256\\_1\\_detainee-provisions-defense-bill-president-obama](http://articles.washingtonpost.com/2011-12-31/politics/35288256_1_detainee-provisions-defense-bill-president-obama) (accessed February 12, 2013).

<sup>21</sup>The 4<sup>th</sup> Amendment protects against unreasonable searches and seizures; the 5<sup>th</sup> Amendment requires indictment by a grand jury before a citizen is held accountable for a felony, and guarantees that life, liberty, or property will not be deprived without due process of law; the 6<sup>th</sup> Amendment guarantees a speedy trial and the right to an impartial jury of peers; and the 8<sup>th</sup> Amendment prohibits excessive bail as well as cruel and unusual punishments.

<sup>22</sup>U.S. Department of Justice, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, (Washington, DC: U.S. Department of Justice, undated White Paper), linked from *NBC News Homepage*, [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) (accessed February 12, 2013).

<sup>23</sup>The American Civil Liberties Union called the DOJ's White Paper "profoundly disturbing" and stated that it was "hard to believe that it was produced in a democracy built on a system of checks and balances." "Memo gives basis for drone strikes vs. U.S. citizens," *Associated Press*, February 5, 2013, <http://www.usatoday.com/story/news/politics/2013/02/05/drone-strikes-justice-department-memo-brennan/1893581/> (accessed February 5, 2013).

<sup>24</sup>Charles J. Dunlap, JR., "The Origins of the American Military Coup of 2012," *Parameters*, (Winter 1992-93): 2-20.

<sup>25</sup>Richard A. Gabriel, *To Serve with Honor* (Westport, Conn.: Greenwood, 1982), 178, referenced in Dunlap, "The Origins of the American Military Coup of 2012," 14.

<sup>26</sup>Alexander Hamilton, "Federalist #29, Concerning the Militia," January 10, 1788, linked from *The Library of Congress Homepage* at "The Federalist papers," <http://thomas.loc.gov/home/histdox/fedpapers.html> (accessed February 2, 2013).

<sup>27</sup>Doyle and Elsea, *The Posse Comitatus Act and Related Matters*, 25.

<sup>28</sup>Stephen I. Vladeck, "Emergency Power and the Militia Acts," *The Yale Law Journal*, vol. 114 (October 7, 2004): 149.

<sup>29</sup>*Ibid.*, 161.

<sup>30</sup>Mathews, *The Posse Comitatus Act and the United States Army*, 5.

<sup>31</sup>*Ibid.*

<sup>32</sup>John K. Mahon, "The Domestic Use of Armed Force: A Summary," in *Bayonets in the Streets: The Use of Troops in Civil Disturbances*, ed. Robin Higham (Manhattan, KS: Sunflower University Press, 1989), 228.

<sup>33</sup>Doyle and Elsea, *The Posse Comitatus Act and Related Matters*, 16.

<sup>34</sup>Mathews, *The Posse Comitatus Act and the United States Army*, 31.

<sup>35</sup>18 U.S.C. § 1385 (2012), Use of Army and Air Force as Posse Comitatus.

<sup>36</sup>"The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." 10 U.S.C. § 375 (2013), Restriction on Direct Participation by Military Personnel.

<sup>37</sup>By federal law, the Attorney General is authorized to call upon other federal agencies, to include DOD, to assist with anti-drug efforts. 21 U.S.C. § 873 (2013), Cooperative Arrangements. See also, U.S. Department of Defense, *DoD Cooperation with Civilian Law Enforcement Officials*, Department of Defense Directive 5525.5 (Washington, DC: U.S. Department of Defense, January 15, 1986, Administrative Reissuance Incorporating Change 1, December 20, 1989), 21.

<sup>38</sup>By federal law and regulation the PCA applies to active duty service members of the Army, Air Force, Navy, and Marine Corps; Reservists on active duty, active duty for training, or inactive duty for training; National Guard personnel in Title 10 Federal service; and civilian employees of DOD when under the direct command and control of a military officer. It does not apply to service members in their private capacity, National Guard personnel in Title 32 State service, or members of the Coast Guard, who have a statutorily mandated domestic law enforcement mission. DODD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, 20.

<sup>39</sup>Doyle and Elsea, *The Posse Comitatus Act and Related Matters*, 46.

<sup>40</sup>"The courts have concluded that, consistent with this legitimate military purpose to maintain order on military installations, military personnel may, without violating the Posse Comitatus Act, turn over to civilian law enforcement authorities armed felons arrested when they flee onto a military base, or drunk drivers arrested on a military base, or firearms stolen from a

military installation, as well as any stolen equipment that belongs to a military unit. The courts have likewise found no violation of the act when military personnel arrest civilians on military facilities for crimes committed there, or when military authorities assist a civilian police investigation conducted on a military facility. The military purpose doctrine also permits military law enforcement personnel to investigate the off-base conduct of military personnel, and allows them to assist in investigating the off-base conduct of civilians who are suspected of involvement in a violation of the Uniform Code of Military Justice (UCMJ).” Doyle and Elsea, *The Posse Comitatus Act and Related Matters*, 47-48.

<sup>41</sup> The following do not violate the PCA: Investigations and other actions related to enforcement of the UCMJ; investigations and other actions that are likely to result in administrative proceedings by the DOD, regardless of whether there is a related civil or criminal proceeding; investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility; protection of classified military information or equipment; protection of DOD personnel, DOD equipment, and official guests of the Department DOD; and such other actions that are undertaken primarily for a military or foreign affair's purpose. DODD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, 14.

<sup>42</sup>Ibid., 17.

<sup>43</sup>Andrew Gillman and William Johnson, eds., *Operational Law Handbook* (Charlottesville, VA: The Judge Advocate General's Legal Center and School, 2012) 171-72.

<sup>44</sup>A helicopter crew of a nearby Air Force Base was asked by the local sheriff to participate in a search for an escaped prisoner. The helicopter subsequently injured a bystander. The government argued, and the court agreed, that the PCA was violated, thus there was no service connection that would allow the injured bystander to sue the Air Force for his injuries. “The use of the helicopter and its personnel here to aid in executing the laws of New York was a forbidden use.” Wrynn v. United States, 200 F.Supp. 457 (E.D.N.Y.1961).

<sup>45</sup>The PCA “was intended by Congress, according to the legislative history...to eliminate the direct active use of federal troops by civil law enforcement officers. The prevention of the use of military supplies and equipment was never mentioned in the debates, nor can it reasonably be read into the words of the Act.” United States v. Red Feather, 392 F. Supp. 916, 921 (D.S.D. 1975).

<sup>46</sup>“Where the target of a military investigation is a civilian and there is no verified connection to military personnel, the PCA prohibits military participation in activities designed to execute civilian laws.” State v. Pattioay, 896 P.2d 911, 920-21 (Haw. 1995). However, when there is a military connection to the off-post investigation, the PCA poses no obstacle. There was no “military permeation of civilian law enforcement” when an undercover CID agent worked with civilian law enforcement to “ferret out a source of some of the cocaine being supplied to both civilians and army personnel in the Fort Stewart-Hinesville, Georgia, area.” Such action was conducted in accordance with CID’s mission and thus did not violate the PCA. United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); Off-base military investigation concerning property stolen on-base by military personnel deemed permissible. United States v. Griley, 814 F.2d 967, 976 (4th Cir. 1987); Military police off-base drug sting targeting military personnel does not violate the PCA. Applewhite v. United States, 995 F.2d 997, 1001 (10th Cir. 1993).

<sup>47</sup>In response to a March 10, 2009 mass killing in Samson, Alabama, Fort Rucker provided armed military policemen to man checkpoints in Samson in an active search for the perpetrator. The Department of Army Inspector General found the use of military personnel in Samson violated the Posse Comitatus Act. The Associated Press, "Review: Soldiers Broke Law in Shooting Response," *Army Times*, October 19, 2009, [http://www.armytimes.com/news/2009/10/ap\\_army\\_rucker\\_shootings\\_response\\_101909/](http://www.armytimes.com/news/2009/10/ap_army_rucker_shootings_response_101909/) (accessed February 12, 2013).

<sup>48</sup>The Navy conducted operations with the Coast Guard to interdict a ship that was transporting illegal drugs. At all times, the Navy personnel on board the ship had acted under the command of the Coast Guard, and only the Coast Guard had searched the ship and arrested the crew. None of the Navy's activities was illegal. *United States v. Kahn*, 35 F.3d 426 (9th Cir. 1994).

<sup>49</sup>The Navy participated in an FBI operation to capture a Lebanese terrorist. Navy's participation was limited to housing, transporting, and caring for the defendant while he was in the custody of the FBI. "None of the Navy's activities constituted the exercise of regulatory, proscriptive, or compulsory military power." *United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988).

<sup>50</sup>U.S. Department of Defense, *Defense Support of Civil Authorities (DSCA)*, Department of Defense Directive 3025.18 (Washington, DC: U.S. Department of Defense, December 29, 2010), 5; DODD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, 15.

<sup>51</sup>Doyle and Elsea, *The Posse Comitatus Act and Related Matters*, 30-31.

<sup>52</sup>*Ibid.*, 32.

<sup>53</sup>Title 10, Section 331 states that "[w]henver there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened...use such of the Armed Forces, as he considers necessary to suppress the insurrection." This delegation is "meant to fulfill the federal government's responsibility to protect states in the event of 'domestic violence'," as guaranteed in Article 4, Section 4 of the Constitution. *Ibid.*

<sup>54</sup>Title 10, Section 332 authorizes the President to use the military to enforce laws or to suppress rebellion if he determines that "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings." This delegates Congress's Article I, Section 8, power under the Constitution to call forth the "state militias" (and adding the active force as well) to "execute the Laws of the Union, suppress Insurrections and repel Invasions." *Ibid.*, 36.

<sup>55</sup>Title 10, Section 333 allows the President to use the Armed forces to suppress, "in a State, any insurrection, domestic violence, unlawful combination, or conspiracy" if it – (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or

obstructs the execution of the laws of the United States or impedes the course of justice under those laws. 10 U.S.C. § 333 (2012), Interference with State and Federal Law.

<sup>56</sup>Exec. Order No. 12,804, 57 Fed. Reg. 19361 (May 5, 1992), Providing for the restoration of law and order in the city and county of Los Angeles, and other districts of California.

<sup>57</sup>President Eisenhower used the 101<sup>st</sup> Airborne Division in 1959 to enforce a court order authorizing nine black students to attend an all white public high school in Little Rock; Presidents Kennedy and Johnson followed the Little Rock precedent to deal with resistance to court-ordered desegregation in other Southern states. *Ibid.*, 40.

<sup>58</sup>President Johnson cited Sections 332 and 333 of the Insurrection Acts as the authority in 1965 to deploy troops, both regular Army and federalized National Guard, to Alabama to protect civil rights marchers as they made their way from Selma, AL, to Montgomery. *Ibid.*

<sup>59</sup>10 U.S.C. § 334 (2012), Proclamation to Disperse.

<sup>60</sup>For a listing of statutory exceptions to the Posse Comitatus Act, see Doyle and Elsea, *The Posse Comitatus Act and Related Matter*, 30-31.

<sup>61</sup>10 U.S.C. § 371 (Secretary of Defense may provide federal, state, or local civilian law enforcement officials with information collected during military training operations or training); 10 U.S.C. § 372 (Secretary of Defense may make equipment and facilities available to federal, state, and local law enforcement operations); 10 U.S.C. § 373 (Secretary of Defense may train federal, state, and local law enforcement officials to operate and maintain equipment); 10 U.S.C. § 374 (Secretary of Defense may provide personnel to maintain and operate equipment and facilities in support of certain federal, state and local law enforcement operations).

<sup>62</sup>The authority granted under 10 U.S.C. §§ 371-382 is subject to three general statutory and regulatory caveats. (1) Assistance may not be provided if it could adversely affect national security or military preparedness; (2) the law enforcement agency that benefits from the assistance must pay the costs of providing the assistance unless reimbursement is waived; and (3) assistance may not involve DOD personnel in a direct role in a law enforcement operation, except as otherwise authorized by law. DODD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, 10.

<sup>63</sup>DODD 3025.18, *Defense Support of Civil Authorities (DSCA)*.

<sup>64</sup>*U.S. v. MacCollom*, 426 U.S. 317, 321 (1976).

<sup>65</sup>Jeffrey Spears, Brian Robinson, and Ben Gullo, eds., *Domestic Operational Law 2011 Handbook for Judge Advocates*, (Charlottesville, VA: The Judge Advocate Generals Legal Center and School, Center for Military Law and Operations, 2011), 211.

<sup>66</sup>Doyle and Elsea, *The Posse Comitatus Act and Related Matters*, 51.

<sup>67</sup>“Dozens of sheriffs across the country are questioning the constitutionality of President Obama's gun-control initiatives and are even suggesting that they would not allow federal officials to enforce laws they deem a violation of the Second Amendment. Chuck Raasch, “Some Sheriffs Vow Not to Enforce Any New Gun Laws,” *USA Today*, January 29, 2013,

<http://www.usatoday.com/story/news/nation/2013/01/29/sheriffs-gun-ban-enforce/1873885/> (accessed 12 February 2013).

<sup>68</sup>In the immediate aftermath of 9/11, combating terrorism in the Homeland was considered by the Office of Legal Counsel to be a military operation, not a law enforcement operation. As a result the PCA would not apply even though military activities could include law enforcement type activities like making arrests and conducting searches. In the intervening years, however, the Office of Legal Counsel has altered its position and the federal government has placed combating terrorism in the Homeland squarely in the law enforcement category, specifically assigned to the DHS. This change in categorization has not caused any issues, however, since the use of the military within the United States for counter-terrorism purposes has been negligible, their role being limited to providing security at various high profile locations and events. Doyle and Elsea, *The Posse Comitatus Act and Related Matters*, 49-51.

<sup>69</sup>U.S. Department of the Army, *Civil Operations*, Field Manual 3-28 (Washington, DC: U.S. Department of the Army, August 20, 2010), vii.

<sup>70</sup>“The skills that allow Soldiers to accomplish their missions on today’s battlefields can support local, state, and federal civil authorities, especially when domestic emergencies overwhelm the ability of government agencies to support fellow Americans. ...Civil support operations require specialized training for military forces, although many of the tasks implemented at the tactical unit level can be similar to some of the tasks conducted in stability operations.” Ibid., Appendix J.

<sup>71</sup>Ibid., vii.

<sup>72</sup>Daniel J. Sennott, “Interpreting Recent Changes to the Standing Rules for the Use of Force,” Department of the Army Pamphlet 27-50-414, *The Army Lawyer*, (November 2007): 53.

<sup>73</sup>U.S. Department of the Army, *The United States Army Operating Concept*, Training and Doctrine Command Pamphlet 525-3-1 (Fort Monroe, VA: U.S. Army Training and Doctrine Command, 19 August 2010), <http://www.tradoc.army.mil/tpubs/pams/tp525-3-1.pdf> (accessed January 26, 2013).

<sup>74</sup>TRADOC Pam 525-3-1, *The United States Army Operating Concept*, 5.

<sup>75</sup>U.S. Army War College, Department of Military Strategy, Planning, and Operations, *Core Curriculum, Theater Strategy and Campaigning*, AY13 (Carlisle Barracks, PA: U.S. Army War College), Lesson TSC-03-L/S: Defense Support of Civil Authorities; U.S. Army Command and General Staff College, *CGSC Catalog*, CGSC Circular 350-1 (Fort Leavenworth, KS: Command and General Staff College, January 18, 2012), Lesson C514 FSO: Civil Support Operations, <http://usacac.army.mil/cac2/cgsc/repository/350-1.pdf> (accessed February 28, 2013); U.S. Army Sergeants Major Academy, Department of Army Tactics, *Lesson Plans*, (Fort Bliss, TX: U.S. Army Sergeants Major Academy), Lesson Plan C424: Defense Support of Civil Authorities.

<sup>76</sup>U.S. Department of the Army, *Army Training and Leader Development*, Army Regulation 350-1 (Washington, DC: U.S. Department of the Army, December 18, 2009, Rapid Action Revision August 4, 2011), Table G-1.

