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**DEFENSE OF SOVEREIGNTY: DOMESTIC OPERATIONS --  
LEGAL PRECEDENTS AND INSTITUTIONAL CONFUSION**

**BY**

**LIEUTENANT COLONEL SEAN J. BYRNE  
United States Army**

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Lieutenant Colonel Sean J. Byrne  
United States Army

Colonel Steven C. Hightower  
Project Advisor

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U.S. Army War College  
Carlisle Barracks, Pennsylvania 17013

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## ABSTRACT

**AUTHOR:** Sean J. Byrne, LTC, USA

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Over the past few years the Department of Defense has been called on with increasing frequency to support civil authorities in an ever-widening variety of domestic operations such as humanitarian relief, riot control and counter-drug operations. These missions are often controversial and unpopular, especially when involving assistance to civilian law enforcement officials. Although U.S. military forces have supported civil authorities in actions of this nature since the founding of our country, considerable confusion exists over the legal basis for this support and the limits on the military's involvement.

While at times controversial, use of military forces to support domestic operations is necessary, legal and warranted. The armed forces have a constitutionally mandated responsibility to safeguard the nation and its people and, as such, will continue to be the instrument of

choice for the National Command Authority during emergencies -- be they foreign or domestic. This study will clarify a number of misconceptions and address the role of the military in support of civil authorities during domestic operations as well as the effect of legal, historical and cultural considerations on its application. It additionally addresses a number of operational and philosophical challenges faced by the armed forces when dealing with expanded missions in support of law enforcement agencies.

## TABLE OF CONTENTS

ABSTRACT.....	iii
TABLE OF CONTENTS.....	v
INTRODUCTION.....	1
MILITARY INVOLVEMENT IN DOMESTIC OPERATIONS.....	4
POSSE COMITATUS.....	6
EXCEPTIONS TO POSSE COMITATUS.....	8
THE WAR ON DRUGS.....	11
EXPANSION OF DOMESTIC MISSIONS.....	13
LAW ENFORCEMENT MISSIONS -- OPERATIONAL CONCERNS.....	16
CONCLUSIONS.....	26
ENDNOTES.....	31
SELECTED BIBLIOGRAPHY.....	35

## **Defense of Sovereignty: Domestic Operations -- Legal Precedents and Institutional Confusion**

The Department of Defense "maintains and employs the armed forces to:

- Support and defend the Constitution of the United States against all enemies, foreign and domestic.
- Ensure, by timely and effective military action, the security of the United States, its territories, and areas vital to its interests.
- Uphold and advance the national policies and interests of the United States.
- Safeguard the internal security of the United States."<sup>1</sup>

This mission statement leaves little room for interpretation. Defense against foreign and domestic enemies have the same priority. However, when reflecting on military involvement in defense of American sovereignty,<sup>2</sup> most envision engagements being fought against foreign enemies on distant battlefields when, in fact, throughout the history of our country the majority of battles to safeguard national security and defend America's values have been fought on U.S. soil.

Although precedents have been established, there continues to be considerable concern over the legal authority and limits on the use of the armed forces in domestic actions. Concerns include fear that "use of military forces may expose civilian government to the threat

of military rule and could lead to the suspension of constitutional liberties and on a lesser scale, that military enforcement of the civil law could leave the protection of Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights."<sup>3</sup>

These concerns were well documented by our founding fathers and formed much of the basis for the Declaration of Independence and the Bill of Rights. Over the last 200 years Congress and the Executive Branch, in the face of new and expanding threats to our national security and well being, have increased the military's responsibilities in domestic operations. However, these changes have been in accordance with the intent of the founding fathers; that the militia (in today's terms -- active, reserve and Guard forces) would provide for the common defense while remaining subordinate to its legally designated civilian leadership. These nuances are significant because while some will argue against virtually any involvement by the military in domestic operations,<sup>4</sup> that involvement is key to safeguarding national security and guaranteeing the continued freedom of our citizens. While controversial, under specific circumstances use of military forces in

domestic operations is not only appropriate, but legal, and warranted. The armed forces have constitutionally mandated responsibilities to safeguard the nation and its people and, as such, will continue to be the instrument of choice for the National Command Authority during emergencies -- be they foreign or domestic.

While acknowledging that there is considerable confusion over this issue, the confusion appears to be based on three factors: 1) preconceived notions concerning civil/military relations based on incomplete information; 2) lack of knowledge concerning the history and intent behind a number of key legislative actions governing these operations; and 3) a failure to fully comprehend the part Congress has played in the evolutionary expansion of the military's role in domestic operations in order to combat new threats (while ensuring actions are taken in accordance with the intent of our founding fathers). This study addresses the role of the military in support of civil authorities and the effect legal and cultural considerations have on its applications. It further outlines the legal and historical framework for military involvement in domestic actions and addresses a number of misconceptions and

philosophical challenges faced by the armed forces in actions of this nature.

**Military Involvement in Domestic Operations --  
Legal, Historical and Cultural Precedents:**

Throughout U.S. history the three branches of government have often been at odds concerning interpretations of the Constitution; however, they have consistently expressed long-standing concerns and biases against involving the armed forces in domestic actions. These concerns have been addressed in the Declaration of Independence, the Constitution, and through both acts of Congress and Supreme Court decisions. In light of these considerations, it is important to have a grasp of the "laws of the land" before discussing specific issues.

While domestic use of the armed forces has been a feature of government in the United States since President Washington called out the militia to put down the Whiskey Rebellion in 1794,<sup>5</sup> the issue of limiting that involvement was raised well before that time. "The Declaration of Independence states among the grounds for severing ties with Great Britain that the King, 'has kept among us, in times of peace, Standing Armies without consent of our Legislature

... (and) has affected to render the Military independent of and superior to the Civil power.'"<sup>6</sup>

These concerns were subsequently raised at the Constitutional Convention by Luther Martin, a delegate from Maryland, when he said, "when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army."<sup>7</sup> The Constitution addressed these issues by putting strict limitations on the role of the military in civilian affairs. It divided authority over the armed forces by making "the President, the highest civilian official in the Executive Branch, Commander in Chief of the armed services (Article II, section 2); ... and grant(ing) to the Congress the power to make rules to govern the armed forces (Article I, section 8, clause 14)."<sup>8</sup> It further states "Congress shall have the power ... to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions ..."<sup>9</sup> and requires the federal government to protect each of the states "against Invasion; and on the Application of the Legislature, or of the Executive (when the Legislative cannot be convened) against domestic violence."<sup>10</sup>

The Supreme Court has also noted both constitutional limitations and public concern over military involvement in civilian affairs. In deciding the 1972 case of Laird versus Tatum,<sup>11</sup> the court reaffirmed this position when it stated, "The concerns of the Executive and Legislative Branches ... reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs ...."<sup>12</sup>

**Posse Comitatus:**<sup>13</sup>

On a number of occasions during the early years of our country Congress passed acts authorizing the use of the militia to aid in law enforcement during emergencies. Throughout the Reconstruction period after the Civil War, Army units performed as posse comitatus (law enforcers), in numerous and varied disorders. In the majority of these instances the military were under the direct control of state governors and U.S. Marshals and outside the federal chain of command. Under these circumstances marshals and governors found it increasingly easy to call on the Army rather than face the difficult political consequences of keeping order.<sup>14</sup> Abuses during this period, for the most part by civilian authorities led Congress to pass the Posse Comitatus Act in 1878. This act created a general

prohibition against the use of military personnel in law enforcement. The statute, as amended, specifically provides:

"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 not more than \$10,000 or imprisoned not more than two years, or both."<sup>15</sup>

This statute prohibits the use of the armed forces in active law enforcement unless specifically authorized by the Constitution or acts of Congress. It is the key legislative act formalizing the American tradition of military subordination to a strong civil authority and placed the decision for federal intervention directly in the hands of the President.<sup>16</sup>

When arguing the case against military involvement in domestic activities most cite the Posse Comitatus Act as their basis. However, it is not the final word on the subject. Based on emergency situations and emerging threats to national security, Congress subsequently passed a number of exceptions clearing the way for significantly increased involvement by the armed forces in domestic activities.

### Exceptions to Posse Comitatus:

With all the concerns over the use of the armed forces in civil actions, the obvious question is, why do the Executive and Legislative Branches continue to call on them? The answer is relatively simple -- in times of emergency, the armed forces are often not only the most effective and efficient assets available, but possibly the only assets available to maintain order, and they can greatly enhance the effectiveness of civilian law enforcement by providing military technologies, equipment, information, and training.<sup>17</sup>

In acknowledging this situation, Congress enacted a number of exceptions to Posse Comitatus (Title 10, U.S.C., Sections 331-335) dealing with civil disturbances and insurrections.<sup>18</sup> "These statutes authorize the President to provide military assistance to state governments upon request, (section 331) ... or upon his own initiative to use the armed forces or federalized militia to suppress any rebellion that makes it 'impracticable to enforce the laws of the United States ... by the ordinary course of judicial proceedings.'... (Section 332). Section 333 also permits military intervention when the constitutional rights of any

state's citizens are threatened by insurrection, domestic violence, unlawful combination, or conspiracy. Under section 334, before the militia can be called out, the President must 'by proclamation immediately order the insurgents to disperse,' that is, read them the riot act."<sup>19</sup>

In 1988 Congress further amended Title 10, U.S.C.<sup>20</sup> providing exceptions "that authorize the Secretary of Defense to provide equipment and personnel to assist civilian agencies in the enforcement of drug, immigration and tariff laws. ... But the statute expressly forbids, 'direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search or seizure, an arrest, or other similar activity unless ... otherwise authorized by law' (Section 375). Nevertheless, military personnel may 'operate equipment' to intercept vessels or aircraft outside the land area of the United States, or follow in hot pursuit of such craft inland (Section 374b). And Coast Guard personnel are assigned to naval vessels with authority to carry out searches and seizures and make arrests (Section 379)."<sup>21</sup>

These two sets of amendments cleared the way for a dramatic expansion of the Department of Defense's

responsibilities in providing support to domestic law enforcement agencies. They also provide the Executive and Legislative Branches with a standing force involved with domestic law enforcement activities on a day-to-day basis rather than the "by-exception" basis of previous years. These amendments represent a major philosophical shift in the use of the armed forces.

Based on these amendments, DoD's participation in counter-drug operations became routine rather than contingency missions. Although in a support role, the Armed Forces were placed squarely in the middle of police-type activities. At first blush it would appear these amendments could be in conflict with the intent of the Declaration of Independence, the Constitution and the Posse Comitatus Act by placing a potentially "unchecked military" in a position to infringe on Fourth and Fifth Amendment rights and subvert their civilian leadership. However, Congress went to great lengths to ensure that while expanding the counter-drug program within the United States, the military's support role would be clearly defined and civil/military relationships would not be subverted. Involvement would be only under the strict supervision of civilian authorities

and "without directly involving military personnel in law enforcement confrontations with citizens."<sup>22</sup>

Because of the significance of this major policy and legal shift, the background behind this decision will be reviewed in more detail.

### **The War On Drugs:**

In 1989 President Bush "declared" this nation at war with drugs. Since that time the policy of the United States has been "to disrupt, to dismantle and ultimately to destroy the illegal markets for drugs by attacking both the supply and demand side of the problem."<sup>23</sup> While different administrations and "Drug Czars" have slightly modified this policy, the theme has been relatively consistent over the years.

Shortly after President Bush's declaration of the "war" on drugs, he directed, "we will for the first time make available the appropriate resources of America's Armed Forces. We will intensify our efforts against drug smugglers on the high seas, in international airspace, and at our borders."<sup>24</sup> This declaration brought the armed forces into the battle under the exceptions to the restrictive provisions of the Posse Comitatus Act.

While President Bush provided a broad mission for the armed forces, specific responsibilities were provided by the Congress, which "through statutes assigned the Department of Defense (DoD) the duties of:

- Acting as the lead agency in the detection and monitoring of aerial and maritime transit of illegal drugs to the United States.
- Integrating U. S. command, control, communications, and intelligence, assets dedicated to drug interdiction into an effective communications network.
- Approving/funding state governors' plans for expanded use of the National Guard in drug control within state borders."<sup>25</sup>

As enacted, these amendments are not in conflict with the Posse Comitatus Act, rather they are part of an evolutionary process that the Posse Comitatus Act itself had begun 110 years earlier. Just as the Posse Comitatus Act itself was enacted to stop abuses in the employment of the military, these amendments were enacted to establish a legal framework to involve the Armed Forces in expanded national security missions to protect U.S. citizens from internal threats, while ensuring abuses would not take place. Since the military's missions already included ensuring the security of our borders, these new responsibilities simply became an expansion of those duties.

**Expansion of Domestic Missions -- Readiness Concerns:**

Prior to the amendments to the Posse Comitatus Act and President Bush's directive to expand military involvement in counter-drug operations, DoD had gone to great lengths to minimize its participation. In 1988, while an amendment to the defense authorization bill was being debated to make the Department of Defense the lead agency for detection of narcotics traffic and give the Navy limited powers of arrest outside U.S. waters, "military leadership argued that the additional requirements for drug interdiction would detract from their principal mission, that the Posse Comitatus Act prevented a military role in searches and seizures, and that, in any case, further actions to stop the flow of drugs could not be undertaken unless more money was provided for the Five Year Defense Plan."<sup>26</sup>

While each of these arguments may be somewhat flawed, they do raise a number of legitimate issues. From a strictly military perspective they include: concerns over military involvement in "non-military" missions; potential adverse affects these missions could have on military readiness and warfighting skills; and anxieties that

involvement in "non-traditional" missions would establish precedents causing the military to be unable to extricate itself from further participation. All of these arguments are credible to a degree; however, they did not sway Congressional opinion. In fact, "research indicates that under pressure to respond in a very visible way to the drug and crime problem, the Congress saw how the use of the armed forces would solve several needs: the military analogy properly fit the drug war image; the vast military resources of personnel, procurement authority, skills and equipment would be an immediate infusion of resources into the problem requiring only limited additional funding . . .,"<sup>27</sup> and the list goes on. It appears that regardless of arguments to the contrary, the mission was going to be DoD's because of the threat drugs pose to our national security and values, and the political sensitivity of the issue. Congressional testimony showed that DoD was criticized for its lack of aggressiveness in the drug support effort and that the determination was made that the military "can and should, do that kind of job."<sup>28</sup>

While that argument may have been accepted nine years ago, when DoD budgets and manpower levels were for the most

part on the upswing, the resource situation has now dramatically changed. Although fiscal cutbacks, personnel drawdowns and mission creep have not "hollowed out" the Armed Forces to the extent of the post-Vietnam years, resources throughout the Department of Defense are being stretched to near breaking point. Compounding this situation, "operational deployments (domestic and overseas) have increased by over 300 percent since 1989,"<sup>29</sup> and there is no reason to believe this trend will change. This portends a period of continuing belt-tightening and in a zero-based budget environment increases in funding levels are not expected, meaning new or expanded missions will take place only at the expense of other priorities or missions.

It would be easy to recommend that the situation be reviewed with an eye towards returning these responsibilities to law enforcement agencies and allowing a downsized military to return its troops and equipment to their services and primary missions. However, it is unlikely that support to law enforcement agencies involved with counter-drug operations will be cut back to any extent in the near future for a number of reasons. The drug problem continues, and according to most reports is

worsening. Law enforcement agencies have become "dependent" on the support they receive from DoD and it would be unrealistic to expect them to acquire the sophisticated technical capabilities DoD brings to the table. In fact, drug enforcement agencies in many instances have expanded their institutional capabilities as a result of the military support they are receiving and project.<sup>30</sup> While it appears the FY97 DoD budget will continue military counter-drug operations at current levels, a cutback in funding would have the effect of not only decreasing DoD involvement, but could also cause other agencies' programs to be curtailed because of their reliance on DoD support. However, because of the overall impact of the drug problem it is doubtful the political leadership of this country would propose or allow any changes in funding or support that might imply a lowering of priority for the war on drugs. Therefore, for the foreseeable future it is extremely doubtful there will be any decrease in DoD's requirements and responsibilities in this area.

**Law Enforcement Missions -- Operational Concerns:**

DoD needs to closely scrutinize the manner in which it prepares for and responds to law enforcement missions.

Although involvement in actions of this nature are increasing, many support operations are done on an ad hoc basis with minimal contingency planning prior to notification and deployment. It seems that every time a domestic emergency arises requiring military support, such as riot control or disaster relief, the force deploying "reinvents the wheel" and starts the planning cycle from scratch. This is because these operations are not generally the focus of routine training programs or contingency planning. Rather, these are often new requirements that place the units in roles for which neither the troops or their leaders have been trained. When called on, units generally have extremely limited time to prepare, be briefed on their mission and then deploy. This procedure has surfaced significant problems that must be understood and addressed. This section will outline a number of such situations.

During the last eight years involvement in counter-drug operations have become relatively "routine" for a number of units. However, even when dealing with the routine, commanders must continually verify the legal justification for involvement. As previously stated the Posse Comitatus

Act, as amended,<sup>31</sup> allows the armed forces to provide equipment, training and military advice to law enforcement agencies in counter-drug operations, but not to conduct searches, seizures, or arrests. However, there must be a nexus, or link, between the military support provided and the counter-drug operations conducted. Had legal advisors assigned to Joint Task Force 6 (JTF 6), which supported the Bureau of Alcohol and Tobacco and Firearms (BATF) during the 1993 siege of the Branch Davidian Compound in Waco, Texas, not questioned that agency's requests for support the armed forces would have been inappropriately and illegally involved in an operation that ultimately led to the deaths of 76 U.S. citizens.

Joint Task Force 6 (JTF 6) conducts operations on the southwest border of the United States providing ground/ aerial surveillance, reconnaissance and other support activities to law enforcement agencies involved in immigration activities and counter-drug operations provided the appropriate legal nexus exists. Law enforcement agencies submit their requests for support through JTF 6, where they are reviewed and, if valid, are forwarded to U.S. Forces Command for final approval.<sup>32</sup> In late 1992 the

Bureau of Alcohol Tobacco and Firearms (BATF), requested "various types of assistance and equipment, including training sessions conducted by Green Berets, tanks, CS gas and ... aircraft. ... in making the initial request for use of the helicopters ... the BATF's Houston office did not mention any 'drug nexus.'" <sup>33</sup> The initial request identified an on-going investigation "targeting persons believed to be involved in the unlawful manufacturing of machine-guns and explosives. These targets are of a cult/survivalist group, its letter requesting the ... helicopters said. Four days later, however ... the agency's Austin office followed ... with a similar request which added 'the individual is suspected of unlawfully being in possession of firearms and possibly narcotics.'" <sup>34</sup> Without questioning the request, it appeared to JTF 6 that the "drug nexus" had been established and therefore the request was valid.

However, the drug connection the BATF used to justify their request for military support was not valid. After-action reports indicate the primary reason for BATF interest in the case was based on the belief that there was an illegal weapons arsenal in the Branch Davidian Compound. <sup>35</sup> The drug connection did not exist. In fact, evidence showed

the "drug connection" used by the BATF had occurred a full six years earlier and David Koresh, the leader of the Branch Davidians, had not only expelled the members involved but had notified the local police and provided them with evidence of the drug offenses.<sup>36</sup> The BATF used this six year old offense to attempt to gain military support. The JTF Commander initially validated the request and "testified before Congress that he saw no reason to 'pierce the veil of the BATF request.'"<sup>37</sup> However, military lawyers literally saved the day when they conducted a further legal review which resulted in the request not being acted on. Had they not questioned what appeared to be a routine request, JTF 6 most certainly would have been involved in a clear violation of the Posse Comitatus Act and been accessories in a tragedy that ended in the deaths of numerous civilians.

While counter-drug operations are becoming more the norm and generally allow for relatively detailed planning before employment, other operations such as riot control are contingency missions with deployments commencing immediately after alert notification, often without the time needed for detailed planning. This brings up a second key requirement for commanders. Commanders must ensure that upon receiving

their mission they have a clear understanding of the legal authority under which their forces are to be utilized. They must also understand the extent of military involvement, whether the military will be the lead agency or in a support role, and the "rules of engagement" under which they will operate. Problems in all of these areas arose during the recent employment of active duty and federalized National Guard forces to aid in quelling riots in Los Angeles, California after the 1992 Rodney King trial<sup>38</sup> verdict.

When the Rodney King trial verdict was announced in April of 1992, riots broke out that were beyond the capabilities of local law enforcement authorities and the California National Guard to control. The Governor of California notified the President of the situation and requested federal support. The President issued an order for the rioters to disperse and an executive order authorizing the Secretary of Defense, in consultation with the Attorney General, to employ members of the armed forces to restore law and order. This order also federalized the California National Guard. A Joint Task Force made up of approximately 3,500 Marines and soldiers from Camp Pendleton and Fort Ord deployed two days later to restore order.<sup>39</sup>

The Task Force Commander and his legal advisors believed that since they were being employed to support domestic operations the restrictions of Posse Comitatus applied. However, this was not the case because the Act specifies that activities authorized by the Constitution or statute are exempt from the statute's limitations. In this case forces were employed under statutory authority allowing the President to use federal troops to quell "domestic violence."<sup>40</sup> Therefore the restrictions Posse Comitatus did not apply and federal troops were authorized to enforce and execute the laws.

Because the Task Force Commander did not understand this nuance, operational decisions were incorrectly based on the restrictions of Posse Comitatus rather than the considerably more flexible exceptions authorized under Title 10 U.S.C., Section 332. "Distinctions were made between military and law enforcement functions with actions such as transporting prisoners being considered law enforcement functions and therefore not supported. This misunderstanding permeated all military activities and led to underutilization (and improper use) of a potent force."<sup>41</sup>

Additionally, National Guard Forces were initially employed by the state governor under the control of the Los Angeles Police Department (LAPD) where they were involved in the entire range of law enforcement activities. However, once federalized, they came under the control of the active duty JTF commander who initially, and incorrectly, removed them from that role during the height of the riot.<sup>42</sup> "The prospect of placing federalized National Guard soldiers under the operational control of the active duty Joint Task Force commander had not been adequately addressed or properly planned. For example, the Rules of Engagement were not initially uniform throughout the JTF. ... (and) active duty forces were operating under far more restrictive covenants than the federalized National Guard."<sup>43</sup> These discrepancies were eventually rectified, but only after considerable confusion.

This operation reinforced some very basic principles. Prior to engaging in domestic activities there must be a clear understanding of the authority under which the forces are to be utilized. When employed under the strictest interpretation of the provisions of Posse Comitatus Act, the armed forces are severely restricted. However, under

Presidential authority and directives,<sup>44</sup> as well as the current exceptions to the Posse Comitatus Act, a task force commander could be responsible for the entire range of law enforcement activities with considerably more authority and far less restrictive rules of engagement. Uninformed commanders may needlessly hinder their forces, limit their effectiveness and could place them in harms way if they do not understand the laws that govern their operations or are not aware of the responsibilities those laws place on their shoulders.

In addition to the examples discussed above, commanders must be aware that regardless of the circumstances behind their deployment to support domestic operations, their performance will be closely scrutinized and could be subject to judicial review. While no case has been found involving criminal prosecution of anyone for violation of the Posse Comitatus Act,<sup>45</sup> violations are often argued as a defense by defendants being charged under other criminal statutes. Defendants often argue that a violation of the Posse Comitatus Act has occurred which taints the case against them solely because of military involvement in the operation

that led to their arrest -- regardless of the capacity under which the military forces were operating.

In 1973 when the defendants at Wounded Knee were charged with interfering with "a law enforcement officer lawfully engaged in the performance of his official duties,"<sup>46</sup> their defense was that "the federal marshals and FBI agents were not performing their duties lawfully, within the meaning of the statute, because they enlisted military forces as a posse comitatus. Others apprehended by the military while attempting to smuggle drugs into the United States have argued that the evidence obtained in their arrests was inadmissible at trial. However, no court has yet agreed to apply the exclusionary rule because of Posse Comitatus Act violations."<sup>47</sup> Commanders and their legal advisors must ensure that the legal basis for involvement is defined and fully understood by all involved prior to commencing operations. While not a "Catch 22" for the military, it is clear that errors in interpretation of the law could lead to civil prosecution.

These examples identify a number of potential hazards faced by military forces when involved in domestic actions. In these cases the armed forces were fortunate; however,

leaders of future operations who do not understand the authority for their mission, the extent of their responsibilities, and the planning and training required may not be so fortunate.

**Conclusions:**

When asked if he believed the future would bring more involvement with civil authorities, the Commandant of the United States Marine Corps' response was, "We view the increased Military support to civilian law enforcement as an inevitability. Started with the war on drugs, forest fires, etc., will, we think, lead to more cooperation, not less. For the USMC, it's not a matter of seeking to do more as much as being prepared to do more when asked. ..."<sup>48</sup>

Not only will the trend continue, but involvement will expand into areas that in the past would have seemed inconceivable. A few years ago it would have been hard to envision the armed forces involved in counter-drug operations on a day-to-day basis, but today that involvement is given little more than a second thought. With DoD's vast capabilities and resources for intelligence gathering, communications and logistics operations, it is clear that many new avenues will be opened. As new threats are

identified the armed forces will be called on to confront them.

It is hard to rule out the continued expansion of domestic support operations for two reasons. While the Soviet Union existed, the primary focus of the Department of Defense was to defend our nation's vital interests, primarily outside of our national borders. However, during the last few years, without the monolithic threat Communism provided, there has been a far greater emphasis on looking inward to solve America's problems at home. Missions for the armed forces have reflected this trend and have increasingly become more focused towards preservation of national values. Virtually all domestic missions fit this category.

Secondly, regardless of the arguments against it, the legislative history behind regulating military involvement in domestic activities has been an evolutionary process and will probably continue in the same manner. Just as the Posse Comitatus Act itself was enacted to stop abuses in, but not prevent, the employment of the military, as times have changed amendments have been enacted to establish the legal framework for increasing involvement by the armed

forces in still more national security missions. There is no reason to believe this trend will not continue as long as it does not compromise the founding fathers' vision of a military subordinate to civilian leadership and providing that leadership with a recourse when the ordinary process of law and order fails.

As much as military leaders may yearn to fight conventional battles against conventional enemies, the roles and missions of the United States Armed Forces will continue to change and reflect the needs of the American public. To actively seek to avoid these challenges would be a disservice to the people of the United States.

All personnel entering the Armed Forces of the United States take the following oath:

"I, \_\_\_\_\_ do solemnly swear (or affirm) that I will protect and defend the Constitution of the United States against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."<sup>49</sup>

In defending the sovereignty of the United States, the armed forces must simply abide by the basic laws and principles under which our country was founded. The armed forces will often be the National Command Authority's

instrument of choice to deal with emergencies and difficult situations because its involvement in operations of this nature is not only justified, but legal and necessary. It forms one of the basic foundations under which this country was founded. Those in the military must be cognizant of evolving threats to our national security and understand their role and responsibilities in defending the Constitution of the United States against all enemies -- be they foreign or domestic.

## Endnotes

<sup>1</sup>Department of the Army, The Army, Army Field Manual 100-1, (Washington: U.S. Department of the Army, June, 1994), 15. Also referenced in Department of Defense, Functions of the Department of Defense and Its Major Components, Department of Defense Directive 5100.1, (Washington: Department of Defense, 25 September, 1987), 17-18.

<sup>2</sup>Henry Black, Black's Law Dictionary, 4th ed. (St. Paul: West Publishing Co., 1991), 1396. Sovereignty is defined as "the supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; .... the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; .... The necessary existence of the state and that right and power which necessarily follow is sovereignty. ...."

<sup>3</sup>Stephen Dycus, Arthur L. Berney, William C. Banks and Peter Raven-Hansen, National Security Law, (Boston: Little Brown and Company, 1990), 423.

<sup>4</sup>American Civil Liberties Union (ACLU) Press Release, various signatories, "Comprehensive Antiterrorism Act of 1995," 6 December, 1995. The letter, addressed to Representative Newt Gingrich, and simultaneously distributed as a press release, identified a number of concerns involving use of the Armed Forces in counterterrorism activities citing the Posse Comitatus Act as the basis for their argument. However, the letter did not detail exceptions to that legislation that legally cleared the way for military involvement.

<sup>5</sup>Dycus, 420.

<sup>6</sup>Ibid., 423.

<sup>7</sup>Ibid.

<sup>8</sup>Ibid.

<sup>9</sup>Constitution of the United States, art. I, sec 8.

<sup>10</sup>Ibid., art. IV, sec. 4.

<sup>11</sup>498 U.S. I, 15-16, (1972). The case revolved around a claim that the defendant's First Amendment rights had been violated by the existence of a data-gathering system maintained by Army Intelligence. The Court held that the mere existence of the equipment did not infringe on the right of the plaintiff.

<sup>12</sup>Dycus, 423.

<sup>13</sup>Black, 1162. Posse Comitatus is defined as "The power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and arresting felons."

<sup>14</sup>Cooper, Jerry, "Federal Military Intervention in Domestic Disorders," in The United States Military Under the Constitution of the United States, ed. Richard Kohn, (New York: New York University Press, 1991), 134.

<sup>15</sup>Crimes and Criminal Procedures, U.S. Code, Title 18, sec. 1385 (1994).

<sup>16</sup>Cooper, 135.

<sup>17</sup>Dycus, 424.

<sup>18</sup>Armed Forces, U.S. Code, Title 10, sec. 331-335 (1980).

<sup>19</sup>Dycus, 428-429.

<sup>20</sup>Armed Forces, U.S. Code, Title 10, sec. 371-380 (1993).

<sup>21</sup>Dycus, 430.

<sup>22</sup>Edward Stelzer, Military Support to Law Enforcement Agencies: A Policy With Unintended Consequences, United States Army War College Strategic Research Project, (Carlisle, PA, 1996), 13.

<sup>23</sup>Office of National Drug Control Policy, The National Drug Control Strategy, (Washington: U.S. Government Printing Office, 1990), 1.

<sup>24</sup>Mathea Falco, "U. S. Drug Policy: Addicted to Failure," Foreign Policy, (Spring, 1996): 122.

<sup>25</sup>Joseph Bergantz, "Military Support of the National Drug Control Strategy," Military Review, vol. 72, num. 6, (June, 1992): 67-68.

<sup>26</sup>Amos Jordan, William Taylor, Lawrence Korb, American National Security Policy and Practice, (Baltimore: Johns Hopkins University Press, 1989), 167.

<sup>27</sup>Stelzer, 11-12.

<sup>28</sup>Ibid., 13.

<sup>29</sup>Department of the Army, United States Army Posture Statement: Meeting the Challenges of Today, Tomorrow, and the 21st Century, Presented to the Committees and Subcommittees of the United States Senate and the House of Representatives, Second Session, 104th Congress, (Washington: U.S. Department of the Army, undated), 3.

<sup>30</sup>Stelzer, 43-44.

<sup>31</sup>Armed Forces, U.S. Code, Title 10, sec. 371-378 (1993).

<sup>32</sup>Department of the Army Judge Advocate General's School, Military Support to Civil Authorities: Posse Comitatus Act, Civil Disturbances, Counter-Drug Support Operations, and Disaster Relief, (Charlottesville, VA: undated) 29.

<sup>33</sup>Richard Reavis, The Ashes of Waco, (New York: Simon and Schuster, 1995), 124.

<sup>34</sup>Ibid., 124-125.

<sup>35</sup>Ibid., 125-126.

<sup>36</sup>Ibid., p.125.

<sup>37</sup>Thomas R. Lujan, Legal Aspects of Domestic Employment of the Army, United States Army War College Strategic Research Project, (Carlisle, PA: 1996), 11.

<sup>38</sup>The case involved an incident, documented via camcorder, of the LAPD using excessive force in apprehending and arresting a suspect. The trial involved charges of police brutality. When the verdict was rendered on April 29, 1992, violence broke out throughout the City and county of Los Angeles that was beyond the capabilities of the Los Angeles Police Department to stop. The Governor of California requested federal assistance from the President who in turn issued an initial proclamation to disperse (literally read them the Riot Act) and issued the executive order to the Secretary of Defense to employ members of the Armed Forces to restore law and order.

<sup>39</sup>Lujan, 15.

<sup>40</sup>Armed Forces, U.S. Code, Title 10, sec. 332 (1956).

<sup>41</sup>A Report by the Special Advisor to the Board of Police Commissioners on the Civil Disorder in Los Angeles, A City in Crisis, October 21, 1992, p.154. As reported by Lujan, 17-18.

<sup>42</sup>Warren Theis, Domestic Role for the U.S. Army in the Post Cold War Period, United States Army War College Strategic Research Project, (Carlisle, PA, 1993), 11.

<sup>43</sup>Department of the Navy, After Action Report, Joint Task Force Los Angeles-Garden Plot-Staff Judge Advocate, Section II c (4). The Staff Judge Advocate of the Joint Task Force reported that inconsistent levels of arming were reported throughout the JTF. Specifically he noted that active-duty troops were uniformly at the correct level "one," while federalized National Guard units were noted at

levels "one" through "six" apparently at the direction of first line leaders, p. 3. As reported by Lujan, 16 and 30.

<sup>44</sup>Armed Forces, U.S. Code, Title 10, sec. 332 (1956).

<sup>45</sup>Gates, Don't Call Out the Marines: An Assessment of the Posse Comitatus Act, 13 Texas Tech Law Review, 1467, 1468, 1968; and Rice, New Laws and Insights Encircle the Posse Comitatus Act, 104, Mil. Law Review, 109, 110, 1984. As reported by Dycus, 428.

<sup>46</sup>Crimes and Criminal Procedures, U.S. Code, Title 18, sec. 231 (1994).

<sup>47</sup>Dycus, 428.

<sup>48</sup>Walter Wood (woodw@carlisle-emh2.army.mil), "CMC Address -- Q&A IRT Inc Support to Civ Authorities," electronic mail to George Brock (brockg@carlisle-emh4.army.mil). Subsequently retransmitted to Sean Byrne (byrnesj@carlisle-emh4.army.mil), 4 November, 1996. E-Mail response to a member of the USAWC faculty by the Commandant of the Marine Corps' office when requesting clarification to an answer given by General Charles Krulak, Commandant of the United States Marine Corps, during an address to the student body of the USAWC on November 3, 1996.

<sup>49</sup>Armed Forces, U.S. Code, Title 10, sec. 502 (1989).

## Bibliography

- American Civil Liberties Union, "Comprehensive Antiterrorist Act of 1995," Letter to Representative Newt Gingrich simultaneously distributed as a press release, 6 December, 1995.
- Armed Forces. U.S. Code. Title 10, (1993).
- Aspin, Les. Report On The Bottom-Up Review, Washington: U.S. Government Printing Office, 1993.
- Bergantz, Joseph. "Military Support of the National Drug Control Strategy." Military Review, Volume 72, Number 6, (June, 1992): 67-72.
- Black, Henry C. Black's Law Dictionary, 6th ed. St. Paul: West Publishing Company, 1991.
- Chairman of the Joint Chiefs of Staff. National Military Strategy of the United States of America, Washington: U.S. Government Printing Office, 1995.
- Cooper, Jerry, "Federal Military Intervention in Domestic Disorders," in The United States Military Under the Constitution of the United States 1789-1989, ed. by Richard Kohn, 120-150. New York: New York University Press, 1991.
- Crime and Criminal Procedures. U.S. Code. Title 18, (1994).
- Dycus, Stephen; Berney, Arthur; Banks, William; and Raven-Hansen, Peter. National Security Law. Boston: Little, Brown and Company, 1990.
- Falco, Mathea. "U. S. Drug Policy: Addicted to Failure." Foreign Policy (Spring, 1996): 120-133.
- Gest, Ted. "Popgun Politics." U.S. News & World Report (September 30, 1996): 30-46.
- Gunby, Phil. "Military's Counterdrug Policy Restructured." Drugs Society and Behavior, (1996): 220.

Jordan, Amos; Taylor, William; Korb, Lawrence, American National Security Policy and Practice, Baltimore: Johns Hopkins University Press, 1989 and 1993.

Kitfield, James. "Drug Warrior." Government Executive Volume 28, Number 8, (August 1996): 12-18.

Kitfield, James. "Four-Star Czar," National Journal, Number 15, (April 13, 1996): 819-823.

Lujan, Thomas. Legal Aspects of Domestic Employment of the Army, United States Army War College Strategic Research Project. Carlisle Barracks, PA, 1996.

Lykke, Arthur, ed. "Towards an Understanding of Military Strategy," Military Strategy: Theory and Application, Carlisle Barracks, PA: March, 1993.

Murphy, Walter; Fleming, James; and Harris, William. American Constitutional Interpretation, Mineola: The Foundation Press, Inc., 1986.

Office of National Drug Control Policy, Executive Office of the President, The White House, Pulse Check National Trends in Drug Abuse. Washington: U.S. Government Printing Office, Spring, 1996.

Office of National Drug Control Policy, Executive Office of the President, The White House, Reducing Drug Use and its Consequences in America. Washington: U.S. Government Printing Office, August 16, 1996.

Office of National Drug Control Policy, Executive Office of the President, The White House, National Drug Control Strategy. Washington: U.S. Government Printing Office, September, 1989.

Office of National Drug Control Policy, Executive Office of the President, The White House, National Drug Control Strategy. Washington: U.S. Government Printing Office, January, 1990.

Office of National Drug Control Policy, Executive Office of the President, The White House, National Drug Control

Strategy: 1996. Washington: U.S. Government Printing Office, 1996.

Office of National Drug Control Policy, Executive Office of the President, The White House, National Drug Control Strategy Budget Summary. Washington: U.S. Government Printing Office, February, 1995

Perry, William. Annual Report to the President and Congress. Washington: U.S. Government Printing Office, March, 1996.

Reavis, Dick. The Ashes of Waco. New York: Simon and Schuster, 1995.

Stelzer, Edward. Military Support to Law Enforcement Agencies: A Policy With Unintended Consequences, United States Army War College Strategic Research Project, Carlisle Barracks, PA, 1996.

The Constitution of the United States of America. As presented by Mr. Brooks (Chairman, Committee on the Judiciary of the House of Representatives). Washington: United States Government Printing Office, 1992.

Theis, Warren, Domestic Role for the U.S. Army in the Post Cold War Period, United States Army War College Strategic Research Project, Carlisle Barracks, PA, 1996.

The White House, A National Security Strategy of Engagement and Enlargement, Washington: U.S. Government Printing Office, February, 1996.

U.S. Department of the Army Judge Advocate General's School, Military Support to Civil Authorities: Posse Comitatus Act, Civil Disturbances, Counter-Drug Support Operations, and Disaster Relief. Charlottesville: U.S. Department of the Army, undated.

U.S. Department of the Army, The Army, Army Field Manual 100-1. Washington: U.S. Department of the Army, June, 1994.

U.S. Department of the Army, United States Army Posture Statement: Meeting the Challenges of Today, Tomorrow and the 21st Century. Washington: U.S. Department of the Army, undated.

U.S. Department of Defense, Functions of the Department of Defense and Its Major Components, Department of Defense Directive 5100.1. Washington: U.S. Department of Defense, 25 September, 1987.

Wood, Walter(wood@carlisle-emh2.army.mil). "CMC Address -- Q&A IRT Inc Support to Civ Authorities." Electronic mail to George Brock (brockg@carlisle-emh4.army.mil), 4 November, 1996.