

CROSSING THE LINE: A STUDY OF THE LEGAL PERMISSIBILITY OF USING
FEDERALIZED TROOPS TO PROTECT THE NATION'S BORDERS

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by

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

ABSTRACT

CROSSING THE LINE: A STUDY OF THE LEGAL PERMISSIBILITY OF USING FEDERALIZED TROOPS TO PROTECT THE NATION'S BORDERS, by Maj Melvin G. Deaile, 61 pages.

The attacks of 11 September 2001 showed that America has problems with its immigration system. The nineteen hijackers involved in these attacks took advantage of a problematic immigration system to penetrate the U.S. and wreak havoc. The porous border between the U.S. and its neighbors is another means by which terrorists can enter America. This thesis examined the legal permissibility of using federal troops to protect the nation's borders. It explored the growing problem American has with illegal immigration and how that problem is a threat to national security. The only viable solution to the border security problem is an increased presence along the border. The military is a source of manpower to supplement the United States Border Patrol (USBP). Asking federal troops to assist with border security, though, can create problems with the Posse Comitatus Act (PCA). This thesis used a legal methodology to examine this issue. The legal material analyzed in the course of this study showed that, barring a change in the PCA, the most that federal troops can provide is *limited* assistance. Based on these findings, the recommendation of this study is that federal troops and USBP agents work in concert to protect the nation's borders.

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ACRONYMS

DEA	Drug Enforcement Agency
DoD	Department of Defense
FBI	Federal Bureau of Investigation
JTF	Joint Task Force
NCIS	Navy Criminal Investigative Service
NG	National Guard
NMS.	National Military Strategy
NSHS	National Strategy for Homeland Security
NSS	National Security Strategy
PCA	Posse Comitatus Act
SAD	State Active Duty
U.S.	United States
USAF	United States Air Force
USBP	United States Border Patrol
USMC	United States Marine Corps
WMD	Weapons of Mass Destruction

CHAPTER 1

INTRODUCTION

Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. (Bush 2002, ii)

President George W. Bush, *2002 National Security Strategy*

A Change in Strategy

Following the terrorist attacks of 11 September 2001, President Bush declared in his 2002 State of the Union address that, “Our first priority must always be the security of the nation” (Bush 2002, L3-A3). The President’s recently released *National Security Strategy* (NSS) emphasized this point and stated, “Our military’s highest priority is to defend the United States (2002, 29).” This focus on homeland security caused the nation’s intelligence, defense, and local governmental agencies to examine their role with respect to this new national directive. Many legislators on Capitol Hill wondered what strategy the military would adopt to prevent future terrorist attacks. Senator Carl Levin, then Chairman of the Armed Services Committee, was quoted in the 13 October 2001 issue of *Stars and Stripes* as saying, “But less clear . . . is how the military will rearrange itself to prevent terrorist attacks on U.S. soil and support civilian authorities in managing deadly consequences.”

A New Military Mission?

One proposal under consideration by the Department of Defense (DoD) is the deployment of armed federal troops along the nation’s borders to serve as deputized Border Patrol (USBP) agents (Barnes 2002, 1). In the months following the 11 September 2001 attacks several National Guard (NG) troops, under control of state governors,

provided civilian agencies with security assistance. Their tasks included airport security, security at the Salt Lake City Olympic games, and border patrol. The mission of the border guards, though, was extremely limited. According to Pamela Hess in the 26 March 2002 issue of the *Washington Times*, the NG troops protected remote border crossings with only one to two law enforcement officers. This course of action helped close the gaps in what many perceived as a porous border along the Canadian and Mexican boundaries. Joyce Prince, of the *Washington Times*, reported on 22 July 2002 that there was even a proposal to arm the border guards, give them the power stop vehicles for search and seizure, and grant them arrest authority. The mission ended, however, before the Federal Government provided a definitive answer on arming state NG troops fulfilling this role. The proposal to make this mission a permanent military mission received mixed reviews from civil libertarians, Congress, and even some in the military, because they view this new mission as a possible violation of the Posse Comitatus Act (PCA). The PCA states:

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.
(*Crimes and Criminal Procedures, U.S. Code, Title 18, Section 1385*)

The original intent of the law was to prevent federal troops from becoming a national police force imposing civilian laws (Rand 2002, 243). Since its inception, though, Congress has amended this provision and allowed the military to provide civilian law enforcement agencies. The military historically provided support in critical areas where it was trained and equipped.

The most recent modification of the PCA occurred in the 1980s when Congress approved legislation that allowed the DoD to participate in the war on drugs. Congressional lawmakers realized the military possessed technologically superior capabilities in surveillance required to track drug smugglers; therefore, the PCA was amended so federal troops could provide *passive* assistance to civilian agencies. Although Congress amended the PCA to help fight the war on drugs, current law may not allow the military the same latitude in the war on terrorism. The problem is that armed federal troops patrolling the U.S. borders could cross the boundaries of the PCA if required to take an *active* role in domestic law enforcement

Thesis Outline

This thesis will argue that federal troops may only provide *limited* assistance, under current law, to the USBP if tasked to protect the nation's borders from threats resulting from America's problems with illegal immigration. Specifically, it will examine why the borders need additional security; the law and legal precedents governing military assistance to civilian authorities; and finally, how current law would constrain the actions of federal troops on the border. This chapter outlines the circumstances surrounding the genesis of the PCA and defines the parameters of this these. The second chapter summarizes the research material gathered in defense of this these. It presents this material in a chronological format to illustrate the evolution of the PCA over the last four decades. Chapter 3 discusses the legal methodology followed during the course of this thesis to reach the conclusions and recommendations. Chapter 4 analyzes the current U.S. law and relevant federal court cases that address the PCA. These rulings from U.S. federal courts formed a three-part test used to evaluate military actions when assisting

civilian authorities. Determining a violation of the PCA requires applying this test to duties performed in military assistance; therefore, the final chapter, chapter 5, presents the conclusions of this analysis and shows why current law limits military actions in homeland defense.

Significance of this Study

While no study can predict *exactly* how a U.S. court will rule, this thesis outlines where courts have ruled in the past and looks at how they might rule in the future. This study is, therefore, significant for two reasons. First, if federal troops start patrolling U.S. borders and performing acts in violation of the PCA, they could be putting themselves at risk. Anyone violating the PCA faces a fine or imprisoned for not more than two years, or both (*Crimes and Criminal Procedures, U.S. Code, Title 18, Section 1385*). Secondly, the results of this research can provide direction for the legislative and executive branches of the government. Congress can legalize any military assistance that currently violates the PCA by authorizing the President to use the military in such a way. The statute provides exemptions for military missions “expressly authorized by the Constitution or Act of Congress” (*Crimes and Criminal Procedures, U.S. Code, Title 18, Section 1385*). If deemed critical to homeland security, Congress could pass legislation that would allow federal troops to take an active role along America’s borders. This study proposes recommendations based on the assumption that federal troops will have to act within the bounds of current law. Although modified the PCA is a law that has existed since 1878.

History of the Posse Comitatus Act

The origin of the PCA provides some insight into why this issue remains contentious in today’s society. The concept of a *posse* originated centuries ago with

America's British ancestors. When the town sheriff needed additional help to arrest a criminal or quell a civil disturbance, he would summon the citizens of the community to assist him. The town men, above the age of fifteen, provided this support (Brinkerhoff 2002, 3). The term *posse comitatus*, translated *power of the country*, defined these able-bodied men called to supplement law enforcement assets and maintain the peace (Trebilcock 2000, 1). The Founding Fathers included the idea of using a posse to assist local law enforcement included in American law.

Early American lawmakers were averse to forming a large standing army because of their experiences with the British Army. They viewed such great armies as an instrument of oppression and tyranny (Hammond 1997, 2). When the Founding Fathers drafted the U.S. Constitution, they mandated civilian control over the military and included several provisions in the Bill of Rights that prevented abuses similar to those they experienced under the British crown (Hammond 1997, 3). Nevertheless, early lawmakers enacted legislation that specifically provided military support to local law enforcement. The Judiciary Act of 1789 gave federal marshals the power to "command all necessary assistance in the execution of his duty" (Meeks 1975, 88). Since the act did not specifically mention the military, Congress modified the act in 1792 to include authorization for the use of the militia. The President now had the authority to use the militia "whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the power vested in the marshals" (Furman 1960, 88). The key distinction in the law of 1792 was the mention of the militia for law enforcement support and not the regular army.

As this infant nation began to develop, the line dividing the use of the militia and the regular military forces became blurred. One reason was the influence of the Mansfield Doctrine. Lord Mansfield, Chief Justice of the Court of King's Bench in England, opined that the marshal could use soldiers for quelling an internal disorder since in that capacity they were acting as civilians, not soldiers (Meeks 1975, 89). U.S. Attorney General Cushing, in 1854, cited this doctrine in his opinion that military members putting down insurrections, whether regular or militia, were acting as citizens when serving in a posse comitatus capacity. These opinions led to the involvement of regular military and militia troops in efforts to suppress the Kansas rebellions that preceded the Civil War.

The Civil War was the event that removed all distinctions between regular and militia forces participating in civil law enforcement. In 1861, Congress rewrote the legislation of 1792 and gave the President authority to call out militia or regular forces when needed to enforce the law (Meeks 1975, 89). This policy changed the original idea behind the Founding Fathers concept of a posse; however, it would be close to seventeen years before new legislation reversed the practice of using regular military troops in law enforcement.

Following the Civil War, Congress received reports of atrocities towards freed slaves in the south. The Republican Congress passed the Reconstruction Act of 1867 and divided the South into military districts headed by military commanders (Meeks 1975, 89). Federal troops in these districts aided revenue officers in suppressing the illegal production of whiskey, aided local officials in quelling disturbances, and finally insured the sanctity of the election booth (Meeks 1975, 90). The election of 1876 changed the role of federal troops within the borders of the United States.

The PCA was a by-product of the military presence in the south and the election of 1876. During this election, President Grant deployed federal troops to the Reconstruction governments of the south to act as federal marshals in case of trouble at the polls (Hammond 1997, 3). When Rutherford B. Hayes won the election by only one electoral vote, the South viewed Grant's actions as a misuse of the military. In a compromise to the controversy over the election of 1876, Southern Democrats agreed to recognize Rutherford B. Hayes as President if the federal government pulled the federal troops from their land.

With the federal troops removed, the Southern Democrats were able to use Jim Crow laws to exclude black voters and soon won back the House of Representatives. Since the Southerners controlled Congress, they fashioned legislation to prevent the federal government from using regular military troops on American soil. Congress passed a rider to the Army Appropriations Act for the year ending 1879, the act forbid the involvement of federal troops in law enforcement (Furman 1960, 85). The law won support of the Senate because it limited the President's authority to use the regular army in law enforcement, but still guaranteed him the right to use federal troops in his execution of his Constitutional obligations (Meeks 1975, 92). That legislation became the PCA and restricted the role of the military in domestic affairs.

The PCA has undergone a couple of changes since its inception in 1878. Congress added the Air Force to the original language of act in 1956 after gaining its position as a separate service (Rand 2001, 244). In the last twenty years, Congress modified the PCA and allowed the military to support civilian law enforcement agencies in domestic matters. Specifically, the "Military Cooperation with Civilian Law Enforcement

Officials” legislation of 1981 allowed military members to provide training, critical information, equipment, and advisors to law enforcement personnel (Rice 1984, 109). This legislation enlisted the help of the military in the war on drugs; however, the war on terrorism has caused the latest debate.

President Bush is not the first president to see a role for the military in support of the war on terrorism. In 1995, President Clinton proposed legislation that would allow the military to disarm and disable individuals suspected of possessing chemical or biological weapons (Matthews 1995, 29). This legislation was a direct response to the bombing of the Oklahoma City Alfred P. Murrah Federal Building by an American terrorist. His proposal met stiff resistance on Capitol Hill from legislators. Senator Biden, a Democrat from Delaware, summed up these concerns when he said, “Our freedoms and our legal traditions are simply too valuable to be put at risk in a hurried rush to respond to this terrible tragedy” (Matthews 1995, 29). The mood in Washington did not change until another terrorist attack hit America; this time from an enemy outside U.S. borders.

The terrorist attack on September 11, 2001, caused new feeling to emerge from Washington about expanding the military’s role in domestic law enforcement. Senator Biden’s comments, about the President’s proposal to use the military in homeland security, highlight this change in sentiment. Joyce Price, in the 22 July 2002 issue of the *Washington Times*, reported that Biden “strongly endorsed” giving soldiers the power to arrest American citizens, and said the PCA “should be re-examined and has to be amended.”

A main reason for suggesting that federal troops aid in patrolling the national borders is the threat posed by a porous border. A 6 October 2002 *Washington Times*

editorial reported that each day approximately 10,000 people cross the Mexican-American border illegally; however, only one third of those illegal aliens are ever captured. This border situation causes a national security issue since terrorists have a good chance of penetrating our borders undetected. The same editorial further states that estimates place the number of illegal aliens from Arab and Middle Eastern nations at close to 250, 000. Supplementing the USBP with federal troops, some suggest, would help plug the gaps in the 1,940 mile long southern border. Although NG troops performed border security after the terrorist attacks, federal troops are likely to assume this role in the future.

Assumptions

The central focus of this paper will be the role *federalized* troops would fill along the U.S. border. One assumption is that NG forces used in this role will be operating under Title 10 authorization. Title 10 of the U.S. Code governs the operations of federal armed forces or those forces that are operating under control of the President. When National Guard troops operate under the control of their respective state governors (State Active Duty (SAD)), or Title 32, they are exempt for the PCA (CLAMO 2001, 10).

State Active Duty status is a status reserved for the NG only (CLAMO 2001, 183). While in this status, NG forces are under direct control of the state governors and subject to their command and control. Their funding is through the state and they can perform duties only prescribed by state law (CLAMO 2001, 183). On the other hand, Title 32 is a status that defines NG troops during their inactive duty training (weekend warrior status) and their annual two-week training. Under Title 32, the NG does have a federal mission and receives money for that training from the federal government

(CLAMO 2001, 183). However, the control of these units still rests with the individual states. Command and control over federal troops is one reason for assuming that all forces performing border patrol duty will operate under Title 10 status.

Title 10 status ensures that all armed forces proposed to guard the nation's borders will be working directly for the President. NG troops operating under SAD or Title 32 are still reporting to their respective state governors. Placing National Guard troops in federal status gives the President control over their mission. Pamela Hess' article in the 26 March 2002 issue of the Washington Times reported that the Secretary of Defense fears that if left to state control, governors could use the NG to support other agencies at their whim. It is because of command and control issues that all troops, for the purpose of this paper, are assumed to operate under Title 10 status.

Terms Defined

The two terms central to framing this thesis are *federal troops* and *borders*. Federal troops, as was discussed above, means military members operating under *Armed Forces, U.S. Code*, Title 10. Active Duty, Reservists, or NG forces deployed in support of border security would all function under control of the DoD. The President, through the Secretary of Defense, would exercise authority over their mission. When the term *borders* is used, it will refer to those internationally recognized geographic boundaries that separate the United States from Canada and Mexico.

Finally, this study will focus strictly on *military* forces under daily control of the DoD. When discussing the role of armed forces in border security, it is limited to missions performed by the Army, Air Force, Navy, and Marines. As previously stated, the PCA covers only the Army and Air Force; however, the Navy and Marines are covered

by the PCA through DOD regulation (Rand 2001, 244). The Coast Guard, since it operates daily under the Department of Homeland Security, is not bounded by the restrictions of the PCA. This paper does not discuss their mission.

Summary

The recent terrorist attacks produced a new focus for the America's *National Security Strategy*. The primary emphasis is to protect the United States from similar type attacks against the American homeland. The situation along America's borders allows illegal immigrants to penetrate America's homeland in great numbers everyday. Terrorists can use this situation to enter America undetected. One solution to correct this problem is to place federal troops along the U.S. borders as a means of plugging the holes in nation's borders. The PCA, however, prohibits federal troops from participating in law enforcement. Initially, this law only allowed the militia (e.g., National Guard in SDA status) to assist law enforcement officials. However, over the last four decades legal experts have seen an evolution in the way courts view this law. Reviewing the progression of these thoughts shows the legal and operational contexts within which the PCA is viewed today.

CHAPTER 2

LITERATURE REVIEW

Introduction

Congress drafted and enacted the PCA at a critical time in American history. The political events surrounding Reconstruction in the South after the Civil War were the main impetus for passage of the PCA. Since that time, the legal views surrounding the interpretation of the PCA have shifted as the political climate in America changed. As of February 2003, U.S. courts have not ruled on the legality of using federal troops to guard the nation's borders. Nonetheless, the research for this thesis showed a distinct evolution in legal thought about how the PCA should be interpreted in a changing social and political environment.

The research materials collected for this thesis were divided into primary, secondary, and tertiary sources. First, the actual U.S. Code and precedent setting court cases outlined the current law with respect to the PCA. The secondary sources used in this research were law review articles that commented on court decisions, recent challenges to the PCA, and legislative actions with regard to PCA. Finally, the tertiary materials gathered for this thesis were commentaries and congressional reports which addressed the applicability of the PCA in homeland security and the fight against terrorism. This material is presented chronologically to correspond with periods where there was a shift in the view towards the PCA. These shifts typically mirrored the different internal and external threats America faced. The U.S. court cases that were precedent setting are discussed in their appropriate chronological period. Information in this chapter concerning U.S. court cases discusses the date of the case, the situation that

led to the case, and the decision of the court. Subsequent chapters analyze and address the impact of these decisions. Before looking at the historical development of the views on the PCA, it is essential to know what the law is today.

The Law Today

As discussed in chapter 1, the PCA is found under *Crimes and Criminal Procedure, U.S. Code*, Title 18. Specifically, Section 1385 under *Crimes: Military and Navy* outlines the PCA. In addition to this section, *Armed Force, U.S. Code*, Title 10 has several sections that detail lawful military support to civilian law enforcement. Sections 371 through 381 to Title 10 of the U.S. Code set out what type of support the regular military may provide to civilian agencies. The U.S. Code used in this thesis was dated 2 January of 2001.

While not part of the U.S. Code, DoD Directive 5525.5 prescribes policies and procedures that DoD personnel must follow when providing support to civilian law enforcement officials. The latest directive dated 15 January 1986 includes one change dated 20 December 1989. This directive expressly addresses the type of support, training, and information federal defense personnel may provide civilian law enforcement. U.S. courts have referenced this document in their decisions on PCA challenges. The above sources laid the foundation of statutory law governing military actions under the PCA. In addition to this law, applicable federal and state court decisions formed the case law portion of the research material. This legal foundation, coupled with the secondary and tertiary sources, shaped the complete structure of research material gathered for this thesis.

The 1960 and 1970s PCA View: Internal U.S. Strife

Following World War II, the entire world was a different place. The advent of the atomic bomb threatened the population of the United States with devastating attacks from the Soviet Union. At the same time, the civil rights and antiwar movements created an increase in nonviolent civil disobedience. At the same time the government faced a terrible external threat, it had to deal with the ramifications of internal unrest on American soil. Against this backdrop, U.S. Army lawyer H. W. C. Furman wrote his 1960 *Military Law Review* article, “Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act” (1960, 85).

His article postulated that the PCA did not impose restrictions upon the President when he orders the military to carry out missions in support of his duties under the U.S. Constitution. In the 1960 environment, it was conceivable that an atomic strike would create a severe civil disruption. The President, therefore, would be authorized to use federal troops to restore order and protect federal lands. Furman made it clear the President has obligations outlined in the U.S Constitution exempt from the PCA; however, commanders below the President using federal troops to enforce the law would be subject to prosecution under the PCA.

The value of his article is twofold. First, it is one of the earliest legal works that attempts to describe in detail the impetus of the PCA and its implications on military assistance to civil authorities. Secondly, Furman outlined how the President’s responsibility to exercise his duty, under the U.S. Constitution, are exempt from the PCA. His work was hailed by U.S. Marine Corps lawyer, Clarence Meeks, as the “only definitive article published on the PCA” (Meeks 1975, 94).

As Furman was writing his article, a precedent setting case was making its way through the courts. Vincent Wrynn, father of Dennis Wrynn, brought a case before the federal bench in 1961 that challenged the PCA. A U.S. Air Force (USAF) helicopter injured Wrynn's son, Dennis, while assisting the local sheriff from Suffolk County, New York, in the search for an escaped convict. During landing, the helicopter clipped a tree wounding nearby Vincent Wynn. Although the federal judges viewed the pilots' actions as a violation of the PCA, the court dropped the lawsuit against the government since the pilots acted outside the scope of their office. The case of *Wrynn v. United States* established a key precedent about government liability when individuals, acting of their own accord, violate the PCA.

In the next decade, several precedent setting cases resulted from the government's 1973 suppression of a rebellion on the South Dakota reservation of Wounded Knee. Although federal marshals and Federal Bureau of Investigation (FBI) agents put down the rebellion, the military assisted these agencies with equipment, material, intelligence, and advice. These actions generated three separate cases: *U.S. v. Red Feather*, *U.S. v. Jaramillo*, and *U.S. v. Casper*. The decisions from these cases helped formed the three-part test U.S. courts use today to judge challenges to the PCA. It was during the trying of these cases that Major Meeks addressed military support to civilian law enforcement officials.

Major Meeks wrote an article for the *Military Law Review* entitled, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*. Major Meeks examined military assistance to law enforcement authorities where "such assistance is provided without the approval or knowledge of the President" (Meeks 1975,

85). His article detailed those instances where military commanders may aid civilian authorities without violating the PCA. He listed these exceptions as enforcement of the Uniform Code of Military Justice (UCMJ), aid to Secret Service, aid to territorial governors, and aid to federal magistrates. Although this thesis assumes the President would approve of using the federal troops along the border, Meeks' article provides excellent analysis on the background of the PCA and interpretation of important court rulings. The Furman and Meeks articles conveyed a cautious pessimism towards participation of the military in civil affairs; that trend would change in the 1980s.

The 1980's View: PCA Changed for the War on Drugs

In the 1980s, Congress passed legislation that modified the PCA and allowed the military to train and support law enforcement agencies in the war on drugs. The Military Cooperation with Civilian Law Enforcement Officials Act of 1981 legalized military assistance to civil authorities (Rice 1984, 109). Colonel Rice's 1984 article, *New Laws and Insights Encircle the Posse Comitatus Act*, explained the changes Congress made to the PCA and its implications for the military. Congress enacted this law because military commanders denied assistance to law enforcement officials they deemed legal and proper (Rice 1984, 112). Drug smuggling was a serious concern and the 1981 act conveyed the legislature's goal to use every means available to combat it. Through this act, Congress attempted to remove some of the ambiguity in the PCA by clarifying the type of assistance the military could provide civilian authorities.

As Congress expanded the U.S. military's ability to support the war on drugs, defendants responded with legal challenges where this assistance led to their conviction. These challenges resulted in precedent setting cases. In the 1986 case, *U.S. v. Hartley*, a

customs agent was riding aboard an U.S. Air Force Airborne and Early Warning and Control System (AWACS) plane when a USAF radar operator spotted an unidentified plane on the radar. The radar operator informed the customs agent who then alerted authorities on the ground. The civilian agents on the ground found and arrested the aforementioned suspect for drug smuggling. The federal courts did not dismiss the charges because they ruled that the assistance received from the military was not direct, and therefore, legal. This case helped to define the limits of legal military assistance.

In another case, *Taylor v. State of Oklahoma (1981)*, a military police officer was pursuing two enlisted personnel for drug dealing when his investigation led him to a civilian dealer off the military installation. The military police officer, acting as an undercover agent, purchased drugs from the plaintiff, arrested him, and then searched the his house. Although the court viewed the military officer's actions as a violation of the PCA, they found that the PCA provided punishment for military members violating the PCA but did not guarantee victims of these violations a free ride. Even though the military officer could be prosecuted under the PCA, the fruit of his action, namely the evidence against the plaintiff, was not automatically excluded from the case.

During the 1980's, Congress commissioned a report to examine this issue of military assistance to civilian law enforcement agencies. Charles Doyle, of the Congressional Research Service, wrote his findings in the report titled, *Use of the Military to Enforce Civilian Law: Posse Comitatus Act and other Considerations*. Doyle agreed with Furman's view that the President may use the military to execute his constitutional duties; however, he argued that the President may not use the military in a domestic enforcement role where "Congress has expressly refused to grant such authority

legislatively” (Doyle 1988, ii). His report looked at the ability of Congress to restrict the President’s authority to use military power in law enforcement. He also discusses changes in the PCA as a result of Congress’ 1981 legislation. Doyle’s study finds that the PCA is a criminal statute that prevents the use of armed forces to execute civilian law (Doyle 1988, 13). He surmised, as did Colonel Rice, that Congress passed the 1981 act to expand the role of the military in the war on drugs. As America entered the 1990’s, however, the debate over the PCA would focus on a new war—the war on terrorism.

The 1990’s View: PCA vs. War on Terrorism

In the 1990s, America would experience an increase in domestic terrorism that caused a shift in the debate over the PCA. The 1993 World Trade Center attack was followed by the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. President Clinton, spurred on by these acts, submitted a terrorism bill to Congress. This bill would have required the military to provide assistance to law enforcement for emergencies involving chemical and biological weapons (Matthews 1995, 29). Prior to these attacks, President Bush deployed military forces to quell the Los Angeles riots of that resulted from the verdict in the Rodney King trial (Schnaubelt 1997, 2). Furthermore, numerous natural disasters in the late 1980s and 1990s saw armed forces providing disaster relief to fellow American citizens. The trend of the 1980s continued into the next decade and signaled more, not less, involvement of the military in assistance to civil authorities.

In this decade, two cases were brought before the federal bench that reinforced the precedent that the military could provide indirect assistance to civilian drug law enforcement agencies. The defendants in the cases of the *United States v. Yunis* (1981)

and the *United States v. Kahn* (1994) challenged their arrests because drug enforcement agencies used military equipment, material, or troops during their apprehension. By this point, the court derived three-part test became the standard for judging challenges to the PCA. The respective federal courts upheld the convictions. More importantly, they illustrated the application of the legal standard to differing circumstances.

Realizing the trend of allowing military assistance to civilian law enforcement, Thomas Lujan, a Staff Judge Advocate with Special Operations Command, wrote his article, “Legal Aspects of Domestic Employment of the Army,” for *Parameters* magazine. He predicted that the Army would experience an increase in domestic assistance and addressed the legal lessons learned from “selected domestic employments in the 1990s” (Lujan 1997, 1). His research examined disaster relief operations during Hurricane Andrew, response to the Oklahoma bombings, Joint Task Force (JTF) 6 support to the raid on the Branch Davidian compound, support to the LA riots, and finally, the Ruby Ridge incident of 1992. The central argument of his article is that at times the civilian law enforcement community is ill equipped to handle some situations. He notes, however, that involving the military in these matters is sure to raise the public’s attention and increase the “prospect of criminal and civil litigation (Lujan 1997, 10). His solution was to keep military forces that responded to terrorist incidents operating under strict military rules of engagement (ROE) (Lujan 1997, 10).

The Opposing View: Reinforce the PCA

While legal experts saw the future and were trying to quell the public’s skepticism, Matthew Hammond was not convinced. His *Washington University Law Quarterly* piece, “The Posse Comitatus Act: A Principle in Need of Renewal,” raised a

flag of caution. He advocated a reversal in the trend to include the military in more domestic situations. Hammond felt that Congress and the public focused on the military as a “panacea for domestic problems” (Hammond 1997, 1). The Founding Fathers concern over a large standing army was the principle rationale for his argument. In his article, he elevated the PCA to a legal level similar to that of the U.S. Constitution. As already discussed, the PCA was only a criminal statute that forbids federal troops from executing civilian law. Hammond’s article is noteworthy because it discusses recent court decisions and raises the Founding Fathers concerns about large standing armies.

The New Debate: PCA vs. US Security

Craig Trebilcock, a Judge Advocate with the Army Reserve, takes a different approach in his article *The Myth of Posse Comitatus*. He realized that there was a perception among military and civilian sectors that the PCA “precludes the use of the U.S. military assets in domestic security operations” (Trebilcock 2000, 1). He argues, however, that the intent of the PCA was not to prevent such involvement. He presented evidence that the PCA’s intent was to prevent military forces from becoming a national police force executing the laws of the land (Trebilcock 2000, 1). Like many before him, Trebilcock noted that the PCA is a “statutory creation” which means it can be amended by subsequent legislation (Trebilcock 2000, 2). He opined that the PCA’s power has eroded, particularly over the past twenty years, to where the PCA is “a low legal hurdle that can be easily cleared through invocation of the appropriate legal justification, either before or after the fact” (Trebilcock 2000, 4). His article pointed out essential elements of the PCA critical to this thesis. First, the PCA is a legal statute that subsequent legislation

can amend. Second, that the President of the United States has ample authority “to employ the military in homeland defense” (Treblicock 2000, 4).

While it seems likely that the military will have an increased role in homeland defense, there is still debate over the ability of these forces to defend themselves and use deadly force. W. A. Stafford, a United States Marine Corps (USMC) Staff Judge Advocate, wrote his article, “How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE, and the Rules of Deadly Force,” for the *Army Lawyer*. Stafford stressed that commanders must develop important rules of deadly force resulting from a thorough risk analysis (2000, 21). His conclusions are important because federal troops operating along the U.S. border may encounter terrorists and drug dealers.

The Threat Posed by Illegal Immigration

Although not directly related to the PCA, Colonel David Lopez, a student at the Army War College, hypothesized that illegal immigration was a national security problem that required the use of military forces to ensure American national sovereignty (2001, 1). His research project, “Illegal Immigration: Is the use of Military Force in Policing the United States’ Border with Mexico a Viable Option,” proposed using reserve, guard, or active military forces in a border role because illegal immigration posed a threat to national security. Lopez believed the application of military force to reverse the trend of illegal immigration was appropriate, but his research does not examine the legal ramifications under the PCA (2001, iii). It does highlight, however, the mounting national threat posed by insecure borders and the need for additional measures to stop the flood of illegal immigrants.

Another research project highlighted the dangers of continued illegal immigration neglect. Michelle Malkin's book, *Invasion*, written in the aftermath of 11 September 2001, exposed the flaws in the U.S. immigration system that allowed nineteen foreign hijackers to infiltrate and attack America. In addition to problems with the immigration system, Malkin also addressed the troubles along the U.S. borders with Mexico and Canada. Her work reinforced the premise that America's problems with illegal immigration pose a problem to national security.

Involving the military in Homeland Security

The terrorist attacks of 11 September 2001 triggered a call for greater military involvement in homeland security. A RAND study, by Eric Larson and John Peters, *Preparing the U.S. Army for Homeland Security*, outlined several of the anticipated roles for the Army in homeland security. Their proposed missions for the U.S. Army included responses to WMD attacks and support to ensure the continuity of the government. The study concluded, however, "border and costal defense is an area of homeland security in which the Army does not have a lead role, although large numbers of Army personnel and equipment can be used for certain operations" (Larson 2001, 158). Although this study saw a limited role for the U.S. Army along the border, it noted that the military possessed great capability to assist USBP agents in their mission.

While the RAND Corporation analyzed military assistance to civilian authorities, David Bolgiano, a senior attorney in the Office of the Chief Counsel of the Drug Enforcement Agency (DEA), outlined guidelines for civilian law enforcement agencies in the *FBI Law Enforcement Bulletin*. His article in the bulletin titled, "Military Support of Domestic Law Enforcement Operations," provided guidance to law enforcement

agencies, specifically the FBI, on assistance the military can provide civilian agencies under the PCA. His work is a primer for law enforcement personnel about the boundaries of military involvement in civilian law enforcement. He listed areas where military support is permissible and should be included. His central recommendation is that when incorporating military assistance into ongoing operations, “law enforcement personnel always should be present whenever the possibility of an enforcement action may arise” (Bolgiano 2001, 5). Bolgiano’s recommendation was critical to resolving the conflict between using federal troops on the border and the ability of these troops to actually stop illegal immigrants.

Chris Quillen, a counterterrorism analyst with the Oak Ridge Institute for Science and Education, wrote an article for *Parameters* entitled, “Posse Comitatus and Nuclear Terrorism.” His thesis is that DoD personnel are best equipped to handle responses to WMD; therefore, they must play a greater role in homeland security. He argued the severity of a nuclear attack requires a legislative exemption to the PCA to allow the necessary military response without abolishing the entire act (Quillen 2002, 15). His logic is the same advocated by those who feel the war on terrorism is of such importance that it requires an exception to the PCA. Constructing exemptions to the PCA for individual military missions is an approach advocated by some legal experts.

In response to the growing concern over domestic terrorism, Congress commissioned another report in 2001. Jeff Brake, a National Defense Fellow, submitted his findings to Congress in a report titled, *Terrorism and the Military’s Role in Domestic Crisis Management: Background and Issue for Congress*. Brake’s report found an American military that has “demonstrated it understands its supporting role to law

enforcement and is prepared to act with technical assistance or tactical forces as called upon” (Brake 2001, 23). Blake concluded that military responses to crises can be hampered by statutory and regulatory issues he found to be “numerous and often confusing” (2001, 20). This article highlighted the complicated regulations and law that surround military support to civilian law enforcement. Brake’s research pointed out the complex issues that military and civilian law enforcement officials must address when planning to use federal troops in a domestic assistance role.

Against the backdrop of the new emphasis on homeland security, John Brinkeroff, an associate director of the Federal Emergency Management Agency (FEMA), wrote an article titled, “The Posse Comitatus Act and Homeland Security.” In a departure from previous articles that attempted to define, refine, and delineate the role of the military in homeland security, Brinkeroff simply called for repealing the PCA. His argument is that the PCA is a legal statute “inappropriate for modern times” (Brinkeroff 2002, 2). Brinkeroff’s rationale for abolishing the PCA stems from his belief that the statute is an artifact from a past conflict between freedom and slavery while the new conflict is between “civilization and terrorism” (Brinkeroff 2002, 10). This article demonstrated the ambiguity in the PCA despite the known limitations and exceptions to the statute. Repealing the PCA, however, is not a universally accepted position.

One article directly denounced the deployment of federal troops on U.S. border and offered a unique solution. Brigadier General (Ret.) Joseph Barnes, a lawyer and Distinguished Graduate from the National War College, argued against this new role for federal troops in his article, “Despite the Posse Comitatus Act, are Federal Soldiers About to Deploy as Deputized Border Patrol and Customs Agents?” General Barnes

believes using federal troops as border agents will violate the PCA; however, his article offers no legal analysis of the issue. Instead, Barnes suggests that Congress should pass legislation that allows the federal government to reimburse the states for using *their* National Guard troops to protect U.S. borders (Barnes 2002, 4). The trouble with Barnes' solution is that it leaves control of the troops under the state governors. As evidenced in Chapter One, this is a situation the Bush Administration finds unacceptable.

The Court Speaks

While homeland security experts and legal authorities were voicing their opinions on military assistance to law enforcement officials, the U.S. federal court made decisions upholding the viability of limited military assistance to civilian law enforcement agencies. In *United States v. Hitchcock* (2002), the defendant in a drug bust again argued that the U.S. Navy violated the PCA since its Criminal Investigated Service (NCIS) had aided the Drug Enforcement Agency (DEA) in his apprehension. NCIS discovered that drugs were being distributed on a military installation and their investigation led them to Mr. Hitchcock. The NCIS provided the DEA with intelligence support that led to the arrest. The federal court, applying the three-part test, upheld the conviction since U.S. Navy assistance never violated the provisions of the PCA. This recent court decision demonstrates that U.S. courts still use the three-part test when judging challenges to the PCA.

The Current Strategy for America

The following documents are not legally bonding; however, they detail the current government's plans to deal with terrorist threats to the American people. The *National Security Strategy for the United States of America 2002 (NSS)*, *2002 National Military*

Strategy (NMS), and the *National Strategy for Homeland Security 2002 (NSHS)* outline how the government anticipates using the military to solve domestic threats to America's security. The *National Military Strategy* analyzed in this thesis was only available in "predecision" draft form and dated 16 October 2002. Any changes to the draft document, with respect to the military's role in homeland security, could affect the analysis presented in chapter 4.

Summary

Several facts are clear from the brief presentation of the research material collected in support of this thesis. First, there is a definite trend towards more military involvement in domestic affairs. In the 1960 and 1970s, there was considerable concern over using military force against U.S. citizens but this research suggests that focus has changed. The war on drugs, seen as a direct threat to U.S. national security and stability, was the impetus that allowed for modification of the PCA. The same rationale is being used today for fighting the war on terrorism. From the 1990s to today, the instances of terrorism directed against U.S. rose dramatically prompting a rise in military support to civilian authorities.

Another fact gleaned from this literature review is that no legal case, opinion, or analysis exists that directly addresses the premise of this thesis. Some view military participation in law enforcement as necessary to protect Americans from an external threat; however, the legality of this act remains in question. Since the primary question is one of legality, this thesis used a legal methodology to solve the problem. The next chapter presents this legal methodology.

CHAPTER 3

RESEARCH METHODOLOGY

Introduction: The Legal Methodology

Properly answering the legal question of using federal troops to assist USBP agents in guarding the nation's borders requires framing the problem in a manner similar to that used in American jurisprudence. The legal methodology for resolving matters of law is a three-step process. First, the court identifies the facts of the case, known as evidence, and ascertains the central legal issue presented by those facts. Next, judges identify the applicable statutory law and relevant court decisions upon which to base their decision. This research used current law, legal precedents, and legal opinions since no court has ruled on the legality of using federal troops in this role. Finally, the court judge(s) apply the statutory law and case law to the facts of the case to decide the legal issue. By using the law and legal precedents, a common law court builds a lawful foundation to support its decision in a particular case. For the purpose of this thesis, it was important to determine two critical legal questions. First, can federal troops legally provide assistance to USBP agents patrolling America's borders? Secondly, if military support is legal, then what are the legal limits that define the type of assistance federal troops can provide? Answering these questions begins, as do all legal cases, with a presentation of the evidence.

Presenting the Facts

The legal methodology begins with an introduction of the facts that support the central disputed before the court. The facts in this case, as previously referenced in chapter 1, are very evident. America suffers from a flood of illegal immigration. Michelle

Malkin, in her book *Invasion*, revealed how failures in the U.S. immigration system allowed the nineteen hijackers of 11 September 2001 to move freely throughout America (Malkin 2002, pg. x). Malkin concludes that the illegal immigration situation, almost a year after the attacks, remains bleak. There is simply too much ground to cover along the nation's borders and not enough agents to patrol the area. As one border patrol agent put it, "The border is porous . . . we just don't have enough manpower to cover it" (Malkin 2002, 61).

The acuteness of the illegal immigration problem now threatens the national security of the United States. Terrorists took advantage of immigration failures to penetrate the national borders and create havoc on the American homeland. If the government does not correct situation on the Mexico and Canadian borders, then terrorists can take advantage of that problem to infiltrate America undetected. The magnitude of the threat is actually greater since terrorists can smuggle in WMD across these borders opposed to other ports of entry that present a greater security risk.

The facts showed that one solution immediately used in the aftermath of the terrorists' attacks on America was to provide the USBP security assistance by employing NG troops along the border. This solution never became permanent to avoid the appearance that America was militarizing its borders (Malkin 2002, 61). Since it was a temporary measure using state activated NG troops, no one ever challenged the legality of the issue in court. The PCA does not cover NG troops.

In addition to the most recent use of NG troops along the border, this research searched for other instances of federal troops assisting with border patrol to establish a historical precedent. The evidence gathered proved there was previous assistance

provided to the USBP in combating illegal immigration. While there is a historical precedent for using the military in this manner, it does mean the current administration envisions a similar role for the military. The only way to discover what type of assistance the current federal government foresees the military providing is to analyze the most recent government strategies. The President's recently released *National Security Strategy*, the new *National Military Strategy*, and the new *National Strategy for Homeland Security*, are government documents that each address the use of the military in homeland security. Based on these strategies, it was possible to determine what type of role the current administration foresees for the military in homeland defense.

Since the threat to national security is real, some now want a permanent military presence along the border to prevent terrorists from taking advantage of thinly guarded American borders. This course of action, however, could face considerable court challenges. As previously described, the PCA prevents federal troops, without legal authorization from the Congress or President, from enforcing the laws of the land on American soil. Therefore, the legal question is whether using the federal troops to provide USBP agents security assistance is a violation of the PCA. Resolving this problem meant examining the U.S. Code, DoD Directives, and previous U.S. court cases to form the legal foundation for evaluating this issue.

Finding the Law

Having identified the central issue, the legality of military assistance to the USBP, the next step in the legal methodology is to research and analyze the applicable law. In order to build the foundation for judging this case, the research pursued two sources of law. First, the statutory law applicable and regulations promulgated there under to this

case were gathered. In this case, that law was Titles 18 and 10 of the U.S. Code, and DoD Directives. Furthermore, this thesis conducted an examination of law review articles to discover the intent of the legislators at the time Congress passed the PCA. This information, presented in chapter 1, provides insight into the circumstances that prompted passage of the PCA.

The second source of law for this legal problem was the applicable case law. A search of recent U.S. federal and state court decisions was conducted to determine how judges have interpreted the PCA. Instead of reviewing every PCA challenge brought before a U.S. court, this thesis only analyzed those cases that specifically challenged the legality of military assistance to civilian law enforcement agencies. Using the legal database, LEXIS, a refined search uncovered all applicable cases decided as of 1 February 03. The next step in the legal methodology, after building the legal foundations, is to judge the central legal issue based on that law.

Applying the Law

Evidence framed the legal question and research discovered the applicable law; however, the final and critical step is to draw conclusions based on what the law says about the legal issue. The legal precedents in this case revealed a commonly accepted three-part test U.S. courts use to determine whether military actions violate the PCA. This examines three separate aspects of the military mission. (DOPLAW 2001, 17). First, it looks at what kind of activity federal troops performed. If that activity is considered active law enforcement, then the act is illegal (DOPLAW 2001, 17). Second, the test scrutinizes the activity of the military members to see if it pervades the activities of law enforcement personnel (DOPLAW 2001, 17). Finally, the test determines the effect this

military mission would have on citizens. If the military's mission subjects them to action, which is regulatory, prospective, or compulsory in nature, then it violates the PCA (DOPLAW 2001, 17). The analysis of the evidence and law gathered in this thesis is presented chapter 4, while the conclusions drawn from applying that law are discussed in chapter 5.

Conclusion

While it is impossible to predict with any certainty how a U.S. court would rule concerning a legal matter, this thesis used the legal methodology in an attempt to highlight the legal issues that govern military assistance to civilian law enforcement agencies. The evidence gathered in this case, and presented in the following chapter, showed America is facing a national security problem at its borders. One solution to this problem is using the military to provide USBP agents security assistance. Solving this problem, though, could lead to legal challenges. A commonly accepted legal test, based on current statutory law and previous case law, was applied to the proposed solution to determine if it was legal under the PCA. The analysis of the legal research is presented in chapter 4 and the conclusions from that analysis are presented in chapter 5.

CHAPTER 4

ANALYSIS

Introduction

Determining the legality of using federal troops to guard the nation's borders required a thorough analysis of the current U.S. Code, current DoD Directives, and the U.S. federal and state court decisions that address military assistance to civilian law enforcement. This review uncovered how the U.S. judicial system views the legality of military support to civilian agencies. Furthermore, it also revealed the legal bounds put on military assistance to law enforcement imposed by the PCA. Prior to examining the law, though, the legal methodology required presenting evidence to support the argument that USBP agents need assistance along the nation's borders. Additionally, the facts in this case show that the government previously sanctioned military support to stop illegal immigrations when it presented a security risk to America.

Fact: Illegal Immigration is a Problem

The facts prove that the United States is facing an illegal immigration problem. According to Colonel Lopez, in his Army War College research project, the USBP apprehends over one million illegal immigrants a year. In the year immediately prior to the terrorist attacks of 11 September 2001, the number of people detained for illegally entering the U.S. was 1, 610, 237 (Lopez 2001, 3). Lopez concludes that the only adequate way to stem the flow of illegal immigrants is by increasing security along the northern and southern U.S. borders. He believes the U.S. can boost border security by deploying more agents, or guards. The USBP, as of 2001, had 8,000 agents to patrol the

northern and southern borders; however, it estimates that it would take twice that amount (16,000) to fully deter unauthorized immigration (Lopez 2001, 5).

Colonel Lopez is not the first researcher to come to that conclusion; however, the reporter and columnist Michelle Malkin supported his findings. She cites a border patrol agent in her book who states, “The border is porous . . . we just don’t have enough manpower to cover it” (Malkin 2002, 61). Whereas Colonel Lopez recognized a need for more agents, Malkin calls for a complete militarization of the U.S. borders. Her suggestion is replace the existing border patrol agents with 100,000 National Guardsmen (Malkin 2002, 233). Clearly, Malkin’s figures would be prohibitive because of funding and military readiness issues. Illegal immigration is a problem; however, that is not why the military would support the USBP in its mission. Military forces are required because of the national security threat posed by terrorists who take advantage of America’s problem with illegal immigration.

Fact: Terrorists Use Breakdowns in the Immigration System to Penetrate America

The terrorists who planned and executed the attacks of September 11, 2001, benefited from problems with the U.S. immigration system (Malkin 2002, x). The supposed mastermind of the group, Mohamed Atta, overstayed his visa, applied for and received a Florida driver license, and was granted a student visa to a Florida flight school six months after he ran an airplane into the World Trade Center (Malkin 2002, 145). Terrorists have learned how to exploit the weaknesses in America’s immigration system to their advantage. The border is one area where America is extremely vulnerable.

Terrorists have illegally crossed America’s borders in the past and are likely to do so again. A Palestinian bomber builder entered America illegally from Canada and an

Egyptian murderer entered the U.S. through Mexico (Malkin 2002, xii-xiii). Currently, according to an article in the 6 October 2002 *Washington Times*, there are approximately 250,000 illegal aliens from Arab and Middle Eastern nations in the U.S. Since terrorists are using gaps in the U.S. border to penetrate America, the problem has become a national security issue. The military is a force capable of handling national security problems. Furthermore, there is a precedent for using military forces to assist the border patrol in securing U.S. borders.

Fact: The U.S. Military has Participated in Border Patrol

Besides the previously mentioned post September 11, 2001, deployment of 1,600 National Guardsmen to guard the U.S. borders, the evidence shows other instances of Presidents sending U.S. troops to assist the USBP in countering illegal immigration. Prior to the creation of the USBP in 1924, General Pershing commanded 110, 000 troops responsible for protecting the U.S. border against incursions by Mexican revolutionaries (Lopez 2001, 8). In 1954, President Eisenhower provided federal forces to help the USBP conduct a paramilitary operation called “Operation Wetback” (Lopez 2001, 9). USBP agents, aided by country, state, federal authorities, and the military, rounded up and deported over one million aliens (Lopez 2001, 9). Although federal forces were involved in the civilian law enforcement action, Colonel Lopez found no record or indications of uproar over possible PCA violations (Lopez 2001, 9).

From 1954 until today, the military has only assisted the USBP with ground sensors, monitors, and other intelligence gathering equipment (Lopez 2001, 9). No has challenged these under the PCA. Nevertheless, the PCA has received renewed interest over the years and a physical military presence on the border might garner such charges.

As suggested in chapter 2, operations similar to “Operation Wetback” face possible legal challenges should they occur in the future. Illegal immigration problems required military support in the past and, in view of the need for a greater presence on the border, it is important to determine if the commander-in-chief plans to call upon them again.

Fact: National Strategies Envision Military Support to Civil Agencies

Although some have suggested that the U.S. militarize its borders, the government proposed a different solution in its published strategies. This does not mean, however, that the government sees no role for the military in homeland security. President Bush’s latest *National Security Strategy* makes defending the homeland the military’s number one priority (U.S. President 2002, 29). Although it does not specifically list the roles and missions required of the military to fulfill this mission, the latest draft version of the *National Military Strategy* offers further insight. The NMS, which is how the military will implement its responsibilities under the NSS, states that the federal military will be engaged in homeland defense (CJCS 2002, 15). Executing this portion of the strategy requires the military to perform two separate missions. First, the military will provide civil support for domestic emergencies and designated law enforcement activities to prevent domestic attacks. Second, troops must be prepared to help civilian first responders in managing crises and responding to the consequences of any domestic attack (CJCS 2002, 15). Finally, the recent reorganization of the military’s Unified Command Plan created North Command (NORTHCOM) that is now responsible for leading and coordinating military support for homeland defense.

The President’s *National Strategy for Homeland Security* further describes the perceived role of the military in homeland defense. The strategy states that military

support to civil authorities during threats or acts of terrorism may take several forms. These could include technical support and assistance to law enforcement; restoring law and order; loaning specialized equipment; and assisting in consequence management (U.S. President 2002, 44). In addition to outlining the perceived roles of the military in homeland defense, the *NSHS* calls for a review of current law to determine the beneficial effects of greater involvement of the military in domestic preparedness and response efforts (U.S. President 2002, 48).

The historical evidence revealed that the military has previously assisted with stopping illegal immigration. The new national strategies (*NSS*, *NMS*, and *NSHS*) plan to involve the military in homeland security. Although the U.S. will not militarize its borders, the military is expected to assist the USBP. In recent years, the military supported USBP operations primarily with equipment; however, a greater role for the military may lie ahead. No one challenged the previous military missions for various reasons. In 1954, the mission was short and the PCA enjoyed relative obscurity. According to one military lawyer, “The relative obscurity enjoyed by the (PCA) during the past hundred years has now been lost and the courts are now being required to determine the Act’s applicability” (Meeks 1975, 85). If future assistance is challenged in court, then it is necessary to understand the standard by which the judiciary will view challenges to this assistance.

Judging Military Assistance: The Legal Standard

In the 1988 case, *United States v. Yunis*, the United States District Court for the District of Columbia (D.C.) applied a three-part test to determine if support provided by the U.S. Navy and USAF in the apprehension of hijacker Fawaz Yunis violated the PCA.

The D.C. Appeals Court affirmed this decision in 1991 and upheld the standard by which the lower court judged military assistance in the *Yunis* apprehension. This same standard was applied in 1994 case of the *United States v. Kahn*. The Ninth Circuit Court of Appeals later affirmed this case. Both federal courts determined that the support provided by the U.S. Navy in the apprehension of Mohammad Kahn, who was involved in drug smuggling operations, did not contravene the PCA. Finally, the Ninth Circuit Court of Appeals used the same standard in the 2002 case, *United States v. Hitchcock*. Mark Hitchcock, the defendant, challenged his conviction because the U.S. Navy provided support during his arrest. The three-part test, first used in the *Yunis* and developed in the *Kahn*, has been the legal standard now for over twenty years. The following sections analyze this three-part test, and examine how U.S. courts apply this test to PCA challenges.

The First Test: Active Direct Participation

The first test U.S. courts use to determine whether military actions violated the PCA is “active” or direct participation (DOPLAW 2001, 17). If military personnel provide active support to law enforcement authorities, then their actions have violated the provisions of the PCA. In the *U.S. v. Red Feather*, one of the federal cases that resulted from the Wounded Knee uprising, the United States District Court for the District of South Dakota defined the *direct active* standard. This U.S. District Court looked at the historical formulation of the PCA and determined that “the prevention of the use of military supplies and equipment was never mentioned in the debates, nor can it be reasonably be read into the words of the Act” (*U.S. v. Red Feather*, 1975). The court ruled that the assistance the military provided in terms of equipment, observers, advice

about operations, and intelligence did not constitute a violation of the PCA. Besides defining what did not constitute a violation of the PCA, the court went further and described those actions that represented unlawful military participation.

The 1975 South Dakota District Court decision asserted that the PCA's "execute the laws" phrase was inserted into the language of the act to "eliminate the direct active use of federal troops by law enforcement officers" (*U.S. v. Red Feather*, 1975). Having examined the circumstances surrounding the formulation of the PCA, the decision made a conclusion about the intent of the PCA. The court stated that the intent was "to make unlawful the use of the federal military troops in the active role of direct law enforcement or execution of process" (*U.S. v. Red Feather*, 1975). Furthermore, the court defined those activities it considered a violation of the PCA. These acts were arrest; seizure of evidence; search of a person; search of a building; and search of an area for a suspect and other like activities (*U.S. v. Red Feather*, 1975).

Similarly, the court also listed those activities it viewed as permissible passive indirect aid to law enforcement authorities under the PCA. These acts were the presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans; advice or recommendations given to civilian law enforcement personnel; use of military equipment or material; training of law enforcement personnel; and intelligence support (like reconnaissance flights and photographs) (*U.S. v. Red Feather*, 1975). Current U.S. Code and DoD Directives reflect the *Red Feather* court's decision and outline the bounds of legal military assistance to civilian law enforcement.

According to the U.S. Code, the Secretary of Defense must create regulations to ensure members of the armed forces do not provide direct participation to civilian law enforcement agencies. The U.S. Code defines direct participation as “search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law” (*Armed Forces, U.S. Code*, Title 10, Section 375). In accordance with the law, the Secretary of Defense created DoD directives governing cooperation with civilian law enforcement officials.

Department of Defense Directive 5525.5 defines prohibited military activities the DoD considers direct assistance. Enclosure Four of DoD Directive 5525.5 lists the following activities as unlawful: interdiction of a vehicle, vessel, aircraft, or other similar activity; search or seizure; 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 (DODD 5525.5 1989, E4.1.3).

Red Feather defined which acts U.S. courts viewed as active direct military participation in law enforcement, and therefore, a violation of the PCA. These types of activities are now listed the in the U.S. Code and DoD regulations. Active participation is just the first test of a three-part test U.S. courts use to evaluate military assistance to civilian law enforcement. Failing any one of the tests constitutes a violation of the PCA; therefore, it is necessary to examine the remaining two tests.

Second Test: Pervading the Activities of Civilian Law Enforcement

If military actions pass the first test, the courts will then determine whether military personnel pervaded the activities of civilian law enforcement officials (DOPLAW 2001, 17). This standard looks at whether troops performed traditional police

investigative or enforcement roles (Bolgiano 2001, 2). The precedent for this test dates back to another of the federal cases arising from the suppression of the Wounded Knee uprising. In the *United States v. Jaramillo*, Judge Urbom described the “pervaded” standard. He stated that if the use of the military *pervaded* the activities of the U.S. marshals and FBI agents, the marshals and agents could not argue that they were “lawfully engaged” in the “lawful performance” of their duties (*U.S. v. Jaramillo*, 1974). The activities he refers to were the same actions described in *Red Feather*. Recent cases, however, shed further light on how U.S. courts apply the pervasive standard.

The United States District Court for Louisiana, in the 1986 case of the *United States v. Hatley*, ruled that the use of an Air Force Airborne Warning and Control System aircraft (AWACS) to track the defendant’s plane did not violate the “pervasive” standard. An USAF officer aboard the AWACS plane pointed out an unidentified aircraft to a customs agent riding on the mission. The customs agent radioed ground agents that intercepted the plane when it landed. These ground agents arrest the defendant when they discovered evidence of drug smuggling. The court found no violation of the PCA since the military plane never stopped doing its primary military mission to provide civilian assistance. (*U.S. v. Hatley*, 1986). The Fifth Circuit Court of Appeals upheld this ruling finding that the AWACS officer’s actions were not pervasive. Furthermore, the court found no evidence of a PCA violation since military personnel did not directly participate in the search of the defendant’s aircraft or his arrest (*U.S. v. Hatley*, 1986).

The U.S. District Court for Hawaii heard another case, *United States v. Kahn*, which demonstrated again the activities U.S. courts viewed as lawful under the “pervasive” standard. In this case, the U.S. Navy intercepted Mohammad Kahn’s ship,

Lucky Star, on international waters. A Coast Guard contingent, on the U.S. Navy ship, boarded the Lucky Star, searched it, found drugs, and arrested Kahn. The Hawaiian District Court found no violation of the PCA during the course of the trial. The Ninth Circuit Court of Appeals upheld the lower court's decision finding that U.S. Navy actions did not violate the PCA. Even though the PCA does not apply in international waters, the court found that the assistance provided by the U.S. Navy, the housing of the defendant and monitoring of sea traffic, did not violate the PCA (*U.S. v. Kahn*, 1994). The court further determined that since the U.S. Navy did not participate in the search of the ship or the arrest of the suspect, civilian law enforcement received no direct assistance from the U.S. Navy (*U.S. v. Kahn*, 1994).

The current U.S. Code reflects the U.S. courts' sentiments. Certain sections of the U.S. code are relevant to the issue of using federal troops in an assistance role along the nation's borders. Section 371 to Title 10 of the U.S. Code states that information collected in the course of normal military operations or training may be provide to civilian law enforcement officials if that information describes a possible violation of Federal or state law (*Armed Forces, U.S. Code*, Title 10, Section 371). Furthermore, the information needs of civilian law enforcement may be taken into account when planning and executing military training or operations (*Armed Forces, U.S. Code*, Title 10, Section 371). Lastly, Section 374 to Title 10 of the U.S. Code allows the military to provide personnel to operate and maintain military equipment used in support of civilian law enforcement personnel. This equipment can be used to detect, monitor, and communicate air and sea traffic, and movement of surface traffic outside the border of the United States (*Armed Forces, U.S. Code*, Title 10, Section 374).

The “pervasive” test prevents the military from assuming the role of law enforcement officials while providing these agencies passive assistance. The “direct active standard” and the “pervasive” stand are two legal hurdles to legal military assistance. U.S. courts, however, stipulated one final test to judge the actions of federal troops when assisting civilian law enforcement.

Third Test: Regulatory, Proscriptive, or Compulsory

The final test adapted by the courts, as used in *Yunis, Kahn, and Hitchcock*, looks at whether the military subjected citizens to the exercise of military power that was regulatory, proscriptive, or compulsory in nature (DOPLAW 2001, 18). If the military controls or directs, then that power is considered regulatory. U.S. courts have viewed, based on case law, proscriptive power as that which prohibits or condemns (DOPLAW 2001, 18). Finally, compulsory power is one that in its nature exerts some coercive force. (DOPLAW 2001, 18). An example of a PCA violation under this standard is the military subjecting civilians to military judicial and administrative sanctions (Bolgiano 2001, 3). The genesis of this standard dates back to another cases resulting from the Wounded Knee uprising.

In the *United States v. Casper*, the Eighth Circuit Court of Appeals ruled that when the military gave assistance in the way of armored personnel carriers and maintenance of those vehicles; intelligence support; and advice and counsel of by U.S. Army personnel about rules of engagement and negotiations, it did not violate the PCA. The court stated that no violation occurred because citizens were not subjected to power that was regulatory, proscriptive, or compulsory (*U.S. v. Casper*, 1976). This ruling

created the last legal standard by which U.S. courts judge military assistance to civilian law enforcement. Examining the *Yunis* decision demonstrates this standard in action.

When FBI agents apprehended hijacker Fawaz Yunis in the Mediterranean Sea, they transferred him to a U.S. Navy munitions ship and interrogated him. Agents then moved him to a naval aircraft carrier. The carrier transported him to the U.S. and flew him to Andrews AFB, Maryland, in preparation for his travel to Washington, D.C., where he faced the charges against him. The court found that the support provided by the military in this operation, the caring, transporting, and housing of Yunis, was passive (*U.S. v. Yunis*, 1991). Furthermore, the court stated none of the military's activities constituted the exercise of regulatory, proscriptive, or compulsory military power (*U.S. v. Yunis*, 1991).

The final test insures that the military does not exercise its inherent power and subject citizens to coercive power in the name of law enforcement. In the precedent setting cases that led to the establishment of the three-part legal test, U.S. courts never found a violation of the PCA. It is just as important, however, to see how the courts ruled when there was evidence of a violation of the PCA. No one has ever been *convicted* of violating the PCA; nevertheless, this does not mean that U.S. courts have found no evidence of PCA violations.

Government Responsibility and PCA Violations

In *Wrynn v. United States*, Dennis Wrynn sued the U.S. government for damages suffered by his son, Vincent Wrynn, when a military helicopter engaged in a local manhunt operation hit a tree on landing. The USAF helicopter was responding to a request by the local sheriff for assistance in finding an escaped prisoner. While providing

military assistance, the USAF personnel injured Wrynn and he sought damages against the government because he claimed the crew had violated the PCA. The district court in New York ruled that the PCA was a statute meant, “To preclude the (military) from assisting local law enforcement officers in carrying out their duties (*Wrynn v. U.S.*, 1958).” It concluded, “The use of the helicopter and its personnel here to aid in executing the laws of New York was a forbidden use (*Wrynn v. U.S.*, 1958).” While the court found evidence of a PCA violation, it ruled that Wrynn could not recover damages from the government since their actions could be authorized within the law (*Wrynn v. U.S.*, 1958). By violating the PCA, the helicopter crew acted outside the ‘scope of their employment’ and they were no longer agents of the government. Mr. Wyrnn, therefore, could seek damages from the members of the helicopter crew but not the government itself.

The precedent resulting from this case explains the liability issues facing military members who violate the PCA. The first word in the PCA is “whoever” that implies individual responsibility. If a military member violates the PCA, then that individual will face a fine or imprisonment. Furthermore, the person could be held legally responsible for damages incurred during the course of his actions. No court record shows that charges were brought against this helicopter crew, but the legal precedent is an important finding that soldiers, sailors, and airmen must be aware of as they provide assistance to civilian law enforcement personnel.

Good Fruit from a Bad Tree

The second precedent setting case concerning actual violations of the PCA comes from the State Court of Oklahoma. Although the PCA is a federal statute, the Oklahoma Court of Appeals made a significant finding in the case of *Taylor v. the State of*

Oklahoma. In this case, a military police officer was investigating two enlisted men for drug activity. His investigation eventually led him off base where he made an undercover drug purchase from Taylor, a civilian. The officer, following the undercover purchase, arrested the defendant, searched his home, and delivered the seized drugs to authorities. The state court drew two important conclusions about PCA violations.

First, the Oklahoma Court of Criminal Appeals ruled that the military police officer in this case violated the PCA. The opinion states that the military intervention was excessive and could not be condoned (*Taylor v. Oklahoma*, 1982). Since the officer directly participated in the arrest and search of the house, the court found he acted under the sole authority of his military status (*Taylor v. Oklahoma*, 1982). The lower court allowed the evidence found in the search; however, the Oklahoma State Criminal Appeals Court reversed the decision. Although the higher court reversed the decision and suppressed the evidence, it stated that a violation of the PCA does not automatically guarantee an invocation of the exclusionary rule (*Taylor v. Oklahoma*, 1982).

The second critical finding by the Oklahoma State Criminal Appeals Court is that violations of the PCA will not guarantee automatic invocation of the exclusionary rule (*Taylor v. Oklahoma*, 1986). Their rationale was that violations of the PCA are not of the same magnitude as violations of the fourth amendment. In the view of the majority of the judges, the PCA provides criminal sanctions for those who violate the PCA, but does protect the personal rights of the defendants (*Taylor v. Oklahoma*, 1982). Therefore, the court looked at each piece of the evidence obtained in the case to see if the illegal conduct by the military police officer rose to such an intolerable level as to require

invocation of the exclusionary rule. The courts excluded only that evidence obtained by intolerable violations of the PCA because it tainted the arrest.

The critical precedent from the *Taylor* case is that violations of the PCA only lead to prosecution of the individuals committing those illegal acts. If a military member violates the PCA, it does not mean the courts will automatically exclude all evidence against the defendant who was the target of those PCA violations. The PCA only proscribes punishment for those who violate its provisions. The act does not provide remedy for victims of the violations including the exclusion of evidence obtained against them. The Oklahoma State Criminal Appeals court found that just because the tree is bad, the fruit from that tree might still be good and accepted in the court.

Summary

This chapter followed the legal methodology by presenting evidence and discovering the law. Using evidence, it showed why the situation along America's borders presents a national security problem that requires military assistance. There is also a precedent for using the military in a supporting role to stop the flood of illegal immigration. The new national strategies outline an assistance role for the military in homeland defense. This chapter described the legal standard by which U.S. courts will judge that assistance. The courts adopted a three-part test, based on U.S. law and legal precedent that insure military assistance will not violate the PCA. The final step in the legal methodology is to draw conclusions, otherwise known as a ruling, based on the evidence and law presented in the case. The next chapter presents these conclusions.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

Introduction

The primary mission of the United States military is to protect America; however, ordering federal troops to patrol the nation's borders can force them to perform illegal activities. As outlined earlier, America has a problem with illegal immigration that threatens the national security of the United States. Although sworn to defend the U.S. Constitution against all enemies foreign and domestic, current law only allows the military to provide *limited* assistance to civilian law enforcement agencies fighting the homeland war against terrorism. This is especially true if the military is required to support USBP agents battling against illegal immigration. This chapter discusses how the legal analysis of the previous chapter supports this assertion.

In the legal methodology, the first step was to present the evidence in the case and frame the legal issue that required a court ruling. The second step was to gather the applicable statutory and case law. Chapter 4 analyzed the law found during the second phase of the legal methodology. Finally, the legal methodology applies the common law to the issue in question and resolves its legality. In legal cases brought before the court, the decisive moment comes when the judge, after viewing the evidence and reviewing the law, issues his verdict. What follows is the verdict of this thesis.

Conclusions outlined in this chapter, while not precedent setting, show how U.S. federal and state courts view the bounds of military activity within America's borders. In addition to the conclusions, this chapter lists several recommendations the federal government and the military can take to expand the ability of federal troops to guard and

protect the nation's borders. Finally, this chapter concludes by presenting areas for further study discovered during the course of this research.

Conclusion: Illegal Immigration Poses a Threat to National Security

Despite previous direct participation in border patrol, the U.S. military has only provide material and equipment support to the USBP since 1954. The events of 11 September 2001 changed the military's role. In the aftermath of the terrorist attacks, the DoD met demands to increase security along the nation's border by deploying NG troops in states status to assist in border security (Barnes 2002, 1). Investigations conducted following the World Trade Center strikes revealed that the terrorists had penetrated America by taking advantage of problems with the U.S. immigration system. The porous situation along the Canadian and Mexican border presents would be terrorists with an equally inviting opportunity. All experts agree that increased manpower is the only solution to this problem. The military is best equipped to support the USBP in their mission.

Conclusion: The Military Can Provide Assistance Only

Although there is a problem at the nation's border, the government does not plan for the military to take the lead in border patrol. Tom Ridge, Secretary of the Department for Homeland Security, declared, "The last thing we want to do is militarize the borders between friends" (Malkin 2002, 233). The military, therefore, will only provide the civilian agency responsible for border patrol (USBP) assistance. Congress' aim when it passed the PCA was to prevent the military from becoming a law enforcement agent. Legislators, however, never intended to prevent the military from assisting America's civilian law enforcement agencies. The first conclusion garnered from the legal cases

reviewed is that the military can legally provide assistance to law enforcement agencies. The District Court of South Dakota, in the 1973 *Red Feather*, case ruled that intelligence and reconnaissance, training support, material support, and military advice in operations were permissible within the scope of the PCA (*United States v. Red Feather*, 1975). According to the U.S. Code, the military may provide information, military equipment, and facilities to civilian law enforcement (*Armed Forces, U.S. Code*, Title 10, Sections 371-372). Likewise, the military may legally offer training and advice to law enforcement agencies about the operation of military equipment or about operations themselves (*Armed Forces, U.S. Code*, Title 10, Section 373).

These findings mean that the military may legally provide assistance to civilian law enforcement agencies conducting border patrol. Under current law, however, the military cannot be the primary agency responsible for patrolling the border. Federal troops can provide on scene advice to USBP agents about the handling of illegal immigrants identified as possible terrorists. More importantly, military training better prepares these troops to handle situations involving the interdiction of WMD. While federal troops can legally provide assistance, it is essential that their actions stay within the legal bounds determined by U.S. federal courts.

Conclusion: Federal Troops May Not Directly Support Border Patrol Agents

The second conclusion from this research is that under current U.S. Code, DoD Directives, and legal precedents, federal troops serving along the border may not arrest, search, or seize people or their property, that cross the national border illegally. The *Red Feather* federal court viewed these actions as direct support and a violation of the PCA. Furthermore, the U.S. Code prohibits these actions by federal troops within the territory

of the United States (*Armed Forces, U.S. Code*, Title 10, Section 375). Any troops along the U.S. border who engage in direct support would violate the first test of the three-part test, which would mean violation of the PCA. This does not mean that troops cannot patrol the border and report violations, collect intelligence, or offer advice. They just cannot perform actions that pervade the normal activities of law enforcement officials.

Conclusion: Federal Troops may not Perform Normal Law Enforcement Actions

The third conclusion reached is that federal troops performing duty within the territorial bounds of the U.S. may not perform actions that take the form of traditional law enforcement activities. As pointed out in the *United States v. Hatley*, U.S. law allows federal troops to inform, help, or guide the efforts of law enforcement officials because these actions do not pervade those functions reserved for civilian law enforcement. Along the border, patrolling troops can notify USBP of illegal immigrant crossing the border, or detain a car or person. If they arrest or search a person or car; however, the courts would find that these actions have violated the pervasive standard of the PCA. Actions that break the *direct active participation* or *pervasive* standards are violation of the PCA; however, it is necessary to realize what a violation of the PCA means.

Conclusion: The PCA applies to Individual Actions

One of the important conclusions discovered in the case law is that the government is not legally liable for damages when individuals, acting outside the scope of their mission, violate the PCA. The PCA prescribes fines and punishment for military soldiers acting outside the legal bounds of their mission. According to the decision in *Wrynn v. United States*, the government is not liable for victim damages when a federal troop directly participates in law enforcement along the U.S. border. If a federal troop

takes direct action, in violation of the PCA, they are no longer agents of the government. In this situation, injuring a captured person in any way poses a double threat to soldiers. First, U.S. Code prescribes fines and or imprisonment for “whoever” violates the PCA (*Armed Forces, U.S. Code*, Title 18, Section 1385). Secondly, the victim defendant could sue the individual troop to compensate for any injuries he incurs during the arrest. This finding highlights the importance of clearly rules of engagement (ROE) and standard operating procedures (SOP) will have in any mission to assist USBP agents with border security. Soldiers must clearly understand which tasks they may perform, and more importantly, which actions are outside the limits of the law.

Conclusion: A PCA Violation does not Mean Dismissal

Another conclusion reached, during the course of this investigation, is that a PCA violation does not automatically grant the suspect a dismissal of charges. In *Taylor v. Oklahoma*, the Oklahoma State Criminal Appeals Court ruled that judges must weigh any and every violation of the PCA. They stated that the court should only exclude the evidence that resulted from an intolerable violation of the PCA (*Taylor v. Oklahoma*, 1982). If federal troops patrolling the border are forced to arrest or seize an illegal immigrant crossing the border before USBP agents can respond, the courts would determine if the severity of that act warranted dropping charges against the defendant. The bottom line is that the PCA deals strictly with individual actions. When military members violate the provisions of the act, victim suspects are not guaranteed automatic acquittal or exclusion of evidence.

Conclusion: The PCA can be modified for this Mission

This paper proved that the PCA is a legal statute that Congress can modify through the normal legislative process. As Maj Trebilcock opines, “The (PCA) is a statutory creation, not a constitutional prohibition” (Trebilcock 2000, 2). Congress created the PCA at a time when the capability of the military, in terms of capability and armament, largely equaled that of the civilian law enforcement. Today, however, the U.S. military possesses technology and operational systems that far exceed the ability of civilian agencies. For this reason, Congress modified the PCA in 1981 to allow military assistance in the war on drugs. Congress significantly eroded the prohibitions of the PCA to meet the variety of law enforcement challenges associated with the war on drugs (Trebilock 2000, p. 2). Congress could take similar action in the global war on terrorism.

The military’s intelligence collection capability, nuclear, biological, and chemical training, and technological superiority can provide civilian agencies tremendous assistance in the war on terrorism. The military is better equipped to deal with catastrophic events like biological and chemical attacks; therefore, some advocate removing the legal barriers to their assistance (Norwitz 2002, p. 8). Since terrorists could try to smuggle WMD across the U.S.’s vast borders, placing federal troops along the border puts them in a position to respond rapidly to situations that uncover WMD. One thing is certain; the military can legally assist civilian law enforcement agencies. Since the law limits the type of assistance the military can provide, federal troops have to develop a coordinated effort with USBP agents to guard the nation’s borders.

Recommendation: Federal Troops Must Work with USBP

The only way that federal troops can assist civilian authorities (e.g. USBP, U.S. Customs, etc.) with border security is if there is close coordination between the agencies. USBP agents arrest more than one million illegal immigrants a year; however, current law prevents federal troops from conducting arrests. Just like the war on drugs, the military would have to assume a notification, intelligence, and advice role. Federal troops could patrol the border, similar to AWACS monitoring the skies, and notify USBP agents when they spot illegal immigrants trying to cross the border. Like in the war on drugs, USBP agents would respond to the incursion and arrest or seize the suspects. Colonel Lopez, in his research paper, suggested the United States form a Joint Task Force (JTF) whose mission is to perform border surveillance in support of the USBP (Lopez 2001, 11). This solution would allow the JTF to provide assistance within the scope of the law, while USBP agents perform actual arrests protecting federal troops from PCA violations. Additionally, federal troops could *detain* suspects at the border until an USBP agent responds. Once the USBP agent arrives, that agent conducts the search and arrests the suspect. This course of actions is only one way for federal troops to provide legal assistance along the border but there are other possible solutions.

Another recommended procedure is to have combined teams patrol the U.S. border. These teams should be comprised of a federal troop and a civilian law enforcement agent. This proposal is in line with FBI recommendations. The FBI bulletin states, "Law enforcement personnel should always be present whenever the possibility of an enforcement action may arise (Bolgiano 2001, 5)." Using combined teams would reduce the response time since the civilian agent in the combined teams could perform

the arrest. The federal troop can, based on statutory and case law, guard and transport the suspect to holding cells. Once a person is in custody, the U.S. federal courts have allowed the military to assume responsibility for his transportation and care. These combined teams are another way to increase the number of people patrolling the borders while staying within the bounds of current law.

Recommendation: Arm these Soldiers for Self-Defense

Following the attacks of 11 September 2001, NG troops assisted civilian authorities with securing the gaps in America's national borders. During this time, however, the troops were unarmed in the performance of their duties. Although the Chairman, Joint Chiefs of Staff, has developed Standing ROE guaranteeing soldiers the "inherent right and obligation of self-defense," the application of that ROE changed (Stafford 2000, 3). As of January 2000, the Standing ROE applies only to operations, contingencies, and terrorist attacks *outside* the United States (Stafford 2000, 3). The government must allow federal troops assisting in border security the right to carry arms since they face the possibility of encountering terrorists or drug dealers trying to cross the border. As one military lawyer stated, "A serviceperson's right to protection from criminal liability for applying military rules should be as inherent as the right of self-defense" (Stafford 2000, 2).

Further Study: Changing the PCA for the War on Terrorism

This study examined the possibility of using federal troops to guard the nation's borders in accordance with current U.S. law. Another area to examine is expanding the PCA to allow greater military domestic assistance in the war on terrorism. Congress modified the PCA so the military could legally provide greater assistance in the critical

war on drugs. Further research should study the consequences of Congress expanding the role of the military under Title 10 of the U.S. Code to support the war on terrorism. One law enforcement expert stated, “It now appears that to fully engage our armed forces to defeat terrorism, we must rethink posse comitatus” (Norwitz 2002, 8).

Further Study: Usefulness of the PCA

“The erosion of the Posse Comitatus Act through Congressional legislation and Executive policy has left a hollow shell in place of a law that formerly was a real limitation on the military’s role in civilian law enforcement and security issues (Trebilcock 2000, 4).” This opinion of one military lawyer reflects the sentiments of several legal experts. Although the cases presented in this study highlighted violations of the PCA, no one has ever been prosecuted under the act (Trebilcock 2000, 4). The relevancy of the PCA in today’s society is an area for further research. With its intelligence and technology superiority, the military can bring considerable capabilities to the domestic fight in the war on terrorism. As one homeland security expert suggested, “It is time to rescind the existing (PCA) and replace it with a new one (Brinkerhoff 2002, 10).” Further research, however, is needed to discover the implications, politically and militarily, of using federal troops to enforce the laws of the United States within its own borders.

Further Study: Assistance beyond the Physical Borders

The thesis purposely narrowed its scope to examine only using federal troops to assist with protecting the physical borders of the United States. There are, however, many areas outside the scope of this study where federal troops could provide homeland security. These include as a minimum ports of entry and airports. Furthermore, the costal

shores of America, like in the state of Florida, present a similar threat where refugees and illegal immigrants arrive regularly. Further studies should examine how operations in these various areas would be affected by allowing the military to assist in their law enforcement responsibilities.

Summary

This thesis examined the legal permissibility of using federal troops to protect the nation's borders. It explored the growing problem American has with illegal immigration and how that problem is a threat to national security. The only viable solution to the border problem is an increased presence along the border. The military is a possible source of manpower to supplement the USBP in its mission. The legal material analyzed in the course of this study; however, showed that, barring a change in the PCA, the most that federal troops can provide is *limited* assistance. The current U.S. Code, DoD Directives, and U.S. case law all forbid the military from assuming a direct role in law enforcement. Based on these findings, the recommendation of this study is that federal troops and USBP agents work in concert to protect the nation's borders. Since USBP agents can legally arrest and search suspects on U.S. soil, they must serve as the lead agency and enforce the laws concerning illegal immigration. The military can only provide indirect assistance in the form of surveillance, monitoring, reporting, and transportation. The goal of this study was to make sure that when federal troops are holding the line against terrorism, they are not crossing the legal line.

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