STRATEGY RESEARCH PROJECT

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THE COP AND THE SOLDIER: AN ENTANGLING ALLIANCE? THE POSSE COMITATUS ACT AND THE NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT

BY

LIEUTENANT COLONEL JAMES G. DIEHL
United States Army

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Queen's University
Centre for International Relations
Kingston, Ontario

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The Cop and the Soldier: An Entangling Alliance? The *Posse Comitatus* Act and the National Security Strategy of Engagement and Enlargement

LTC James G. Diehl
US Army War College Fellow
Visiting Defence Fellow
Queen's University, Centre for International Relations

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ABSTRACT

The American Constitution and a considerable portion of statutes regulating the US armed forces are meant to separate the professional military from political power and a routine and recurring role in domestic security and law enforcement. America's historic fear and contempt of standing armies has manifested itself in military security policies which made a conscious attempt to keep regular, professional military forces out of domestic affairs except in the most dire circumstances for at least 175 years.

The *Posse Comitatus* Act of 1878 (PCA) has served as the main statutory bulwark against the intrusion of federal troops into the domestic law enforcement arena. 18 USC 1385: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined not more that $10,000 or imprisoned not more than two years, or both."

No one has ever been charged with a violation of PCA, however, it has served to constrain the activities of the military in providing support to civil authorities. During the Cold War, America fielded its first large, standing, professional military in peacetime. As the Cold War ended and perceptions of national security threats evolved, the PCA was amended to provide for a greater military role in domestic security and law enforcement. The purpose of this paper is to examine the relevance of PCA in the context of a post-Cold War National Security Strategy.

In this paper the theory on the use and purpose of professional military forces is used to develop a paradigm on the use and purpose of American professional military forces. A happy coincidence of geographic isolation, weak neighbors, and a reliance on the militia kept the US Army small and focused on mainly domestic tasks until the beginning of the Second World War. Federal intervention in domestic law enforcement had been closely controlled by the President and Congress and restricted to emergency situations. After the war, the looming threat of Communism and the advent of the Cold War changed the focus of the Army to preparing for external threats.

The end of the Cold War and the current state of military affairs in the US is unique in that the threat basis for the only large, professional standing Army in American history has dissolved. A perception exists among strategists of the idle presence of enormous capabilities which can address domestic and internal threats. It would appear that the National Security Strategy of Engagement and Enlargement has opened the possibility of developing an entangling alliance between military forces oriented on external threats and police forces oriented on domestic security and law enforcement by coming closer and closer to crossing the line drawn by the PCA. Routine and recurring military support to civilian law enforcement agencies can involve a gradual assumption of civil roles for the military which might erode both its apolitical nature and its technical skill. This entanglement poses potentially dire consequences for the apolitical nature of the military and the professional and efficient conduct of traditional military operations.

INTRODUCTION

"A large army in a democracy will always be a serious danger."[1]

Alexis de Tocqueville in Democracy in America

Despite the intentions of the framers of the US Constitution, the United States has maintained a large, standing, professional Army within American society in a time of peace since the end of the Second World War. Prior to that, the American Army was a small, socially (and physically) isolated military force which trained and prepared itself for wars on limited resources while predominantly performing as a general servant to the will of the executive branch of the government. The Army built roads, bridges, and frontier communities; it fought with Indians, outlaws, and terrorists; it kept the peace across enormous expanses of territory, settled labor disputes, and assisted communities in the wake of natural disasters. On a number of rare occasions related to the outbreak of war, it was expanded ten or a hundred-fold with volunteer militia or conscripts and sent to combat. At the conclusion of hostilities, it would shrink to previous levels and resume its less spectacular duties.[2]

The end of the Second World War and the advent of the Cold War changed that cycle of inflation and deflation. Although the Army was drastically reduced at the end of the war, nearly half a million men remained under arms. The requirements of the Korean War, Vietnam, and a significant overseas presence in Europe kept those numbers high throughout the Cold War. In the Cold War's aftermath, it appears that the Army will still have over 450,000 soldiers. The presence of such a large force with enormous capabilities, first rate equipment, and trained and disciplined personnel has prompted the executive branch to consider employing the troops to address a wide range of social issues newly defined as "national security threats."[3]

The enforcement of the nation's laws in suppressing civil disturbances, fighting against smugglers attempting to introduce contraband materials, and apprehending violent outlaws and terrorists has been described by a current observer as "a most elegant and

appropriate use"[4] of the Army in the post-Cold War era of American history. Despite the attractiveness of using the Army to enforce laws and a significant body of history which demonstrates that the US Army (as well as most other armies) is up to the task, it is, nevertheless, contrary to our culture and contrary to a considerable number of Congressional actions and Supreme Court decisions which have sought to separate the Army from law enforcement activities. This desire to separate the military from police activities can be traced to the origins of the republic and the perception at the time that standing military forces enforcing civil laws allowed despots to stay in power by force of arms rather than the consent of the governed. The most poignant image held by the framers of our Constitution intent on keeping the military out of civil law enforcement is that of regular British troops gunning down protesters in the streets of Boston in 1770.[5]

The *Posse Comitatus* Act of 1878 has served as the main statutory bulwark against the intrusion of federal troops into the domestic law enforcement arena.

> Title 18, US Code, Section 1385: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined not more that $10,000 or imprisoned not more than two years, or both."

In its nearly 120 years on the books, no one has ever been charged with a violation of the Act.[6] The mere fact that "this obscure and all-but-forgotten statute"[7] exists, however, has served to constrain the activities of regular, federal Army troops in the enforcement of domestic civil laws.[8]

The purpose of this paper is to examine the relevance of the Act in the post-Cold War era within the framework of the current National Security Strategy (NSS) and National Military Strategy (NMS). The issue is particularly germane given the new security environment and the presence of a relatively large professional Army with tremendous capabilities perceived to be largely idle. The Act, its Constitutional roots, and

its legal interpretation over the years have drawn a fairly clear border around the activities of civil law enforcement agencies and the legal support they can be provided by the regular forces of the US Army. This paper to examines the origins of the Act and its evolution to determine if the current National Strategies bring the US Army closer to crossing that line and blurring the distinction permanently.

The first question which must be answered is: How has the United States traditionally employed its standing military forces? In Chapter One, the theory on the use and purpose of professional military forces is examined to develop a paradigm on the use and purpose of American professional military forces. Military forces are generally used in three capacities: to deter and fight wars against external threats, to realize internal and external goals short of war, and to maintain order internally. The US Army has performed each of these tasks, however a lack of credible external threats throughout most of its history and a general distaste for professional forces has evolved a distinctive American military paradigm for the creation, maintenance, and use of professional troops.

The paper then examines the extensive history of the US Army's involvement in domestic security and law enforcement and the Constitutional and statutory basis of the *Posse Comitatus* Act of 1878. Chapter Two looks at the question of how the federal government has attempted to restrain the US Army's involvement in civil and police functions prior to passage of the Act, during the Act's birth, and after its passage. It concludes with an evaluation of current restrictions on US Army involvement in domestic security and law enforcement.

Chapter Three addresses the final question. Has the NSS of Engagement and Enlargement entangled the US Army in domestic security and law enforcement and threatened the viability of its external mission? The current NSS and NMS are examined to assess the threats to the nation which fall in the domestic security and law enforcement arena and determine the scope of the military's role in addressing those threats. The end of the Cold War and the current state of military affairs in the United States is unique in

that the threat basis for the only large, professional standing Army in American history has apparently dissolved. Nevertheless, the Army continues to field ten combat divisions and a half million soldiers overwhelmingly based in the continental United States. A perception might exist among strategists of the idle presence of enormous capabilities which can address domestic and internal threats. It appears that the NSS of Engagement and Enlargement has opened the possibility of entangling the functions of a military force oriented on external threats with a national police force oriented on domestic security and law enforcement.

The final chapter concludes by weighing the paradigm initially created on the use and purpose of American military forces with the new role envisioned and pointing out the risks assumed by focusing the US Army on those threats. The point to be made is not that violations of any laws have occurred. Rather, the argument is made that significant risks are being taken in maintaining the effectiveness and professionalism of the US Army by blurring the separation between military and civil responses to national security threats. The long term effects of this could result in serious challenges to our democracy.

It is important to point out what this study will not do. The paper will not discuss the legal issues of the US Constitution, the Act and its amendments, or the judicial decisions relating to those documents. They will be mentioned and cited on occasion to point out the current or past interpretation of American civil-military relations, however, it is well beyond the purpose of this paper to render an opinion on the constitutionality or legality of such judicial edicts.

Questions such as the applicability of the Act to the Navy and Marine Corps are not at issue in this paper. Department of Defense regulations codifying the Act and its amendments are applicable to both of those services.[9] Nevertheless, the surface Navy, Naval aviation, and the Air Force, except in the field of surveillance and operations on the high seas, have a very limited role to play in supporting civil authority. The Marine Corps' narrow strategic role does not lend itself to orienting on domestic support to the civil

authorities. Also not at issue is the routine and recurring support that the US Army Corps of Engineers have provided and continue to provide in the construction and maintenance of transportation arteries in the US. Suffice it to say, that this study is restricted to the US Army in supporting civil authority and law enforcement and when referring to military forces, unless otherwise noted, it is in reference to the regular, federal (or federalized, in the case of the National Guard or Reserves) Army forces of the United States.

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[1] Alexis de Tocqueville, Democracy in America, translated by George Lawrence, edited by J. P. Mayer (Garden City, NY: Doubleday and Co. Inc., 1969), p. 651.
[2] The best source tracing the cyclic nature of American military forces size and preparedness for war can be found in Russell F. Weigley's American Way of War, (Bloomington, Indiana: Indiana University Press, 1973).
[3] US National Security Strategy of Engagement and Enlargement (Washington, DC: US Government Printing Office, February 1996), p. iv.
[4] Seth Cropsey, Moderator and John R. Brinkerhoff, Rapporteur, "Supporting Civil Authorities at Home and Abroad," Non Combat Roles for the US Military in Post-Cold War Era, ed. James R. Graham (Washington DC: National Defense University, 1993), p. 110.
[5] MAJ Clarence I. Meeks III, "Illegal Law Enforcement: Aiding Civil Authorities in Violation of the *Posse Comitatus* Act." Military Law Review/Department of the Army Pamphlet 27-100-70 (Washington DC: US Government Printing Office, Fall 1975), p. 86.
[6] Larry L. Boschee, "The *Posse Comitatus* Act as an Exclusionary Rule: Is the Criminal to go Free Because the Soldier Has Blundered?" North Dakota Law Review Volume 61/No. 1 (1985) p. 108.
[7] Meeks, "Illegal Law Enforcement," p. 85.
[8] James P. O'Shaughnessy, "The *Posse Comitatus* Act: Reconstruction Politics Reconsidered," American Criminal Law Review/American Bar Association Section of Criminal Justice, Volume 13/No. 4. (Spring 1976): pp. 730-731.
[9] Roger B. Hohnsbeen, "Fourth Amendment and *Posse Comitatus* Act Restrictions on Military Involvement in Civil Law Enforcement," The George Washington Law Review/George Washington University, Volume 54/Nos. 2 & 3. (January/March 1984): p. 407.

CHAPTER 1

> "The end for which a soldier is recruited, clothed, armed, and trained, the whole object of his sleeping, eating, drinking, and marching *is simply that he should fight at the right place and the right time*(emphasis in original).[1]
>
> Carl von Clausewitz in On War

This quote from the 19th Century Prussian military theorist describes one side of the debate on the use of professional military forces. The "specialists" theorize that the army exists solely to fight wars against external enemies and for no other reason. All of its peacetime activities should directly contribute to its capacity to fight the imagined war of the future and activities which detract from that must be avoided. The opposite end of the debate, the "generalists," posits that the army is the general servant of the nation ready to do the bidding of the national leadership in whatever capacity it deems appropriate and that, in the event of external warfare breaking out, the resources of the nation will be called to bear against the enemy and the army will be expanded to lead that effort. Meanwhile there are good and useful purposes to which the army can be put in peacetime such as internal security, infrastructure development, nurturing of citizenship, and others.

A professional army likes to view itself as the defender of the nation's borders, the shield and sword of the state ready to defeat the external aggressor, and above the political and internal squabbling that characterize domestic political interchange.[2] "Politics is beyond the scope of military competence, and the participation of military officers in politics undermines their professionalism, curtailing their professional competence, dividing the profession against itself, and substituting extraneous values for professional values."[3] The modern military theorist, Samuel Huntington, would go so far as to enhance military professionalism by removing all non-military and internal security functions from a military and give it exclusive focus on the external threats to its parent society.[4]

However, it is also clear, as Canadian historian Desmond Morton has pointed out, that most armies are not capable of performing exclusively external security duties and

staying out of domestic politics. In fact, the most common use of military force and armies across the planet and throughout history is to defend the existing regime from domestic turmoil.[5]

In Huntington's treatise on civil-military relations, The Soldier and the State, he describes the state's National Security Policy as composed of military security, internal security, and situational security components. Military security policy is oriented on the external threat while the Internal security policy is obviously focused on subversion and other domestic threats. The Situational security policy addresses the long term threats to the state posed by the erosion of the social, economic, demographic, and political systems of the state. The state's civil-military relations are formed by the functional and societal imperatives which stem from the relative nature of those threats.[6]

The tensions in civil-military relations are the product of the state's struggle with determining the army's role in addressing all of the national security threats to the state's existence. The "specialists," as I have characterized them, assert that the army has no role in addressing non-external threats. Those threats are the proper domain of civilian police, the social welfare infrastructure, and private institutions. The army is an external political tool wielded against the foreign enemies of the state and must remain focused on that mission alone. All of the army's activities from training to schooling to actual deployments contribute to the mission of external defense. Any contribution made to other than external defense national security issues is strictly a by-product.

On the other hand, the "generalists" would integrate the army into every facet of national security. While conceding that the defense of the state against foreign threats is the primary purpose of the army, it does not preclude the army from taking the lead or having a major role in internal policing functions, education, disaster relief, infrastructure development, and other essentially non-military responses to an array of threats. They argue that the army is extraordinarily well-suited for an efficient response to such threats. Large portions of the army are dedicated to administering unsophisticated and simple civil

societies by providing the basic necessities to soldiers deployed in austere or harsh environments. The army in most societies has the equipment, the expertise, the discipline, the organizational capabilities, and the in-place leadership to bring its enormous capabilities to bear on a perceived threat very quickly.[7] Comparable civilian organizations either do not exist, would be too expensive to create, or cannot operate in the dangerous and harsh conditions characteristic to a military operation. As a result, the "generalist," who perceives the army to be essentially idle during peacetime, has no reservation about putting its enormous and expensive capabilities to good use.

The Specialists

The very first precept in Sun Tzu's The Art of War states that "War is a matter of vital importance to the state; the province of life or death; the road to survival or ruin. It is mandatory that it be thoroughly studied."[8] The state instrument which is dedicated to the thorough study of war is, of course, the army. The state's army is a special organization granted by the state with a monopoly on the application of violence against any thing or body that threatens the existence of the state or its interests.[9] It is raised, trained and equipped to threaten the use of violence in order to deter conflict or to actually do battle with the state's adversaries. The risks to the state are enormous. Losing battles could mean the imposition of inimical conditions on the state or its citizens including the destruction of the state itself. The members of the army take tremendous risks as well since they are expected to willingly forfeit their lives in pursuit of the state's purposes.[10]

An orientation on this paramount external purpose for a professional army serves to give its members a unique self-image and sense of purpose. Other potential uses tend to be considered, at best, distractions, or, at worst, ready-made excuses for a general military takeover. Warfighting and external security are unique functions vastly different from internal security and support to civil authorities. The army has a clear ultimate purpose—to defend the nation against foreign enemies. Professional qualities of courage,

selflessness, loyalty, and obedience are the pillars of service. Its mission orientation and hierarchical structure tolerate only minor deviations from established norms and goals. The domestic arena and associated political agendas, on the other hand, are often inefficient and filled with competing interests attempting to achieve crossed purposes. The army is less inclined to enter such an arena because it can become confused as to where its ultimate loyalty lies.[11]

The threat to the state posed by a professional standing army is a function of its proclivity towards taking the reins of power to itself. Samuel Finer in his book, The Man on Horseback, argues that the paramount technique to prevent this from occurring is the army's firm and internalized adherence to the principle of civil supremacy.[12] The army's self-image as the loyal defender of the state, prepared to sacrifice itself and its members for the good of the state, uniquely maintaining an identity as the "nation's custodian against foreign foes; the foreigner is the enemy, not a fellow national"[13] is critical to maintaining a healthy separation between the reins of power and the army. The army feels the need to view itself as a professional organization serving the civil authorities of the state by keeping it safe from external threats. .

The Generalists

The other end of the debate on uses for professional standing armies would concede that the primary purpose for the army is to be prepared for armed combat against the external enemies of the state. However, it also recognizes both the enormous capabilities that the army can bring to bear on other problems and the broad nature of national security threats.

The evolution of national security threats, i. e. terrorism sponsored by sovereign states, narcotics trafficking on international levels, seemingly insoluble ethnic and tribal warfare, ecological disasters and the rapid transmission of knowledge about these threats from electronic media; has served to broaden the state's perception of risks to its existence and stability and the welfare of its citizens. As a result, the army, an organized, well-

equipped, trained and disciplined state instrument is perceived as the most efficient or, certainly, the most readily available tool to be used to address the threats.

Morris Janowitz, author of The Professional Soldier, recommends the creation of a "constabulary" military force prepared to act across the spectrum of international conflict. This would include everything from peacekeeping, disaster relief, and nation-building, to waging war. He acknowledges that this would be encompass a police-type mission dependent on the concept of minimum force—a vastly different mission from that of armed combat. He also recognizes a potential for a sense of military frustration growing in civil-military relations if the military is oriented on these type of tasks. Once again, like Huntington, Janowitz places great reliability on a professional adherence on the part of military leaders to the concept of civil supremacy. [14]

Janowitz does not necessarily foresee a domestic civil police role for the military, but Martin Blumenson does. He has recognized an admittedly "distasteful and dangerous" role for the military to enforce civil law, but that is in preference to "lawlessness and anarchy."[15] In the presence of civil disturbances overwhelming the capabilities of local police or in the case of civil authorities requiring assistance to protect civilian lives and property, preserve social values, and maintain liberty and social order, he feels the army is a perfectly prepared force readily available to support the civil authorities.

Other observers, as well, see the tremendous capabilities of the army and the US Army's rich history as a foreign and domestic civil administration tool and desire to see the tool put to good use. They perceive the army as a "politico-military problem solver with great organizational skills, lots of manpower, and resources to operate in remote, dangerous environments for extended periods."[16] They envision a civil police role for the army in the areas of drug trafficking and illegal immigration as well, although it is acknowledged that a well-defined set of criteria and procedures must be in place to protect the army from misuse and to ensure that it remains focused on its paramount mission.

The generalists would broaden the army's skill structure, organizational layout, decision-making hierarchy, leadership instruction, and career management to make it more suitable for this expanded mission focus.[17] Some would go so far as to organize units or career and skill specialties to allow army officers and soldiers to be specialized wagers of other than war operations.[18]

The dangers of this expanded role for the army to the concept of civilian authority and supremacy will be addressed by a combination of professionalism in the same sense as Huntington asserts, i. e. that the officer will acquiesce to civil authority because it is internalized in his professional demeanor, and in formal procedural safeguards against misuse of the army. The generalists recognize that there is a risk of military dominance in civil matters when the army is inordinately woven throughout the fabric of state society. However, it can be addressed through professionalism which rewards military submission to civil authority, a legal and constitutional structure which separates the institutions and allows the army its distinctive cultural nuances and protects its self-image, and an awareness on the part of civilian authorities which allows them to assert control over the assignment of missions and the army's performance to ensure that civilian dominance is maintained.[19]

The civil-military relations in a state address two vital concerns for the state. How to get the army to do what the civil authorities wish and how to keep the army in its place, i. e. subordinate to the civilian leadership. In some states, the army is the most cohesive, capable, and effective state organization and it appears to hold numerous advantages over other state instruments. The inherent advantages, for example, superior and hierarchical organization, trained and disciplined (for the most part) personnel, and a monopoly on arms, beg the question Samuel Finer asks in his book, The Man on Horseback, "Instead of asking why the military engage in politics, we ought surely to ask why they ever do otherwise... The political advantages of the military *vis-a-vis* other and civilian groupings

are overwhelming. The military possess vastly superior organization. And they possess *arms.*"[20]

There are numerous situations in which the army may need to address domestic issues and negotiate the political terrain of essentially civilian concerns. Developing countries, in particular, turn to organized military formations for direction and structure. Developed countries in war or in the wake of natural disasters will do the same thing. However, there is a risk that the process itself will be corrupted by an organization which prides itself on knowing what is best, is capable of putting it in place, and has the monopoly on force to do it. The risk to the state is the abdication of power by civilian authorities to military leaders. The danger to the existence of civilian authority is that a well-organized, functionally capable, and well-armed entity like the army can be assigned a domestic political problem and feel that it needs to provide a solution, either good or bad. It is obviously capable of compelling a solution, but there is no indication that the solution arrived at is demonstrably better than that arrived at through the domestic political processes.[21] In fact, it may be just the opposite.

An American Paradigm

A lack of external threats due to a happy coincidence of geographic isolation, weak or friendly neighbors, and a reliance on the militia kept the regular US Army small and focused on mainly domestic tasks until the beginning of the Second World War. After the war, the looming threat of Communism and the advent of the Cold War changed the focus of the Army to preparing for external threats.

From the birth of the American republic, civil authorities have harbored a genuine fear of the existence of a large, standing, professional army. The source of this fear can be traced to its English roots. As early as the 14th Century in England local magistrates could raise the "power of the county," or a *posse comitatus*, in order to suppress local resistance to authority and the King's Law. No professional police force existed and public order rested on a system of watchmen and constables. A special force of constables, composed

of retired soldiers, were called forth on occasion to supplement the local magistrates. Their performance was, not unexpectedly, poor. As a result, small garrisons of regular troops grew up around the English countryside to provide the magistrates with a reliable force of compliance to the King's Law.[22]

The growth of standing military forces and the ability of local authorities to call on them gave birth to an ominous threat to civil liberty. In the 17th Century, Oliver Cromwell's brief administration of civil affairs through military districts gave Englishmen plenty of reasons to dislike the standing army. As a result and after the Restoration, the English Parliament made it illegal to maintain a standing army in time of peace without the consent of Parliament. The militia, an informal corps of Yeomanry or part-time soldiers, would provide the enforcement of civil law should the need arise.[23]

The militia's performance as civil police was plagued by a lack of training, frequent conflicts of interest and a personal stake in the resolution of local politics through familiarity with political figures and local business interests. By the late stages of the 18th Century, standing regular troops had once again displaced militia as the civil authorities' primary compulsory force. And once again, a certain amount of hostility to regular troops accrued whenever they were brought out by local magistrates to suppress civil disturbances.[24]

The troops and their officers as well faced important dilemmas on the use of force when confronted with unruly crowds. The inability to bring together the "perfect" mix of force and restraint could well result in criminal charges against the magistrate who is too late to bring in the troops (Gordon Riots, 1780) or against the officer and troops who fire on rioters in a situation, later determined to have been amenable to a lesser degree of violence (Wilkes Riots, 1763-68).[25] The soldier is caught in a moral dilemma where, as Major General Sir Charles Napier described it in 1837, "...it reduces the soldier to a choice between the hanging awarded to him by the local law for obeying his officer, and the shooting awarded him by the military law for disobeying his officer!"[26]

The British distaste for standing troops was inherited by the American colonies. Colonists resented the British habit of quartering troops in private residences and the perceived lack of accountability for heinous acts performed by the troops. The 1770 Boston Massacre where a detail of British soldiers fired on a rock-throwing mob and killed five civilians resulted in criminal charges lodged against the commander and the troops. However, all except two of the soldiers were acquitted.[27] The 1774 Administration of Justice Act mandated that trials of soldiers accused of excessive force would be moved to England or out of the affected colony. This gave rise to strong objections from the colonists who perceived that armed bodies of regular British troops would become "independent and superior to civil power" in the colonies.[28]

After independence was achieved, the American federal government intended to keep the regular US Army small and non-threatening to the newly-won American liberty. The Constitutional Convention delegates felt that, as Alexis de Tocqueville noted in his treatise, Democracy in America, "...a large army in the midst of a democratic people will always be a source of great danger"[29] and they intended to minimize that danger. As a consequence, a considerable amount of confidence was placed in the state militias to provide the necessary enforcement to unpopular federal laws or regulations.

The Constitutional Convention in 1787 divided control of military power between the legislative and executive branches of government. Although serious consideration was given to not having an Army at all, the convention eventually decided to make the President the Commander in Chief of the American military and Congress was to have the authority to raise and support the army and control the militias when called to the service of the United States as well as the authority to review and control military appropriations and declare war. Alexander Hamilton had argued in Federalist Paper #28:

> "That there may happen cases in which the national government may be necessitated to resort to force, cannot be denied...emergencies of this sort will sometimes arise in all societies, however constituted; that seditions and

> insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body; that the idea of governing at all times by the simple force of law...has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental institutions. Should such emergencies at any time happen under the national government, there could be no remedy but force."[30]

Hamilton's arguments did not convince the delegates to specifically grant the President Constitutional power to use regular Army forces in domestic circumstances. However, early opposition to federal authority in the form of a number of poorly organized rebellions against federal taxation and revenue regulations forced Congress to give the President some of the coercive force that Hamilton envisioned. Initially, it was to be the militia, but by Jefferson's time, it included militia and regulars.[31]

The tendency over the next century was to keep a tiny, cadre-based regular Army dispersed over the American frontier which could be expanded by militia forces when the need arose. During the major wars and conflicts of that period, that is indeed what happened. Until 1879, the regular Army participated in 70 wars and military campaigns. However it also participated in over 70 domestic disturbances, labor disputes, draft riots, racial disorders, natural disasters, as well as served as an occupation force administering the South during Reconstruction.[32] Throughout this period, militia forces acted separately, in conjunction with regular troops, and, in some cases, were shut out of participation or were ignored. Their performance was uneven. As a result, regular troops became more popular due to their superior professionalism and performance and the sure command and control which could be exercised over them by federal authorities.[33]

The reputation earned by the militia did not change significantly after the turn of the century. Regular federal Army forces continued to be preferred by civil authorities. However, by the end of the Second World War, a new paradigm had evolved. The massive threat represented by Communism to the free world and the US's new international military role which saw large regular Army forces stationed on nearly every

continent made the National Guard a more likely force selection in the role of support to civil authority. Nevertheless, regular forces still had a important, albeit reluctant, role to play in the civil rights disturbances of the '50s and '60s.[34]

Regular US Army forces have served the nation in peace and war. For most of its history, the US Army has been a general servant to the nation. However, for most of its history, the US has been free of external enemies. As historian, C. Vann Woodward put it:

> "Between the second war with England and Second World War the United States was blessed with a security so complete and so free that it was able virtually to do without an army and for the greater part of the period without a navy as well. Between the world war that ended in 1763 and the world wars of the twentieth century, the only major military burdens placed upon the people were occasioned not by foreign threats but by domestic quarrels"[35]

Only for the latter half of the 20th Century when the specter of a legitimate threat to the existence of the United States loomed before her, did the regular Army orient itself overwhelmingly on its external purpose and give up large segments of the "support to civil authority" role to the militia or National Guard. On occasion, faced with the most dire circumstances and when other avenues had been exhausted, the regular Army could and would assume a domestic police role.

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[1] Carl von Clausewitz, On War, edited and translated by Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), p. 95.
[2] Samuel Finer, The Man on Horseback (London: Pall Mall Press, 1962), p. 27.
[3] Samuel P. Huntington, The Soldier and the State: The Theory and Politics of Civil-Military Relations (Cambridge, Massachusetts: Harvard University Press, 1957) p. 71.
[4] Samuel Huntington as quoted in Robin Hay's Military and Security Institutions; Challenges in Development and Democratization (Kingston, Ontario: Queen's University Centre for International Relations/Martello Papers, 1994), p. 38.

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CHAPTER 2

> "The US Constitution is a remarkable document—and a demanding one for those of us who choose to make our career in the military. We are required to pledge our sacred honor to a document that looks at the military...as a necessary, but undesirable, institution, useful in times of crisis; and to be watched carefully at all other times"[1]
>
> GEN Colin Powell

The Constitution

The framers of the US Constitution were faced with a dilemma on the control of military forces. The concept of a standing army in times of peace was clearly contrary to the basis upon which the Revolution had been fought. The Declaration of Independence accused that King George "has kept among us in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the military independent of and superior to the Civil Power."[2]

On the other hand, it was equally clear that the federal government needed a reliable force that was sufficient to enforce the laws across a large territory only sparsely settled, to prevent or to put down domestic violence or insurrection, and to force the settlement of quarrels between the states.[3] The rebellion of debtors under a former Continental Army captain, Daniel Shays, in western Massachusetts in the summer of 1786 drove home the requirement for a reliable force to back the laws of the federal government. The rebels had prevented courts from convening in several counties and the government enlisted the aid of neighboring states' militias to reassert its authority. Shays' Rebellion and the subsequent permutations it required the federal government to go through in order to secure reliable military force effectively counterbalanced the framers' fears of standing military forces as the Constitutional Convention met in 1787.[4]

The Constitution envisioned a domestic role for military forces. Article I/Section 8 gives Congress the authority to "provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions." Article III/Section 4 requires the

government to "guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." Nevertheless, the "military forces" the framers were thinking of at this stage were the state militias. The threat that a standing army posed to "the liberties of the people" was a common belief held by most Americans during this period. There was a very real fear that it would be used by the government to tyrannize its citizens rather than fight its enemies.[5]

The Constitution gave the President in Article II/Section 2 command of the military and the militia when called into federal service and in Section 3 charged him with the duty to "take care that the laws be faithfully executed." It was understood that the President would be able to call on the US Army to support him in his duty to enforce federal law, however, given the minuscule size of the regular Army, the militia was the only real force available to the President.

Initial Legislative Acts

Congress recognized that the enforcement of federal laws would require a certain compelling force and in the Judiciary Act of 1789 established a force of federal marshals. The Act authorized the marshal to "command all necessary assistance in the execution of his duty."[6] This was interpreted to mean that, like the local magistrates in 17th Century England, they were authorized to call out the militia as a *posse comitatus*.

The Calling Forth Act of 1792 specifically authorized the President to call out the militia to repel a foreign invasion or to put down an insurrection within the state (if requested to do so by the legislature of the state or the executive of the state in the event the legislature could not meet). In the case of an insurrection, the President was required to issue a "cease and desist" proclamation to the insurgents after determining that local authorities were not able to cope with the situation and obtain a judicial certificate from a federal judge certifying that federal laws were not being enforced. In addition, the 1792 Act allowed the President to call out the militia to overcome opposition to federal laws

that were "too powerful to be suppressed by ordinary course of judicial proceedings..." Finally, the 1792 Act gave the federal marshals the same power to execute US laws that the local sheriffs had in executing state and municipal laws.[7] This meant, of course, if the local sheriff could call on the state militia, then so could the federal marshal. This specification would have great impact in the mid-19th Century.

Unfortunately, the Congress also passed the Uniform Militia Act of 1792. This act left the organization, training, and equipping responsibility for the various state militias with the states.[8] A lack of oversight and standardization of state militias guaranteed a system which would fail to produce reliable, well-trained and well-equipped units for the state militias. It is ironic to note the heavy dependence on the militia which Congress intended and its lack of foresight in administering it which guaranteed an inefficient and unreliable militia.

The Use of Federal Troops Prior to the Civil War

It was not long before the US federal government had an opportunity to exercise its mandate to compel obedience to federal laws. The Whiskey Rebellion which broke out in the summer of 1794 gave the President and the government ample opportunity to practice the power which had been delegated to them.

Resistance in western Pennsylvania to the payment of a federal excise tax on whiskey started out in the summer of 1794 with attacks on tax assessors and even the assembly of some local militias bent on preventing payment of the tax. President Washington conferred with the Supreme Court and civil authorities to develop a plan of action and to ensure that the appropriate Constitutional and legislative steps were followed in addressing the rebellion. By fall of 1794 after the assembly of militia forces from Pennsylvania and surrounding states and their subsequent march on Pittsburgh resulting in the arrest and dispersal of the insurgents, the rebellion was quelled.[9]

Washington's handling of the crisis, his display of patience, his conciliatory efforts to address the grievances of the rebels, his conferring with local officials, all served to set

the Whiskey Rebellion up as a model for executive action in the use of military forces to address domestic insurrection. In fact, the subsequent Calling Forth Act of 1795 essentially affirmed the Presidential powers established in 1792 and deleted some of the more innocuous requirements for the President to confer with the judicial authorities and to act only when Congress was in session.[10]

The use of the militia by the early Presidents was not a particular surprise to the Constitution. It was the use of regulars by Thomas Jefferson which expanded the role of the US Army in the domestic arena outside of the limits seemingly emplaced by the Constitution. In 1806 President Jefferson, when faced with Aaron Burr's conspiracy to mount a military operation against western Florida and Mexico with the intent to form his own country, deployed both regular Army and militia forces under a regular Army commander to arrest the conspirators.[11] By 1807, Jefferson had secured passage of a law which allowed the President to use the regular Army (and the Navy, for that matter) in any situation in which he was authorized to use the militia.[12] The framers of the Constitution had now seen their worst fears realized.

In the period of time leading up to the Civil War, regular federal troops were used on occasion to address the widespread urban rioting and violence that characterized the growth of the nation and its cultural struggle between North and South. Labor riots, slave revolts, abolitionist and anti-abolitionist battles, all demanded the attention of certain combinations of regular and militia troops. The challenge for the too small regular Army was to be in the right place at the right time. Its frontier duties and involvement in the Indian Wars made the regulars much less available regardless of the preferences of state and federal authorities.[13] As a result, small bands of federal troops near the scene of disorder would be rushed to the scene and would later be reinforced with hastily formed militia.

In the decades prior to the start of the Civil War, the success of military responses to civil unrest enabled the national government's authority to use the regular Army to

subdue resistance to its laws to grow and develop. From Nat Turner's Rebellion in southeastern Virginia in 1831, the South Carolina Nullification Crisis in 1832, labor riots along the Chesapeake and Ohio Canal in 1834, President Van Buren's use of federal troops to enforce American neutrality along the northern border during rebellions in Canada from 1837-41, to President Tyler's support to one side of a governmental legitimacy crisis in Rhode Island in 1842,[14] the American presidents and the Congress agreed that the use of regular federal forces to enforce laws and quell domestic unrest was legitimate.

The enforcement of the 1850 Fugitive Slave Law expanded the role of federal troops further. It required that runaway slaves recaptured in free states be returned to their owners. The emotion surrounding this act frequently prevented US Marshals from being able to enforce it without significant military force. In a few cases the marshals and local authorities relied on the little used proviso in the 1792 and 1795 Calling Forth Acts which gave them the authority to call on local troops as a *posse comitatus*. In those instances, amassed forces including marshals, militia, and regular troops ensured the return of runaway slaves in the face of strong local resistance. The mayor of Boston and a US Marshal assembled the largest *posse comitatus* ever to prevent a mob from freeing the runaway slave, Anthony Burns, during a court appearance in 1854. The posse assembled consisted of nearly 1600 men including a 1000 militia, nearly 200 soldiers and marines, and several hundred Boston policemen and deputized civilians.[15] In the opinion of US Attorney General Caleb Cushing, writing in 1854:

> "A Marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority to summon the entire able-bodied force of his precinct, as a *posse comitatus*. The authority comprehends, not only bystanders and other citizens generally, but any and all organized armed forces, whether militia of the state, or officers, soldiers, sailors, and marines of the United States."[16]

Cushing's opinion essentially confirmed giving the US Marshals the power on their own authority to call on regular federal troops to assist them in enforcing federal laws. Although used infrequently leading up to the Civil War, it is important in the context of devolving what was essentially a Presidential power onto a civil servant. Nevertheless, it did not significantly alter the procedures states had to follow in order to request federal assistance as articulated in the Acts of 1795 and 1807, i. e. the legislature must request assistance (or the governor in the event the legislature could not be convened) from the President who must be convinced that all state resources (state militias) have been brought to bear on the disorder before granting federal assistance.

However, the Cushing Doctrine did appear to remove the President from the process used to decide the issue of using regular federal troops to enforce civil laws in specific cases. The US Marshal facing resistance could now make that decision. At any rate, it was not used extensively prior to the Civil War as US Marshals and troop commanders typically awaited higher authorization prior to taking such steps.[17] Although only an attorney general's opinion, its impact would be felt more heavily after the war.

As the passions which would ignite the Civil War became enflamed, in the 1850's the US Army was used to bring order to a state caught in the grip of pro and anti-slavery violence. Kansas was the scene of essentially a civil war between rival factions intent on making it a free or slave state. President Franklin Pierce sent federal troops to assist federal and local law officers attempting to enforce the law. It became clear to commanders on the scene that armed federal troops needed to undertake a more ambitious program of general policing of the territory in order to break up all bands, whether pro or anti-slavery rather that simple support to marshal, sheriffs, and various civil authorities.[18] Their performance as a general police force rather than as a *posse comitatus* supporting marshals, sheriffs, or municipal authorities acting to enforce laws served to further expand the Army's role in internal order.

Federal troops eventually began assuming a larger role in civil administration on the edges of the American frontier. The Mormons in Utah Territory attempted to make it impossible for federal officials to operate there in the late 1840's through the 1850's. As a consequence, a number of military expeditions were mounted at the request of federal marshals and judges attempting to enforce federal law over the Mormons. Eventually successful, without the backing of these regular forces it would have been extremely difficult to administer remote territories such as Utah over the objections of well-armed and led bands of Mormon dissidents.[19]

By the beginning of the Civil War and despite the intent of the framers of the Constitution, there was a well established precedent for the use of regular federal troops to address other than external threats to the security of the nation. Regular troops had been used in the resolution of labor disputes, enforcement of civil laws, quelling civil disobedience and insurrection, opposing terrorism, and the enforcement of federal neutrality, not to mention exploring, mapping, and surveying the nation's frontiers and quelling recalcitrant Indian tribes. By the start of the Civil War, the President of the United States, without a request from the state legislature or the governor and on his own authority, could issue a "cease and desist" proclamation and employ regular federal troops of the US Army to enforce federal law or quell a civil disturbance. It was also understood that a state could request from the President that federal troops assist them in disturbances which overwhelmed their organic capabilities. In addition, it was a widely held legal opinion that a US Marshal could call on the US Army as a *posse comitatus* to assist him in the performance of his duty.

The Use of Federal Troops During the Civil War

In a number of ways the Civil War can be perceived as the greatest domestic disorder in American history. The legal basis for President Abraham Lincoln's decision to go to war with the secessionist states lay with the laws of 1795 and 1807 and the legal precedents established by his predecessors.[20] Nevertheless, a federal law passed in July

1861 allowed him to employ the US Army to overcome "unlawful obstructions, combinations or assemblages of persons, or rebellion against the authority of the government of the United States."[21]

Other than the conduct of the war itself, the July 1861 law served as the legal basis for federal troops responding to violent civil resistance to the draft laws of the period. Riots protesting the conscription of men to fight in the war broke out in a number of northern cities starting in 1862 and continued to the war's conclusion. Lincoln's suspension of the writ of *habeus corpus* for the duration of the conflict decentralized the decision-making authority for military responses to this civil unrest to the War Department and departmental commanders. Local requests from civil authorities were answered by local departmental commanders. Combinations of regular troops, militia, sheriffs, and US Marshals responded to the draft riots and performed with varying degrees of competence. Civilians were arrested by soldiers and stood trial in military courts. As a result, by the end of the war, military administration of civil authority was fairly commonplace in the South and in the North.[22]

The Use of Federal Troops in the Reconstruction South and the *Posse Comitatus* Act

Upon the defeat of the Confederacy and during the period of time following the Civil War in which they were in the process of meeting the conditions established by the federal government for their readmission to the Union, the US Army played an important role in the administration of the former states. Due to absence of reliable and loyal militias of any type in the Confederate states, this administration was performed exclusively by regular federal troops.

As Southern territory was retaken during the war and at its conclusion, President Andrew Johnson and President Ulysses Grant undertook to get the Southern states readmitted to the Union as quickly as possible. The South was divided into divisions with subordinate military departments, districts, and sub-districts, all administered by the military. The First, Second and Third Reconstruction Acts mandated that in order for a

state to be readmitted, the civil authorities had to host a constitutional convention, draw up a new state constitution, approve it, and ratify the 14th Amendment to the US Constitution. At that point, military rule would end and the state could rejoin the Union. Up until that time, the military government of the state was supreme and military commanders enjoyed wide discretion in governing the states as they saw fit.[23]

Getting the Southern states readmitted to the Union was only one aspect of the challenge facing Reconstruction. Freedom for the Negro slaves ushered in an entirely new set of problems. Discrimination and racism in the South directed against the former slaves was to be addressed by a series of federal legislative acts which sought to enfranchise the black population by banning racial discrimination (Civil Rights Act, February 1866), directing the military to protect civil rights (Freedmen's Bureau Act, July 1866), banning slavery (14th Amendment), and fighting the Ku Klux Klan (the Reconstruction Acts, 1870-71). In each of these federal laws, the enforcement mission fell to US Marshals, military departmental commanders, and the *posses comitatus* called out by the marshals to support them in the execution of their duties.[24]

The formation of the Ku Klux Klan and similar organizations was the product of white dissatisfaction with former slaves exercising their newly acquired rights and the perception of a need to protect white civil dominance and authority in the South. It presented a significant threat to the newly freed black Americans. In portions of the South, open conflict was being waged between black and white vigilante groups. President Grant perceived that direct military action was required against the KKK. The Third Reconstruction Act allowed him to call out the military and direct it against rebellion in any state which failed to protect any portion or class of people from the free exercise of their rights as defined in the US Constitution. In fact, the military was committed in South Carolina during the Grant administration.[25]

As the US Army drew down at the end of the Civil War, the military resources available for civil administration were likewise reduced. Nevertheless, the smaller

numbers of troops continued to play an active role in the South whether acting as administrators, forming *posses comitatus* in support of US Marshals, or ensuring free and open elections at polling stations.[26] As Reconstruction ended with the readmission of the last of the former Confederate states and during the 1876 Presidential elections, emotions were still at peak levels and local officials feared the outbreak of violence. Regular federal troops were deployed to guard polling places and to protect civil officials during counting and tabulation of results. As a result of a close Presidential election going to the Republican candidate and the election of the newly readmitted states' representatives giving control of Congress's House of Representatives to the Democrats, perceived inconsistencies in the manner of counting votes and the use of regular forces in supporting that effort, the Congress passed in 1878 the *Posse Comitatus* Act or the Knott Amendment (after Representative J. Proctor Knott, Kentucky) to the Army Appropriations Act for that year.[27]

The Act did not substantially restrict the powers of the President to use troops as prescribed in the laws of 1795 and 1807 or in the precedents developed in ensuing years. However, it did declare that such use could only be authorized by the President and so tightened up a certain looseness in the use of the Army to enforce laws which had evolved around the conduct of civil administration during the Civil War and Reconstruction. A Congressional investigation had revealed that regular troops had been performing such routine law enforcement functions in the South as collecting taxes, arresting civilians and controlling labor strikes at the behest of a wide variety of civil administrators including revenue agents, US attorneys, marshals, sheriffs, and governors. According to Representative Knott, the Act was passed, "to put a stop to the practice, which has become fearfully common of military officers of every grade answering the call of every marshal to aid in the enforcement of the laws."[28] The tumultuous times of the mid-19th Century in the United States had led the federal government to rely heavily on its regular

military to enforce its edicts. The Act was an effort to correct the balance and restrain the government's habit-forming turn to military solutions for civil problems.

The Use of Federal Troops in Domestic Roles to World War II

In the years following the passage of the *Posse Comitatus* Act, the Presidential use of militia forces when needed to compel compliance with federal laws or protect the states from civil disturbances as envisioned by the framers of the Constitution fell into disuse. When the Presidents needed force or the states requested federal assistance, the state militias were not called. Regular Army forces were the exclusive tool of federal compliance. That is not to say that state militia forces did not contribute to the maintenance of order. Under the state governors, they served in disaster relief, labor unrest, and as *posses comitatus* to enforce the authority of state governments. However, when the federal government chose to act or was requested to act, regular Army forces responded.

The conclusion of the Civil War and Reconstruction saw a dramatic decline in the strength of the regular forces of the US Army. The lack of any credible external threat brought Army strength to the neighborhood of 25,000 troops throughout the remainder of the 19th Century deployed primarily on the frontier fighting the Plains Indian tribes. However, the Industrial Age was arriving in America and the growth of heavy industry and its requirements for raw materials and labor brought about a class struggle between the forces of management and organized labor. Strikes became a popular tool for workers attempting to organize themselves and address the economic imbalances which existed between employers and the employees.[29]

Labor relations were in the developmental stages in the United States and a certain percentage of strikes precipitated acts of violence and dangerous confrontations between opposing sides which called for intervention on the part of authorities. In most cases, when such intervention was required, state and municipal authorities turned to the state militias because of their generally convenient location. In the latter half of the 19th

Century more than a third of militia duty was as a result of strikes and labor disputes.[30] However, the performance of the militia was uneven due to local biases, political interests, and mediocre discipline and training.[31]

The regular Army, on the other hand, had a much different reputation. Secretary of War, George W. McCrary in his report of 1877, "The Army is to the United States what a well-disciplined and trained police force is to a city... Coolness, steadiness, and implicit obedience to orders are the qualifications most needed in soldiers who are to deal with an excited and exasperated mob; and they are qualities acquired only by training, and are seldom found in inexperienced militia."[32] The regular Army had an effect on civil disobedience all out of proportion to the numbers deployed. A small number of troopers had a calming effect on the most belligerent of mobs. General E. L. Viele, Park Commissioner of New York, said, "There is a general understanding among the floating population of cities, that while the National Guard might hesitate, 'Them Reg'lars are the fellers that shoot!"[33]

The militia's uneven performance in civil disturbances and its mediocre performance in the Spanish-American War indicated a need for reform. In 1903 with the passage of the Dick Act, the state militias became the National Guard and were subordinated for training, equipping, and organization to the US Army. By 1916, the Army National Guard was a full-fledged component of the US Army. It would report to the state governors and serve under the command of state adjutants general, however, responsibility for its administration and standards of performance would rest with the regular Army.[34] Governors could still turn to the National Guard as their force of choice in addressing civil disturbances and natural disasters, however, this did not exempt the regular Army from such duty.

Overseas the regular Army was extremely busy with such tasks as policing civil disturbances and revolutions in the Philippines, China, Mexico, Nicaragua and the Caribbean. The *Posse Comitatus* Act did not restrict such activities in a foreign

environment and the Army was perceived to be the best tool for colonial police work in the first half of the 20th century.[35] Nevertheless, there was a significant amount of domestic work to be done by regular forces. Nearly 16,000 regular troops (of the approximately 25,000 on duty) assisted in containing the Pullman Strike of 1894,[36] regular Army troops were patrolling the Mexican border and pursuing Pancho Villa across the Southwest at the beginning of the 20th Century, and during the depression the US Army ran one of the most comprehensive social work programs in history, the Civilian Conservation Corps.[37]

One of the more widely known uses of regular Army troops in civil disturbances and law enforcement during the period prior to World War II was dispersal of the Bonus Marchers from the capitol grounds by President Herbert Hoover and Army Chief of Staff Douglas MacArthur in the heart of the Great Depression. The marchers were jobless veterans of the Great War who had gathered in Washington DC to demand a bonus for their wartime service. The area they chose to set up camp upon was creating a public nuisance in the vicinity of the Capitol and local police nearly started a riot when they attempted to clear the area. The President ordered MacArthur to disperse the marchers and the General assembled local troops from the Military District of Washington, fixed bayonets, drew sabres and methodically moved through the crowds and quelled the disturbance. In this instance, although with a certain amount of distaste for the task itself, the disciplined and steady response of the troops contributed a rapid solution to a volatile and potentially violent confrontation. The troops fired no live ammunition, killed no one, and through the force of their steady presence ended the disorder.[38] When compared to some of the more celebrated instances of National Guard performance in civil unrest, it was no wonder that regular troops were preferred.

Post World War II

As a result of donning a new mantle of world leadership in the struggle with Communism, the armed forces of the United States oriented themselves to deter the most

significant external threat ever posed to the existence of the republic. The Truman Doctrine, forward presence, forces in being, Korean intervention, US Army Europe, Vietnam, and other terminology characterized an army being drawn out of its historic role of providing internal security and placed on the front lines of an ongoing external security mission during a time of peace or undeclared warfare.

The Cold War and the ever-present threat of its evolving into a hot war in any of several regions saw the largest peacetime regular US Army orient itself on external security while internal security and support to the civil authority rested with the Army National Guard. However, the racial tensions of the time and the emotions of the Vietnam War were so pervasive and overwhelming that the regular forces nevertheless found themselves peering over open sites and pointing bayonets at their fellow citizens again.

In Little Rock, Arkansas in 1957, President Dwight Eisenhower was forced to federalize the state National Guard and deploy 1,200 Army paratroopers to enforce integration laws in the face of a state governor's threat of resistance with the very same National Guard.[39] In 1962 in Oxford, Mississippi, President John Kennedy initially tried to force integration of the state university with a force of federal marshals. Their failure to control the situation and the subsequent outbreak of rioting forced Kennedy to once again federalize the state National Guard and deploy regular troops.[40] President Lyndon Johnson learned from Kennedy's hesitation about the calming effects of disciplined troops and deployed regular forces to Tuscaloosa and Selma, Alabama when faced with potential race riots and demonstrations against the state's racial policies.[41]

In the latter part of the '60s when Vietnam and racial tensions combined to spark urban rioting in a number of major metropolitan centers, regular US Army troops once again served to quell rioting and anarchy where the forces of the local police, federal law enforcement agencies and the state National Guards were overwhelmed. In the wake of these riots, local commanders made some familiar observations about the performance of Regular Army troops *vis-a-vis* the Army National Guard. Major General Charles Stone,

deputy commander of the forces deployed to Detroit during the riots there, noted that "The appearance, smartness, and military discipline must be exemplary. The image they portray has a very decided effect on the rioters and on the confidence they create among the public...If you look strong and if you look as if you can do the job, then the public is going to have confidence in you, and the looter or the rioter is going to be afraid to confront you."[42] General Ralph Haines, the Army's Vice Chief of Staff in 1967, "The well-disciplined execution of orders is the most effective force applied against rioters"[43]

Current Interpretation of the Act

The *Posse Comitatus* Act of 1878 effectively stopped the practice which had evolved of numerous federal officials turning to the regular Army and, without consulting or even advising the President or Congress, using them to enforce federal and state laws or quell domestic unrest. It did not, however, restrain the President from making that decision and turning the compulsory power of a disciplined military onto the citizenry to enforce laws or quell disturbances. The Act does not apply to state militias (National Guard) unless called to federal service. In other words, the governor is free to use the National Guard within the state. The Act is not applicable outside of the boundaries of the United States as certain American citizens who had performed criminal acts and were residing in Germany or Japan found out after the war concluded and the US Army began occupation duties.[44]

In the early 70's, law enforcement activities at Wounded Knee, South Dakota gave some additional insight into the restrictions imposed by the Act. At Wounded Knee, law enforcement officials in a siege situation borrowed equipment from the Army which was maintained by Army soldiers and undertook surveillance of the site with military aircraft. Military advisors on the site, as well, advised the officials on logistic requirements and drew up contingency plans for federal intervention. As a result of appeals and judicial decisions, the courts eventually ruled that the Act precluded the presence of federal troops from pervasively influencing the activities of law enforcement personnel, from being

actively involved in law enforcement (An active role, for example, would include making arrests, seizing evidence, searching a person or a crime scene, investigating a crime, interviewing witnesses, pursuing prisoners or suspects. A passive role is allowed[45]), and from subjecting the citizens to the application of military power.[46]

Later decisions have clarified things a bit further. Soldiers do not give up their citizenship and, as such, can render assistance to law enforcement authorities as private citizens. In addition, if a legitimate military purpose is being served, such as the enforcement of the Uniformed Code of Military Justice, the information turned up about crimes may be provided by the Army to the appropriate officials.[47]

In 1981 the Act was amended for the first time in its history with the passage of the Military Cooperation with Civil Law Enforcement Agencies Act. In response to a growing concern about drug abuse and drug and narcotics trafficking, the Act was clarified to spell out the support that could be provided to law enforcement agencies by the regular Army (applicable to the military as a whole). In Title 10 of the US Code, Sections 371-378 (see appendix to this paper), Congress gave the military wide latitude to conduct its "normal" operations in a manner in which would support the interests of law enforcement agencies, to lend its equipment and facilities to the agencies, to advise and train law enforcement personnel on the operation of military equipment, and to operate that equipment, if necessary, in an emergency. The amendment reiterated that military personnel were not to participate in the interdiction of a vessel or plane or in searches, seizures, or arrests. Finally, the amendment attempted to alleviate the impact on readiness by instructing the Secretary of Defense to insure that support rendered did not have an adverse impact on readiness or national security and that the military would be reimbursed for its support.[48]

These developments are significant. For the framers of our Constitution, the legislators who passed the *Posse Comitatus* Act in 1878, and for the past fifty years in recognition of a significant external military threat to the existence of the United States,

the regular US Army has been professionally and legally insulated from a major routine and recurring role in law enforcement and support to civil authorities without direct Presidential or Congressional oversight. On a number of occasions, as has been shown, in the face of crisis or emergency, the President exercising his Constitutional role as Commander in Chief and in support of federal law could temporarily direct the US Army to enforce laws in a specific situation and a specific area for short periods of time. Since the time of the Act and the 1981 amendments to the Act, the military has taken a more visible and active role in providing routine and recurring support to civil authorities in law enforcement. As the Cold War has concluded and the massive military infrastructure which had supported its conduct have been drawn down, it is important to determine if the national leadership envisions a larger or a continuing role for the military in addressing new "national security threats."

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[1] As quoted in James H. Toner, The American Military Ethic—A Meditation (New York: Praeger Publishers, 1992), p. 204 from a US News and World Report article in the 4 February 1991 edition.
[2] As quoted from the Declaration of Independence in Arthur A. Ekirch, Jr. "The American Liberal Tradition and Military Affairs" Bayonets in the Streets: The Use of Troops in Civil Disturbances, edited by Robin Higham (Manhattan, KS: Sunflower University Press, 1989) p. 141.
[3] Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders, 1789-1878 (Washington, DC: US Army Center for Military History, 1988), p. 3.
[4] Ibid., p. 7.
[5] Ibid., p. 3.
[6] MAJ Clarence I. Meeks, III, "Illegal Law Enforcement: Aiding Civil Authorities in Violation of the *Posse Comitatus* Act," Military Law Review/Department of the Army 27-100-70. (Fall 1975): p. 88.
[7] Coakley, The Use of Federal Forces in Domestic Disturbances, p. 21.
[8] Ibid., p. 22.
[9] Ibid., pp. 58-65.
[10] Ibid., p. 67.
[11] Ibid., pp. 77-82.
[12] Ibid., p. 83.
[13] Ibid., p. 92.

[14] Nat Turner's Rebellion in southeastern Virginia in 1831brought out the regular troops at Fort Monroe on the request of the mayor of Norfolk. Militia reinforcements were sent by the governor and Turner was quickly captured. Federal troops had directly responded to the call of a local official without following the procedures laid out in the laws of 1807. Apparently the innate fear of a widespread slave revolt prevented this issue from rising to the surface. In 1832 South Carolina declared certain federal tariffs null and void within the state. President Andrew Jackson began moving regular troops to enforce the law. The crisis was resolved amicably, however, the President had demonstrated a willingness and established a precedent to use federal troops against one of the states. Labor riots along the Chesapeake and Ohio Canal in 1834 provided Jackson with another opportunity to employ regular troops in a, heretofore, unprecedented way. On the request of Maryland state authorities, federal troops were used to quell a domestic labor disorder. It would not be the last time the troops were used in a labor dispute. President Martin Van Buren from 1837-41 used federal troops to enforce neutrality along the Canadian border among American sympathizers advocating a Canadian revolt against British authority. In 1842 President John Tyler threatened the use of troops to decide between rival state governments in Rhode Island. Excerpted from Chapters 5 and 6 of Coakley, The Use of Federal Forces in Domestic Disturbances.

[15] Ibid., pp. 132-137.

[16] Ibid., p. 128.

[17] Ibid., p. 137.

[18] Ibid., pp. 171-172.

[19] Ibid., p. 225.

[20] Ibid., pp. 227-229.

[21] Ibid., p. 228.

[22] Ibid., p. 267.

[23] Ibid., p. 268.

[24] Ibid., p. 272.

[25] Ibid., pp. 311-312.

[26] Ibid., p. 315.

[27] The Presidential election contested between the Democrat, Tilden, and the Republican, Hayes, came down to 20 electoral votes contested in the states of Florida, South Carolina, Louisiana, and Oregon. A bipartisan investigating commission voted along strict party lines to award all 20 votes to Hayes who was declared the winner 185-184. The Democratic-controlled House of Representatives conducted investigations into the Grant Administration's use of troops to support marshals, guard polling places, and protect boards of canvassers in the three Southern states. Their conclusions about the improper use of troops was the catalyst for passage of the *Posse Comitatus* Act. Excerpted from Meeks, "Illegal Law Enforcement," pp. 90-91.

[28] Meeks. "Illegal Law Enforcement." P. 132.

[29] Barton C. Hacker, "The United States Army as a National Police Force: The Federal Policing of Labor Disputes, 1877-98." Military Affairs 33 (Apr 1969): pp. 256-258.

[30] Ibid., p. 259.

[31] One of the more celebrated incidents involved the Colorado National Guard in its handling of Cripple Creek in 1894 and 1903-04. Regular forces eventually were called in where the Colorado units had failed to restore order and force settlement. See MAJ Alan M. Osur, "The Role of the Colorado National Guard in Civil Disturbances," Military Affairs 46 (February 1982): pp. 19-24.
[32] Hacker, "The US Army as a National Police Force," p. 260.
[33] Ibid.
[34] Roger A. Beaumont, "Must the Guard Be a Police Force?" Army 20 (Sep 1970): p. 36.
[35] Samuel Huntington, The Soldier and the State: The Theory and Politics of Civil-Military Relations (Cambridge, Massachusetts: Harvard University Press, 1957), p. 255.
[36] Hacker, "The US Army as a National Police Force," p. 261.
[37] William Rosenau, "Non-Traditional Missions and the Future of the US Military" Fletcher Forum Volume 18 No. 1, p. 39.
[38] Martin Blumenson, "The Army as Cop: Not a Role It Relishes" Army 26 (May 1976): p. 53.
[39] Paul J. Sheips, "Enforcement of the Federal Judicial Process by Federal Marshals: A Comparison of Little Rock and Oxford" in Bayonets in the Streets: The Use of Troops in Civil Disturbances edited by Robin Higham (Manhattan, Kansas: Sunflower University Press, 1989), pp. 41-43.
[40] Ibid.
[41] Stephen E. Ambrose and James A. Barber, Jr. "The Armed Forces and Civil Disorder," in The Military and American Society: Essays & Readings edited by Stephen E. Ambrose and James A. Barber, Jr. (New York: Free Press, 1972), pp. 247-248.
[42] Blumenson, "The Army as Cop," p. 55.
[43] Ibid.
[44] MAJ H. W. C. Furman, "Restrictions Upon Use of the Army Imposed by the *Posse Comitatus* Act." Military Law Review/Department of the Army Pamphlet 27-100-7. (January 1960): pp. 98-103.
[45] Larry L. Boschee, "The *Posse Comitatus* Act as an Exclusionary Rule: Is the Criminal to go Free Because the Soldier Has Blundered?" North Dakota Law Review, Volume 61/No. 1. (1985): p. 117.
[46] Roger B. Hohnsbeen, "Fourth Amendment and *Posse Comitatus* Act Restrictions on Military Involvement in Civil Law Enforcement." The George Washington Law Review/George Washington University, Volume 54/Nos. 2 & 3. (January/March 1984): p. 413.
[47] Boschee, "The *Posse Comitatus* Act as an Exclusionary Rule," p. 125.
[48] MAJ Robert E. Hilton, "Recent Developments Relating to the *Posse Comitatus* Act." The Army Lawyer/Dept of the Army Pamphlet 27-50-121. (January 1983): pp. 1-8.

CHAPTER 3

> "For the American people to be safer and enjoy expanding opportunities, our nation must work to deter would-be aggressors, open foreign markets, promote the spread of democracy abroad, combat transnational dangers of terrorism, drug trafficking and international crime, encourage sustainable development and pursue new opportunities for peace."[1]
>
> National Security Strategy of US (1996)

National Security Strategy of Engagement and Enlargement

The dissolution of the Soviet Union and the demise of communism as a social system has charted a new course for the national security of the United States. No clear military or ideological threat exists to challenge America's economic, social, political, and military dominance of the global scene at this time. As a result, the nation has defined its national security threats on the basis of maintaining economic strength, promoting its political systems, and preparing military forces to address a wide variety of threats ranging from potential combat to humanitarian assistance.[2]

The NSS identifies the current threats to American national security as nuclear proliferation, regional instability, reversal of reform in the former Soviet Union, international crime, terrorism, drug trafficking, and unfair trade.[3] The criminal nature of some of the current threats is significant. "The threat to our open and free society from the organized forces of terrorism, international crime and drug trafficking is greater as the technological revolution, which holds such promise, also empowers these destructive forces with novel means to challenge our security."[4] As such, the Strategy identifies a major role for the American military. In addition to preparing for combat in two major regional contingencies, providing an overseas presence, contributing to peacekeeping operations, and countering weapons of mass destruction, it is envisioned that the military will support counterterrorism efforts, fight drug trafficking, conduct counter-narcotics operations, provide specialized assistance to other nations, and give humanitarian and disaster relief assistance when called for.[5]

The NSS points out that modern technology and the international nature of the criminal threat has magnified the threat posed by criminal activities such as proliferation of weapons of mass destruction, drug trafficking and terrorism. The military has a role in countering these dangers with its extensive intelligence gathering apparatus, its ability to take direct action against terrorists and drug traffickers anywhere in the world, and its support to foreign assistance programs where training is conducted with governments and their militaries to build the social infrastructure and professional tenets that will allow these countries to combat the criminal elements within their borders.[6]

Are these threats so pervasive that they present a challenge to our vital interests, i. e. the survival, security, and vitality of American citizens requiring unilateral and decisive application of military power? Or are they generating an important effect on our national well-being and the character of the world in which we live and against which we are prepared to act in concert with international security organizations? Or are we contemplating the application of military force to address these problems because of the unique capabilities of the military? Whether these are threats to our vital, important, or humanitarian interests is open to interpretation and the NSS does not make it clear. However, it is clear in the NSS that the national command authority intends to employ the military to address these threats.

National Military Strategy

GEN John M. Shalikashvili, the current Chairman of the Joint Chiefs of Staff and the President's principal military advisor, recognizes the more ambiguous national security challenges facing the military today in the NMS of the US. He advocates maintaining a "full spectrum" of military capabilities to selectively and flexibly engage these new security challenges. While acknowledging that the fundamental purpose of the armed forces remains to "fight and win our Nation's wars," "the challenge of the new strategic era is to selectively use the vast and unique capabilities of the armed forces to advance national interests in peacetime."[7]

What are some of these interests? As outlined in the NMS and compatible with the NSS, they include battling transnational dangers such as drug trafficking and terrorism along with regional instability, proliferation of weapons of mass destruction, and "dangers" to democracy and reform around the world.[8] The NMS envisions "peacetime engagement," "deterrence and conflict resolution," and "fight and win" components. Military support to the civil authority to enforce laws and control civil disturbances directs that in the "peacetime engagement" component, the armed forces closely cooperate with law enforcement agencies to halt the flow of illegal drugs and fight international terrorism while simultaneously conducting humanitarian operations in the wake of national and international disasters and providing military assistance to friendly nations combating their own internal domestic challenges.[9]

It is interesting to note here that the NMS forecasts that when a smaller armed force is called upon to undertake its "fundamental purpose," it would have to somehow "quickly generate combat power in wartime" by withdrawing forces engaged in lower priority missions from less critical theaters for reorganization, retraining, and redeployment to a more critical combat theater. The UN or other security organizations would simultaneously pick up these less critical missions.[10] It is obvious that given a reorganization and retraining component to such a crisis action that the senior military leadership, at least, perceives that such units involved in other than combat military operations will not initially meet standards of training and performance which will allow them to participate in combat. There is no timetable or risk assessment given for such a reorientation.

The Army White Paper—Force of Decision

Within the framework of engagement and enlargement and flexible and selective engagement, the US Army has recognized that it must be prepared to "do whatever the country asks."[11] In the Army's Force of Decision, GEN Dennis J. Reimer, Army Chief of Staff, and the Honorable Togo D. West, Jr., Secretary of the Army, reaffirm that the

primary mission of the US Army is to fight and win our Nation's wars. However, they also recognize that the end of the Cold War has generated a much broader range of missions which the US Army must have the capability to address. Among these missions is included, "tracking and combating terrorists, providing humanitarian assistance, maintaining peacekeeping forces, and helping local and state governments deal with domestic disasters."[12] The US Army must be able to do more that just fight—it must deter potential enemies, reassure friends and allies, and support the needs of our nation and its people within the borders of America.

This Army White Paper further recognizes that this expanded role for the US Army is taxing its capabilities. The very same assets which enable the US Army to fight and win on the battlefield are the same ones needed to reassure friends and allies as well as support domestic requirements. Nevertheless, the Army's leadership insists that the Army is fully capable of addressing the future adversaries of "terrorism, narco-trafficking, ethnic cleansing, clan murders, and resurgent, competitive nationalism" while maintaining the capabilities needed to carry out the more fundamental role of being prepared to fight and win the wars of our nation.[13]

FM 100-19, Domestic Support Operations

The Army's Field Manual 100-19, Domestic Support Operations, is the doctrinal source and guideline for the Army (and US Marine Corps) support to civil authorities. The 1993 version of the manual, the most recent edition, points at the end of the Cold War as the watershed event reorienting the nation's domestic and foreign priorities for military support.[14] In anticipation of the later publications of the NSS and NMS, this doctrinal manual predicts a "new awareness of the benefits of military assistance to improve the nation's physical and social infrastructure."[15]

The manual does recognize the limitations placed upon it by the *Posse Comitatus* Act. It points out the Act, its history, its current interpretation, and the subsequent amendments to the Act included in the 1981 Military Cooperation with Civilian Law

Enforcement Agencies Act. The Army's role in law enforcement and support to civil authorities remains significant. Although the regular Army is restricted from conducting arrests, search and seizures, interdiction of vessels, aircraft, or vehicles, surveillance or pursuit, or to act as agents or investigators in civilian cases, a considerable degree of support is still available to the civilian law enforcement agencies in the form of equipment, facilities, operation and maintenance of military equipment, and information.[16] In addition, the Army National Guard, not under federal status and acting under the state governors, can perform an even greater range of support activities.

Army resources are available to law enforcement authorities in the battle against domestic crime. Terrorism is identified as a grave threat domestically to the nation. The Federal Bureau of Investigation (FBI) is the lead executive agency in combating terrorism, however, the domestic and international scale of terrorism has generated a demand for close cooperation between the Department of Defense (DOD) and the FBI. Of all the potential support available to the FBI, intelligence sharing is clearly an important and sensitive subject, given the federal government's experiences with domestic military intelligence gathering.[17] Therefore, the Army must receive permission from DOD prior to supporting any domestic intelligence gathering mission. Nevertheless, it is clear that with Presidential authorization, personnel, equipment, facilities, and intelligence-gathering resources can be made available to the FBI in the battle against terrorism.[18]

The fight against drugs has drawn the Army into another battle with domestic and international implications. There is an increased role for the military to attack drugs at the source (foreign and domestic), in transit (land, sea, or air), and domestically (users and their suppliers). In the war on drugs, DOD is the lead executive agency for the detection and monitoring of the air, sea, and ground transit of illegal drugs into the US.[19] Although, law enforcement agencies remain responsible for interdiction of suspects and their contraband, it is clear that the intent is for the military to point them out. For the Army,

this indicates a potential role in ground reconnaissance and security of the land borders of the US.

The Army continues to maintain its role in supporting the civil authorities in the wake of domestic disturbances. The state's Army National Guard forces are the local authorities' first military force to call upon in the event that a particular disturbance overwhelms local and state police forces. In the event that federal or federalized forces are called for, the US Attorney General appoints a Senior Civilian Responsible to the Attorney General (SCRAG) to coordinate the federal response. This civilian is in place to coordinate with local authorities on the use of federal troops during widespread domestic unrest, rioting, flagrant violation of law, and other types of disturbances. The military, in this case, remains under federal control and local authorities receive needed support through the SCRAG.[20] The maintenance of law and order in Los Angeles in the wake of the April 1992 riots is a recent example of this type of operation and was accomplished with a combined regular Army and Army National Guard force effecting civil disturbance support to local authorities.[21]

The unique capabilities of the Army to operate in austere areas and provide basic human needs and services gives the Army an obvious role in responding to natural disasters. However, the maintenance of law and order in such an afflicted area also falls within the Army's bailiwick.[22] Until civil services resume, for temporary periods of time the Army clearly has responsibility for such a mission. Combined forces of regular Army units and Army National Guard units in conjunction with the Federal Emergency Management Agency (FEMA) and state authorities continue to support domestic relief operations in the wake of hurricanes, typhoons, earthquakes, and other natural disasters.

FM 100-20 Stability and Support Operations

The US Army has recently published a more current (1997) field manual describing Army support to stability and support operations, a term coined to include Army operations in situations other than combat. This document provides the framework for

subordinate manuals (like FM 100-19 Domestic Support Operations) to describe military doctrine in the conduct of more specific types of stability and support operations, for example, support to law enforcement and disaster relief agencies (as in FM 100-19), peacekeeping, nation assistance, and others.

In the context of this paper, FM 100-20 points out the supporting role that the Army has historically played in providing support to civil authority throughout its history. Unique Army capabilities, the challenging and, at times, hostile environment that only Army resources can address, and the occasional necessity to resort to force of arms in order to establish or maintain federal authority have meant that the US Army has been involved in stability and support operations incessantly and worldwide. However, this role has been restricted to ensure that it remains a supporting role and does not usurp civilian control and authority. The Federal Bureau of Investigation, the Drug Enforcement Agency, the Federal Emergency Management Administration, the State Department, and others have lead roles in the conduct of various stability and support operations with wide-ranging levels of support from the Army.[23]

State governments have the authority to use their National Guard units in a much broader capacity than federal troops. The *Posse Comitatus* Act is not applicable to the Guard in its state support role. FM 100-20 notes that during the Los Angeles riots of 1992, federalization of the California National Guard (CANG) resulted in a dramatic decrease in military responsiveness to state requests. Prior to federalization, the CANG was able to perform a wide range of tasks that were not legally able to be performed by the regular troops called upon to assist. During hurricane relief operations in Florida later in the year and due to the prior experience in Los Angeles, it was decided that the Florida National Guard would not be federalized to support operations in relief of Hurricane Andrew.[24] As a result of this experience, it appears incumbent upon the states to exhaust all organic means of assistance prior to calling on the regular troops of the US Army to respond...clearly one of the intents of the *Posse Comitatus* Act.

The counterdrug efforts of the US Army came about as a direct result of the declaration of drug abuse as a national security issue. The 1981 Military Support to Civilian Law Enforcement Agencies Act which clarified the legal support the military could provide to law enforcement agencies, the 1986 Presidential National Security Directive 221 which declared drug abuse and narcotics trafficking a national security threat, and the Narcotics Leadership Act of 1988 which created the Office of National Drug Control Policy have served to mobilize the nation's military and police in a dramatic alliance to combat narcotics trafficking and the effects of drug abuse.[25] Since the 1989 Defense Authorization Act, the Department of Defense has assumed leadership in the detection of drug smuggling into the US, the coordination of command and control apparatus among federal agencies, and support to the state governments in their application of the state National Guards to the problem. Nearly $1 billion dollars in the DOD budget was directly applied to the national drug control effort in 1994 alone.

State National Guards are playing important roles in various state programs from detection and surveillance operations within states[26] to support to Drug Abuse Resistance Education, a school education and literature distribution program.[27] Joint Task Force Six in El Paso, Texas is an active, regular joint headquarters tasked to coordinate and control the military counterdrug support given to civilian law enforcement agencies in the Southwest. The Unified Combatant Commands are also tasked to support drug enforcement initiatives in their overseas areas of operations. Language support, intelligence analysis, the conduct of aerial and ground reconnaissance, and the manning of listening and observation posts are among the military tasks performed which have direct application to the counterdrug efforts. However, such direct involvement is not the only support provided. Logistic and transportation assets are available to support law enforcement operations as well as a major dedication of regular and National Guard assets devoted to training law enforcement and military personnel.[28]

The Future—Joint Vision 2010 and Army Vision 2010

Joint Vision 2010 is a long range forecast of the American military's modes of operation in the next century. It outlines four operational concepts that will guide future military operations—dominant maneuver, precision engagement, focused logistics, and full-dimensional protection. This outlook attempts to take advantage of the technological revolution to create a new level of military effectiveness. The subsequent effectiveness of these operational concepts and the integration of emerging technology is supposed to give American military forces "full spectrum dominance—dominate the full range of military operations from humanitarian assistance, through peace operations, up to and into the highest intensity conflict."[29]

However, such a "full spectrum" will require enormously versatile leaders at every level. "Future leaders at all levels of command must understand the interrelationships among military power, diplomacy, and economic pressure, as well as the role of various government agencies and non-governmental actors, in achieving our security objectives."[30] It is well that such versatile leaders will be present as Joint Vision 2010 imagines a continuing role for the military to apply its operational concepts in the counterdrug and counterterrorism battles.

Army Vision 2010 is considered a "blueprint for the Army's contributions to the operational concepts identified in Joint Vision 2010."[31] It defines the missions that the leadership of the Army believes will be important in the future and discusses how technology will be able to give degrees of advantage to Army forces in the application of the JV2010 operational concepts.

It is interesting to note that the US Army has embraced an all-encompassing set of tasks as potential uses for Army forces. The three purposes for the Army of the future are, essentially, to fight wars, to deter aggression, and to be ready to do anything else that might be asked of it or Military Operations Other Than War.[32] In a laundry list of missions described as dominant roles for land forces, the Army is expected to be capable of *defending or liberating territory* in its traditional warfighting role, conduct *punitive*

intrusion against foreign sources of drugs, terrorism, or weapons of mass destruction, *contain conflicts* with peacekeepers, *leverage technology*, *reassure* allies by posturing forces nearby, *secure the core of the nation* against drugs, illegal immigration and crime in the streets, and, finally, perform *humanitarian* missions domestically and overseas.[33]

The current national security strategy articulates a plethora of national security threats which envision an important role for military forces and particularly the Army. Combating illegal drugs and terrorism, addressing civil disasters natural and man-made have Army components performing dominant roles now and in the foreseeable future. "In this unstable and turbulent world, the Army will continually be called upon to meet the Nation's needs: from responding to hurricanes, forest fires and other disasters; to internal security matters at Olympic and inaugural events; to humanitarian assistance; to shaping the future world environment through continuous contacts around the world; to peacekeeping; to nation building; and to conflict resolution. A versatile force is required to respond with little or no notice to this full spectrum of operations."[34]

The only clear role which is forecast for the US Army in the 21st Century is as a general servant which needs to gird itself to address any threat the national command authority perceives. In the past, the Army, small and isolated, without any real enemies, adequately served the nation as a general servant in an environment of murky, ill-defined threats. In specific cases, it was employed to support the civil authorities and enforce laws. Now a broad range of ill-defined threats has found the national command authority attempting to find solutions by bringing together in an entangling alliance two distinct entities—the policeman and the soldier. Is the formal integration of the Army into the law enforcement role risky? What are the risks to the Army and the nation in applying a large professional US Army to solve these problems?

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[1] National Security Strategy of Engagement and Enlargement, (Washington, DC: US Government Printing Office, February 1996), p. iv.

[2] Ibid., pp. 11-12.
[3] Ibid., p. 12.
[4] Ibid., p. i.
[5] Ibid., pp. 13-18.
[6] Ibid., p. 17.
[7] Letter from GEN John M. Shalikashvili, Chairman of the Joint Chiefs of Staff in National Military Strategy of the United States, Flexible and Selective Engagement, (Washington, DC: US Government Printing Office, 1995).
[8] Ibid., p. i..
[9] Ibid., p. ii.
[10] Ibid., p. 15.
[11] Letter from GEN Dennis J. Reimer, US Army Chief of Staff and Togo D. West, Jr., Secretary of the Army in Force of Decision: Capabilities for the 21st Century, (Washington, DC: US Government Printing Office, April 1996).
[12] Ibid., p. 4.
[13] Ibid., pp. 13-16.
[14] Field Manual 100-19, Domestic Support Operations, (Washington, DC: US Government Printing Office, July 1993), p. 1-1.
[15] Ibid.
[16] Ibid., p. 3-1.
[17] John P. Coffey, "The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?" Georgetown Law Journal/Georgetown University, Volume 75/No. 6. (August 1987): p. 1960. The Army was embarrassed by its role in domestic surveillance of politically suspect individuals in the 1960's and early 1970's. When discovered, a lawsuit against DOD resulted in public outcry and Congressional hearings. Domestic surveillance is now the province of the Justice Department.
[18] FM 100-19, p. 3-3.
[19] Ibid., p. 7-4.
[20] Ibid., pp. 7-12 to 7-14.
[21] U.S. Army Combined Arms Command, Operations Other Than War. Volume 3: Civil Disturbance. Newsletter 93-7 (Fort Leavenworth, Kansas: Center for Army Lessons Learned, Nov 1993). This newsletter provides an after-action-review of the operations of JTF-LA in support of Los Angeles County authorities attempting to deal with rioters and civil disobedience in the wake of the Rodney King verdicts. Elements of the federalized 40th Armored Division of the CANG and the US Army's 7th Infantry Division (Light) composed JTF-LA
[22] FM 100-19, pp. 5-4 to 5-6.
[23] Field Manual 100-20, Stability and Support Operations, (Washington, DC: US Government Printing Office, 1997), Chapter 1.
[24] Ibid., Chapter 3.
[25] Ibid., Chapter 9
[26] Ibid., Among numerous examples of support in law enforcement operations, is the example of Minnesota National Guardsmen training on night infantry skills conducting surveillance of a rural drug lab in Minnesota in 1993. The police raid resulting from that

surveillance netted 80 pounds of synthetic drugs, 25 automatic weapons, and 100,000 rounds of ammunition.

[27] Ibid. The Maine National Guard is closely allied with the DARE program providing storage and transportation of instructional material, serving as speakers and honor guard at DARE events, and supporting the DARE summer camp.

[28] Ibid. The Mississippi National Guard mans and operates the Regional Counterdrug Training Academy at the Meridian, Mississippi Naval Air Station. The RCTA trains law enforcement officers in counterdrug skills. The National Interagency Counterdrug Institute (NICI) in San Luis Obispo, California is a federally funded DOD field operating activity of the National Guard Bureau operated by the California National Guard. Its purpose is to instruct law enforcement agents on planning and coordinating interagency counterdrug operations that use military resources

[29] Joint Vision 2010: America's Military, Preparing for Tomorrow, (Washington, DC: US Government Printing Office, 1996), pp. 1-2.

[30] Ibid., pp. 28-29.

[31] Army Vision 2010. (Washington, DC: US Government Printing Office, 1996), p. 1.

[32] Ibid., pp. 2-3.

[33] Ibid., p. 8.

[34] Ibid., p. 18.

CHAPTER 4

> "And through all this welter of change and development your mission remains fixed, determined, inviolable—it is to win wars. Everything else in your professional career is but a corollary to this vital dedication. All other public purposes, all other public projects, all other public needs, great or small, will find others for their accomplishment; but you are the ones trained to fight, yours is the profession of arms."[1]
>
> GEN Douglas MacArthur, 1962 West Point Address

Regardless of the fears expressed in the Constitution, the regular Army of the United States has played a significant role in the maintenance of law and order and the assertion of federal authority domestically. In fact, for a large portion of its history, the support lent by federal troops to civil authority was its most important and visible role. Insulated against credible foreign threats for most of its history, the US Army has asserted federal authority and federal laws in remote frontier regions and in areas contemplating or actively engaged in rebellion; it has battled insurgents, rebels, and outlaws across the continent; and it has assisted in maintaining civil order from New York to Los Angeles.

While assuming this domestic role throughout its history, the US Army has never been a significant threat to continued civilian control of government. The United States has enjoyed significant advantages in keeping its military subordinate to civilian authority—a dearth of credible enemies capable of overcoming the significant geographic advantage of isolation enjoyed by her kept the Army small and dispersed. The military itself remained largely apolitical and shunned *coup d'etat* as a tool of statecraft. With some notable exceptions, professional military men in the United States have viewed themselves as general servants to the executive branch pledging loyalty to the US Constitution and to the concept of civilian supremacy through the President of the United States whose orders they are sworn to obey.[2]

The US Constitution and the *Posse Comitatus* Act have contributed to the non-interference of the Army in the domestic political arena. As has been shown, the creators

of the Constitution and the American citizenry harbored serious reservations about the presence of professional federal troops in the United States. As a result, the Constitution was designed to create and support a large militia system which, in essence, would keep the regular Army small and divide its control between the legislative and executive branches to render it less likely of overthrowing a civilian government. The framers had no illusions about the necessity to resort to military force in emergency circumstances to enforce federal authority, put down rebellions and insurrections, and guarantee a republican form of government to the states. The tools they imagined would provide that compelling force were the state militias.

However, the unique circumstances of the evolution of American democracy saw an early turn to professional federal troops in support of civil authority. The state militias appeared from the outset to be inadequate to the task. Within twenty years of the Constitutional Convention, Congress passed a law allowing the President to call on professional federal troops to do the jobs that the framers had envisioned for the militias.

The middle of the 19th Century with the cultural clash between North and South and the racial upheavals which accompanied slavery and its demise, saw the President and Congress delegate their authority to call on professional troops to subordinate federal officials. The epic nature of the struggle between cultures had threatened the very fabric of the nation resulting in a costly civil war and the unique challenge of administering a defeated nation domestically. In the aftermath of the war, federal troops were playing a pervasive role in the civil administration of the former Confederate states and Congress felt the need to try and put the use of federal troops back in balance. The Act accomplished that by forbidding federal officials and military officers from attempting to enforce laws without a decision from the President and Congress. The Act drew a distinction between federally sponsored support to law enforcement in an emergency situation as recognized by the President and Congress and local requests for support. Civil authorities needed to exhaust civilian police and state militia resources prior to

asking the President to call out the US Army. It ensured that the decision to use federal troops remained with the national command authority and did not rest with local federal officials or military commanders.

Is the *Posse Comitatus* Act of 1878 still relevant? The current status of the Act as amended in 1981 protects the military from direct law enforcement activities and not much else. Is that enough? If National Guard troops begin combined patrols with local police to reduce crime and gang activities on the streets of urban America and armored cavalry units with border patrol augmentees stop illegal immigration in the Southwest and Apache helicopters vectored by Army air defense radars stop small airplanes ferrying drugs into the United States, it would appear to some that US Army resources are being put to good use.

However, the cost to the United States will be paid in two installments. By taking small steps to make it easier for assets, assistance, personnel, and support to be given to law enforcement without the direct involvement of the national command authority, a certain gray area is created where once a clear distinction existed. The slow and steady infiltration of military assets into the fabric of American society and the use of military coercion and the US Army against its own citizens is the first installment. It can be argued that the National Guard has been available to state governors for exactly this purpose throughout American history. However, during this century, the Guard has become more closely integrated with and subordinated to the regular Army. The general public is unlikely to distinguish between regular Army forces and the state's Army National Guard. Camouflaged uniforms and military equipment keeping the peace, pursuing suspects, securing the border, and patrolling classroom hallways is occurring on some scale today in many places. Its continued spread across the US is not as far-fetched as it would initially appear. As Representative Knott noted on the passage of the Act in 1878:

> "It is the collective effect and the gradual erosion of the democratic principle of non-interference by military authority in domestic matters that

must be guarded against. Commanders must remember that this tradition did not evolve by accident. It evolved out of the determination to abate governmental abuse of the rights of private citizens. Failure to preserve this tradition...will surely weaken the democratic system."[3]

The amendment to the *Posse Comitatus* Act which occurred in 1981 with the Military Cooperation with Civilian Law Enforcement Act was spawned by concern over domestic drug abuse and crime and generated a whole new set of potential missions for the American military. The 1981 Amendment gave the Secretary of Defense the authority to more fully integrate the activities of military units with civilian law enforcement agencies in order to provide better support to the those agencies. It is clear that personnel, equipment, and training resources are to be made available as well as the integration of military exercises with law enforcement needs. Caveats within the law speak of preventing the impact of this expanded role from harming military preparedness and reimbursing DOD for the costs. In addition, it specifically forbids military personnel from direct law enforcement activities.

The creation of a National Drug Control Strategy (as well as the position of "drug czar" currently occupied by a retired US Army general) in 1989 assigned specific missions in law enforcement to DOD. DOD is currently responsible for detecting the transit of illegal drugs into the United States, integrating the "drug war's" command, control, communications, and intelligence assets, and resourcing the states' use of National Guard assets to combat illegal drugs.[4] From surveillance aircraft and ships to US Army augmentation of border police to joint military-police headquarters securing the borders from everything from illegal immigrants to drug smugglers, the military has been increasingly drawn into the enforcement of federal laws.

The National Security Strategy, the National Military Strategy, Army doctrine, and the future outlook of military operations for the 21st Century, all appear to call for a continued if not dramatically increased role for modern military forces to play in a variety of challenges to national security to include drug smuggling. There are also military

components in the battle against international and domestic terrorism as well as support to nationbuilding on an international scale and support to civil authority against domestic disturbances and natural disasters. For nearly twenty years, Congressional legislation, Presidential Decision Directives, and the national security strategy have sought some manner to increase the amount of support military forces can render civil law enforcement agencies.

The assignment of these missions has generated varying responses from the military. A certain amount of support to battling this "national security threat" is perceived to be in order. The scale of the threat and its increasing international character appear well suited for the conduct of extensive military-style campaign planning according to some.[5] The Army has the surveillance equipment, command and control apparatus, and logistical infrastructure to provide the law enforcement agencies with an enormous level of support. The Army can mount an international campaign with foreign military training teams to provide assistance, support and cooperation in foreign countries in mounting their own domestic battle against their criminal industries. Army equipment and personnel support to border patrols and immigration authorities can make the transit of drugs as well as illegal immigrants into the United States more difficult. The Army fields high-tech surveillance equipment for the collection of intelligence which can easily be directed at suspected terrorists and international criminal activity. The Army could detail personnel and assets to assist police in the eradication of drugs from the streets and schools of the United States. Finally, the US Army will achieve a certain amount of efficiency for the federal government because the equipment and personnel are already in place to tackle this expanded role and the Army itself will gain a new and relevant role in the post-Cold War world.[6]

In recognition of a "can-do" military spirit, others agree with the assessment of drug smuggling and the associated criminal activity as a national security threat fitting and appropriate for a massive military response. In fact, there are a small number of military

leaders advocating that mere support from the military to civil law enforcement agencies is not going far enough. In a surprisingly strident call for military action, MAJ Mark Hertling (now COL Hertling) recommended in a 1990 Military Review article that the military undertake its own major campaign to attack "narco-terrorism." This campaign would require a major revision of the current laws to allow the military to participate in traditional police functions of arrest, search and seizure, and detention. But it goes further. Suspected criminals would be treated as prisoners of war and not as accused violators of the law. Foreign governments, unwitting tools or otherwise, would be overthrown by American military and political pressure to force them to join our fight against their domestic drug industries. The media would have to be corrupted to avoid complaining about military heavy-handedness and undermine the "will of the people." This extreme view envisions the suspension of laws and international conventions to allow for a more liberal application of military force in the effort to combat a social ill.[7]

As Finer and others have noted, there is a fine line of distinction between supporting civil authority and usurping civil authority. The uniqueness of the military role in any society with its monopoly on weapons and hierarchical structure gives it strong temptation when the society turns to the military for more and more routine civilian functions. Finer speaks of military motives, moods, and opportunities to intervene in civilian affairs. In each instance as the military becomes more entwined in addressing domestic challenges, there arises a danger that they may begin to perceive themselves better able to define the national interests (motive),[8] better able to serve the interests (mood),[9] and, finally, better equipped and organized to solve the challenges to those interests (opportunity).[10] The danger does not appear suddenly, but evolves slowly over time as the threat to civilian society from external sources recedes and internal threats grow or law and order displaces security from attack as the goal of the citizenry.[11]

There is a second cost associated with the integration of the military into law enforcement. Former Secretary of Defense, Frank Carlucci, testifying to a joint session of

the Senate and House Armed Services Committees in 1988 noted that nothing can be allowed to stand in the way of the military's primary role of being prepared to defend the country from armed aggression. He assured the Congressmen that support for the anti-drug and anti-crime policies of the nation would continue from the military. However, to him it appeared to threaten an overcommitment of DOD resources. Secretary Carlucci pointed out that readiness is a "zero sum" game, i. e. resources committed to other than "readiness for combat" activities cannot then be considered ready for combat.[12]

Other observers agree with the Secretary and forecast dire consequences for a slow and inexorable assimilation of military and police roles. They recognize the differences between military and police work and its potential effect on training and performance. Policemen derive a major portion of their authority from their common acceptance as officers of the law and not from the fear of their ability to apply firepower. A police action is characterized by restraint and minimum levels of force designed to apprehend live suspects and seize evidence. The military applies maneuver and firepower liberally to kill enemy soldiers, destroy their equipment, and occupy terrain.[13] It is a time-consuming process to train highly qualified and fit men and women to do either job, much less both. The emphasis on one job will negatively impact the performance of the other.

The detrimental effect of such roles on the effectiveness of the military in what is conceded as its "fundamental purpose" is risky. Ground combat is an exhaustive, all-consuming activity for Army forces involving unique activities in a highly lethal environment. Soldiers are expected to act aggressively and seek out enemy forces for destruction. Military equipment is designed to perform in an environment and against opposition vastly different from law enforcement arenas. High technology based equipment operated by qualified and trained individuals preparing for intense combat against an equally well-equipped and trained enemy suddenly being oriented on low technology smugglers hurts readiness. The NMS recognizes that units disengaged from

other than combat activities will need to be retrained and refitted prior to entering a combat environment.

In their critical and essential line of work, policemen risk their lives, but they are also trained to operate under the threat of other less final sanctions. What are the civil liabilities the soldier assumes when participating in law enforcement activities for which he has not been adequately prepared? Who will decide if the rules of engagement were clearly articulated to suspects who find themselves subjected to military force? Like the dilemma faced by British magistrates and soldiers in 18th Century England, decisions on the appropriateness of the use of force made while passions were enflamed by riots, fear, and confusion will be judged in sedate, calm courtrooms by people whose lives are not at risk. It is an enormously heavy burden on soldiers to be capable of performing in both environments without error. In police work, the soldier can be subject to civil liability and incarceration for the very acts he has been trained to perform in combat. Errors in either environment can cost the soldier his life and the lives of his fellow soldiers.[14]

Irregardless of caveats within the 1981 Amendment, that law, its more recent adjuncts, and the National Security Strategy of Engagement and Enlargement have sanctioned an "entangling alliance" between the professional military forces of the United States and the civilian law enforcement agencies. Direct coordination and cooperation between federal law enforcement agencies and the Department of Defense without a clear and well-defined emergency situation and Presidential and Congressional oversight is beyond the intent of the Constitution and the *Posse Comitatus* Act and has the potential to evolve into a routine assimilation of roles just as it did during Reconstruction in the South during the late 1860's and 1870's. As this paper has attempted to demonstrate, prior to the Civil War and Reconstruction as well as since, the regular Army has indeed responded to domestic crises requiring it to assume certain law enforcement and support to civil authority roles. However, these crises were clearly defined and of relatively short duration. There is no indication that the drug abuse crisis is of such a short term character

or that military support of the "war" is having any significant impact sixteen years after amending the *Posse Comitatus* Act. The routine and continuing nature of the current liaisons and coordination has the potential to grow into other areas given limited federal resources and a proliferation of other "national security threats" until a widespread integration of the military into routinely civilian activities has occurred, but was barely noticed.

Today it is unclear where the next military threat to American vital interests will appear. However, that is not to say that there is no threat. Army forces face the possibility of combat in numerous regions of the world. It would be extremely risky to underestimate the combat potential of even the most primitive of modern soldiers as happened in Somalia in 1993. Nevertheless, the Chairman of the Joint Chiefs of Staff in the National Military Strategy has assumed a huge risk for the nation in the event that the military is called upon to fight a war (or two, as outlined in the two major regional contingency scenario) while engaged elsewhere in operations other than war. A window of risk appears unavoidable as dual-hatted forces are extricated from one area, retrained, refitted, and redeployed, hopefully, in a timely fashion to the more critical theater. The Army leadership, as well, clearly admits an "imbalance" is apparent in the "increased demands" and the necessity to "remain prepared to fight and win the Nation's wars."

As the US Army is slowly committed to internal police missions, its fundamental purpose cannot help but be compromised. The steady erosion of external security as a *raison d'etre* for the US Army will harm its performance on future battlefields. The former Under-Secretary of the Navy, Seth Cropsey, noted in a recent forum on other than combat roles for American armed forces:

> "The moment non-traditional missions become the military's purpose—or even its partial aim—the dangers and stress of combat will cease to guide our armed forces' training...the edge honed by war's realities will be lost...A larger military that is uncertain about its fundamental purpose will be

harder to reconstitute as an effective fighting force than a smaller one that knows exactly why it exists and what it is supposed to do."[15]

The abuse of drugs by Americans is unquestionably an important and critical social issue facing the nation. The criminal enterprises which have their roots in this tumor are widespread and pose a significant threat. Terrorism, gang warfare, violent crime of all types, the decline of American social structure, and other problems can be traced directly or indirectly to international drug trafficking and domestic consumption of drugs. It is, unarguably, one of the greatest current challenges to the American way of life. However, it threatens our national security from within and not without. The American experience with Prohibition, China's experience with the Opium Wars, and simple economic theory clearly indicate that long-term victory in America's drug war is probably to be found in reducing demand rather than attempting to interdict supply. The drug war America is waging is a long and arduous social campaign more akin to the Twelve Step Program of Alcoholics Anonymous than the Normandy Invasion.

More than two centuries of American military history demonstrate that the military can be the appropriate tool domestically in specific circumstances against clear threats. Nevertheless, a long term entanglement with police work and law enforcement agencies is inadvisable. There is a significant danger in an increased use of military solutions for loosely defined national security threats that appear to have more criminal characteristics than national security ones. It does not bode well for the republic in the long term. The threat to the United States stems from a too-familiar integration of civil police and military roles in combating social ills and the delegation of authority to various federal and state officials to call on military resources without an appeal to the President. In the context of a frontier America with few external threats, the US Army, small and dispersed, served as a general servant to the nation and well and adequately policed its territories and was never a threat to the notion of military subordination to civil authority. Today, a large, well-equipped, well-trained, and fit Army, veterans of frequent foreign service and sure to

continue service on various foreign shores should not be overburdened with domestic police tasks. Such a load will inextricably entangle the Army in domestic considerations which could threaten its historic apolitical nature. In addition, a law enforcement orientation cannot help but to alter combat training standards and threaten both the high standard of performance expected in modern military operations as well as police operations. Although admittedly not clear at the present time, external threats from foreign military sources are certain to rise again in the future. A military composed of well-equipped riot police, counter-narcotics agents, and humanitarian providers of basic services will be poorly prepared to deter or defeat the threat that such enemies will present to American vital interests.

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[1] As quoted in COL Charles J. Dunlap, Jr. "The Last American Warrior, Non-Traditional Missions and the Decline of the US Armed Forces," Fletcher Forum Volume 18, No. 1 (Winter/spring 94): pp. 81-82.

[2] Richard H. Kohn, "The Constitution and National Security: The Intent of the Framers" in The United States Military under the Constitution of the United States, 1789-1989, ed. Richard H. Kohn (New York: New York University Press, 1991), p. 87.

[3] MAJ Clarence I. Meeks, III "Illegal Law Enforcement: Aiding Civil Authorities in Violation of the *Posse Comitatus* Act." Military Law Review/Dept of the Army 27-100-70. (Fall 1975): p. 135.

[4] COL Joseph L. Bergantz, "Military Support of the National Drug Control Strategy," Military Review 72 (June 1992): p. 68.

[5] Graham H. Turbiville, Jr. "Operations Other Than War: Organized Crime Dimension" Military Review, 74 (Jan 1994): p. 46.

[6] Stephen M. Duncan, "The US Military's Role in Drug Policy Enforcement," in The United States Army, Challenges and Missions for the 1990's, edited by Robert L. Pfaltzgraff, Jr. and Richard H. Shultz, Jr. (Lexington, Massachusetts: Lexington Books, 1991), pp. 149-152.

[7] MAJ Mark P. Hertling, "Narcoterrorism: The New Unconventional War" Military Review 70 (March 1990): pp. 16-28.

[8] Finer, The Man on Horseback, p. 25.

[9] Ibid., pp. 70-71.

[10] Ibid., p. 75.

[11] Alexander Hamilton in The Federalist Papers as quoted in James H. Toner, The American Military Ethic—A Meditation (New York: Praeger Publishers, 1992), p. 225.

[12] Stephen M. Duncan, "The US Military's Role in Drug Policy Enforcement," in The United States Army, Challenges and Missions for the 1990s, edited by Robert L.

Pfaltzgraff, Jr and Richard H. Shultz, Jr. (Lexington, Massachusetts: Lexington Books, 1991), p. 142.

[13] COL Charles J. Dunlap, Jr. "The Origins of the American Military Coup of 2012" Parameters 22 (Winter 1992-93): pp. 2-20 and COL Dunlap's "The Last American Warrior, Non-Traditional Missions and the Decline of the US Armed Forces," Fletcher Forum Volume 18, No. 1 (Winter/spring 94): pp. 70-82. COL Dunlap wrote two controversial articles speculating on an American military coup and the future defeat of American military forces due primarily to current military involvement in operations other than war.

[14] One reported instance in 1990 involved a Marine reconnaissance patrol operating along the Mexican border in Arizona supporting US Border Patrol operations with the combined DOD-DEA-USBP headquarters designated Joint Task Force Six. The patrol fired warning shots to disperse a group of smugglers they were skirmishing with and it prompted a Marine colonel observing to comment that combat-trained Marines should not be taught to squeeze off warning shots. "That teaches some very bad habits." As related in COL Charles J. Dunlap, Jr. "The Last American Warrior, Non-Traditional Missions and the Decline of the US Armed Forces," Fletcher Forum Volume 18, No. 1 (Winter/spring 94): p. 70.

[15] As quoted in COL Charles J. Dunlap, Jr. "The Last American Warrior, Non-Traditional Missions and the Decline of the US Armed Forces," Fletcher Forum Volume 18, No. 1 (Winter/spring 94): p. 81.

CONSTITUTION OF THE UNITED STATES

Congressional Powers: Article I/Section 8/Clauses 9-15

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

Presidential Powers: Article II/Section 2

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States;

Section 3 ... he shall take care that the laws be faithfully executed

Article III/Section 4

The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

AMENDMENTS TO THE CONSTITUTION

Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

UNITED STATES CODE

18 § 1385. Use of Army and Air Force as *posse comitatus*

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

10 § 331. Federal aid for State governments

Whenever there is an insurrections in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

§ 332. Use of militia and armed forces to enforce Federal authority

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

§ 333. Interference with State and Federal law

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it -

- so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
- opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

§ 334. Proclamation to disperse

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

10 § 371. Use of information collected during military operations

• The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.
• The needs of civilian law enforcement officials for information shall, to the maximum extent practicable, be taken into account in the planning and execution of military training or operations.
• The Secretary of Defense shall ensure, to the extent consistent with national security, that intelligence information held by the Department of Defense and relevant to drug interdiction or other civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials.

§ 372. Use of military equipment and facilities

The Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes.

§ 373. Training and advising civilian law enforcement officials

The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available -

• to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment, including equipment made available under section 372 of this title; and
• to provide such law enforcement officials with expert advice relevant to the purposes of this chapter.

§ 374. Maintenance and operation of equipment

The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available for the maintenance of equipment for Federal, State, and local civilian law enforcement officials, including equipment made available under section 372 of this title.

§ 375. Restriction on direct participation by military personnel

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

§ 376. Support not to affect adversely military preparedness

Support (including the provision of any equipment or facility or the assignment or detail of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such support will adversely affect the military preparedness of the United States. The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any such support does not adversely affect the military preparedness of the United States.

§ 377. Reimbursement

To the extent otherwise required by section 1535 of title 31 (popularly known as the "Economy Act") or other applicable law, the Secretary of Defense shall require a civilian law enforcement agency to which support is provided under this chapter to reimburse the Department of Defense for that support.

§ 378. Nonpreemption of other law

Nothing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981.

§ 379. Assignment of Coast Guard personnel to naval vessels for law enforcement purposes

§ 380. Enhancement of cooperation with civilian law enforcement officials

The Secretary of Defense, in cooperation with the Attorney General, shall conduct an annual briefing of law enforcement personnel of each State (including law enforcement personnel of the political subdivisions of each State) regarding information, training, technical support, and equipment and facilities available to civilian law enforcement personnel from the Department of Defense.

§ 381. Procurement by State and local governments of law enforcement equipment suitable for counter-drug activities through the Department of Defense