

USAWC STRATEGY RESEARCH PROJECT

**COUNTERING TERRORISM IN THE HEARTLAND --  
CAN WE AFFORD POSSE COMITATUS ANY LONGER?**

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The views expressed in this academic research paper are those of the author and do not necessarily reflect the official policy or position of the U.S. Government, the Department of Defense, or any of its agencies.

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## ABSTRACT

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Congress passed Posse Comitatus in an environment that no longer obtains. New threats force reexamination of the wisdom of shackling the military element of power from the fundamental task of national security – protecting the Homeland from disastrous attack.



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## COUNTERING TERRORISM IN THE HEARTLAND – CAN WE AFFORD POSSE COMITATUS ANY LONGER?

There are moments in history when events suddenly allow us to see the challenges ahead with a degree of clarity previously unimaginable. . . Now we see clearly the challenges facing us – and we are confronting them. . . As we have been for more than 227 years, the Army is dedicated to delivering victory for our nation, today and in the future.

- Thomas E. White, Secretary of the Army

Twenty years ago, a young infantry lieutenant driving his command vehicle, a 1979 Gran Prix, led his platoon of combat-equipped soldiers loaded on a 2½-ton truck out the back gate of Fort Carson, Colorado. Their mission: to quell a breach of the peace involving other company soldiers at a private residence in nearby Fountain, Colorado. As alleged in the inevitable lawsuit that followed:

the defendants' negligent and wrongful acts were engaged in while the defendants were acting as investigative or law enforcement officers of the United States government as the defendants intended to imprison and arrest all of the plaintiffs . . . and intended to conduct a search of all of the plaintiffs' residences.<sup>1</sup>

Luckily, save allegations of ridicule, embarrassment, mental anguish, and invasion of privacy, no one was injured. Yet variations on this episode, which served to educate all involved on the coverage of the Posse Comitatus Act (Title 18, U.S. Code, Section 1385),<sup>2</sup> could be resurrected in communities throughout the United States. National security policy makers have opened the debate on the necessity of revising posse comitatus to confront extant threats to homeland security. A unique confluence of circumstances supports the timing of this debate: the events of 11 September 2001, with their pervasive influence on the Administration's new National Security Strategy, the recent National Strategy for Homeland Security and just-published National Strategy for Combating Terrorism; passage of the bill establishing a new Cabinet-level Department of Homeland Security; and, within the Department of Defense, the establishment of Northern Command, a combatant command tagged with defense of the homeland.

The Posse Comitatus Act ("PCA") is not the sacred cow it once may have been. Over time, Congress has gradually carved out exceptions to prohibitions on use of the military for law enforcement. These legislative measures recognize that proliferation of weapons of mass destruction, with likely access by committed terrorist groups, changes the policy calculus. In a perfect world, under our democratic tradition, local policemen enforce domestic law, while soldiers fight enemies abroad. But the neat dichotomy between law enforcement and national

security has blurred. In some cases, using military force in the U.S. to counter a threat by terrorists may indeed constitute the most effective means to preserve national security.

If no longer a sacred cow, posse comitatus remains a significant obstacle to unified action on homeland defense. On several issues over the 15 months since the terrorist strikes of 11 September 2001, elected and appointed officials have re-examined longstanding policies that, like posse comitatus, might hinder an effective approach to homeland security. Caution underlies these efforts, with good reason. No one desires to alter fundamentally the essential fabric of American society. With our system under attack, we must heed more than ever the counsel of Supreme Court Justice Jackson not “to emphasize transient results upon policies and lose sight of enduring consequences upon the balanced structure of our Republic.”<sup>3</sup> At the same time, however, all wish to ensure we have the right mix of capabilities in effect to prevent other large-scale acts of terrorism here. Revisions to posse comitatus logically serve that goal. Moreover, this effort could generate beneficial unintended consequences. As an institution, the U.S. Army enjoys tremendous respect from the citizens of this country. The ability to earn that respect tangibly, through demonstrated action in the homeland, can further cement the rapport we maintain with the public we serve.

## **THE DEBATE OPENS**

With the September, 2002 release of the National Security Strategy of the United States (“NSS”), the Bush Administration has revealed the cornerstone of its national security foundation for the next few years. As expected, task one – “defending our Nation against its enemies”<sup>4</sup> – has assumed greater prominence following the events of 11 September 2001. In his introduction to the NSS, President Bush promises to “defend the peace by fighting terrorists and tyrants,”<sup>5</sup> in that order.

Section III of the NSS outlines the U.S. strategy to defeat global terrorism. Conceding this to be unlike any war in our history, we will commit all the elements of our national and international power to identify and destroy terrorist threats before they reach our borders.<sup>6</sup> In addition, the government has embarked upon a significant structural reorganization to prosecute this war. New organizations include the Department of Homeland Security and a unified military command with responsibility for North America.<sup>7</sup> The new unified command, U.S. Northern Command, recognizes the prominence of posse comitatus, evidenced by its inclusion of a fact sheet on PCA, one of five fact sheets on its recently developed web site.<sup>8</sup> In part, the new organizations stem from 2001’s realization that we will not destroy all terrorist threats before

they reach our borders. Hence, domestic counterterrorism serves as a critical component of an enhanced homeland security posture.

“Homeland Security” contains its own strategic primer. The National Strategy for Homeland Security (“SHS”) is the first of several additional “planks” that, when published, will reinforce the formal NSS structure.<sup>9</sup> One of the additional planks, the National Strategy for Combating Terrorism, defines our “war plan” against international terrorism.<sup>10</sup> Prominently, the NSS and SHS together take precedence over all other national strategies, programs, and plans.<sup>11</sup>

The SHS attests that “the U.S. government has no more important mission than protecting the homeland from future terrorist attacks.”<sup>12</sup> Accordingly, one of the “critical mission areas”<sup>13</sup> addressed in the SHS is domestic counterterrorism. Within that mission area, the “national vision” highlights our intent to “use all legal means -- both traditional and non-traditional -- to identify, halt, and where appropriate, prosecute terrorists in the United States.”<sup>14</sup> The domestic counterterrorism section of the SHS reflects a “redefined mission” for federal, state and local law enforcement authorities.<sup>15</sup> The SHS is silent, however, on the prospect of a redefined domestic mission for the U.S. military.

The National Strategy for Combating Terrorism (“SCT”) affirms that combating terrorism and securing the U.S. from future attacks are the two top priorities of the Bush Administration.<sup>16</sup> Complementing the SHS, the SCT orients on identifying and defusing threats before they reach U.S. borders. One of the means toward that end is the President’s direction to develop an interagency Terrorist Threat Integration Center, to merge and analyze all threat information in one location. This will ensure “that the right people are in the right places to protect the American people.”<sup>17</sup>

In summary, this Administration’s domestic counterterrorism policy is as follows:

- protect the homeland by countering terrorism, to defend the peace.
- coordinate all of our elements of power.
- implement structural reforms.
- use all legal means available (even if non-traditional).
- reorient law enforcement authorities to address the emergent threat.

If that policy obtains, as an element of national power the military must carve out its domestic role in the “interagency, integrated” homeland security effort. Recently, SECDEF Donald Rumsfeld wrote: “every week, it seems, a senior official in this Department tells me we are constrained in our ability to do something by an obsolete legal provision.”<sup>18</sup> He called for

legislative proposals concerning 10 priority areas, one of which includes defining DoD's role in Homeland Security.

The SCT offers little indication of an expanded domestic role for the military. In that vein, the policy continues that of the Clinton Administration's Presidential Decision Directive (PDD) 39. Under PDD 39, "terrorism is both a threat to our national security as well as a criminal act."<sup>19</sup> As an instrument of national power, the military often responds to threats to national security. Under PDD 39, however, crisis management -- those measures concerned with anticipating, preventing, or resolving a threat or act of terrorism -- "is predominantly a law enforcement response" under the lead agency responsibility of the Department of Justice.<sup>20</sup> An immediate default to the law enforcement structure for crisis management brings posse comitatus prohibitions squarely into play.

### **POSSE COMITATUS HISTORY**

Posse comitatus reveals a rich historical tradition, but remains broadly misunderstood and misinterpreted. As with much of the American legal tradition, we look to English common law for the background of posse comitatus. Posse comitatus embodies the idea that citizens enforce the law best. At common law, the sheriff could invoke "the power of the county" to summon all men 15 and older to enforce the law.<sup>21</sup> An empowered citizen constabulary argues against the need for a large standing army. That concept resonated with American colonists who experienced the abuses of George III, including the forced quarter of British troops among the civilian population.<sup>22</sup>

Later, in Federalist Number 29, Alexander Hamilton skillfully defended the Constitutional framework proposed to govern the militia. Constitutional detractors claimed that execution of federal law would require magistrates to rely solely on the militia, since the Constitution was silent on the ability of the magistrate to invoke assistance from the posse comitatus. Hamilton scoffed at this claim. He chastised those who, in the same breath, claimed the powers of the federal government would be despotic and unlimited even though that same government ostensibly lacked the authority to call out the posse comitatus.<sup>23</sup>

Hamilton noted the possibility that standing armies might be dangerous to liberty, and placed the militia in counterpoise to that danger. In addition, Hamilton railed against those who viewed the militia as dangerous to American liberty:

Where in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their

countrymen and who participate with them in the same feelings, sentiments, habits and interests?<sup>24</sup>

This theme warrants further development, *infra*. For present purposes, it suffices that federal troops performed law enforcement tasks for the first 100 years of the republic. In 1807, for example, Congress enabled the small frontier army to enforce federal laws.<sup>25</sup> Soldiers at polling places prevented inebriates from voting and enforced the scheme of limited suffrage then in place.<sup>26</sup> In 1859, soldiers and Marines under the leadership of then-Colonel Robert E. Lee participated in the capture of John Brown at Harper's Ferry.<sup>27</sup>

As the Civil War era approached, President Pierce's attorney general opined that soldiers of the regular army, not just militiamen, could serve in the posse at the call of the local sheriff.<sup>28</sup> Two consequences ensued. First, in the west, soldiers frequently assisted local officials to enforce the law along a difficult frontier. In these areas, outside of the U.S. proper, Army troops policed criminals and Indians who threatened settlers headed westward.<sup>29</sup> Though expedient, it also unnerved elected civilian officials.<sup>30</sup> Second, after the surrender of Confederate forces at Appomattox and the beginning of Reconstruction, federal soldiers served the military government administered during the Reconstruction period of 1867-1870.<sup>31</sup> Under the first of the Reconstruction Laws, on March 2, 1867, Congress empowered military forces to enforce the law as required "to suppress insurrection, disorder and violence."<sup>32</sup> During this time, there was no local militia. Soldiers ensured the extension of universal manhood suffrage (to all but former Confederate officers).<sup>33</sup> As Reconstruction proceeded, and the defeated states reentered the Union, state and local institutions supplanted federal military troops.

With the election of the Republican candidate for President, Rutherford B. Hayes, Reconstruction ended. Southern Democrats perceived that the presence of federal troops at polling places, ensuring the rights of black citizens to vote, enabled Hayes to "steal" a close election from Samuel J. Tilden.<sup>34</sup> Congress also increasingly opposed the practice of local sheriffs and U.S. marshals calling out federal troops on their own authority.<sup>35</sup> The Southerners allied with Northern Democrats who opposed the use of the Army to crush railroad unions in the Pittsburgh railroad riots of 1877.<sup>36</sup> An 1878 amendment to the Army appropriation bill resulted in the Posse Comitatus Act. Yet even with its passage, the President and Congress retained the ability to direct the Army to enforce the law.<sup>37</sup>

In large part, the Army welcomed the restrictions placed by the Posse Comitatus Act. Some officers viewed domestic policing requirements as "corrupting" to the institution. In some

instances, soldiers were employed apart from their chain of command, and placed in situations where they took orders from those whose actions had created the unrest at issue.<sup>38</sup> For more than 100 years following the enactment of posse comitatus, restrictions emplaced generated little serious concern. Threats to America's security arose abroad, and stayed largely abroad. The armed forces deployed to meet and defeat distant threats. That model changed dramatically on 11 September 2001. In the wake of that tragedy, and with a mandate to shore up the defense of the homeland, government policies across the board invite renewed scrutiny.

### **CALLS FOR REVISION**

Calls to reexamine Posse Comitatus began almost immediately after the events of 11 September 2001. In October, 2001, testifying before the Senate Armed Service Committee, Deputy Secretary of Defense Paul Wolfowitz indicated he "strongly favor(ed)" a review of posse comitatus, in agreement with Senator John Warner on that issue.<sup>39</sup> Later that month, chairing a hearing on the role of the Department of Defense in homeland security, Senator Carl Levin noted the expanded military roles in the U.S. post-9/11, deeming them to be "extraordinary responses to an extraordinary threat and require a reexamination of the proper role of the U.S. Armed Forces in helping to ensure the security of the American people."<sup>40</sup> Levin reflected on the overarching presence of the PCA of 1878, asking whether it should be revised or repealed.<sup>41</sup> Appearing at the same hearing, Air Force General Ralph Eberhart, the North American Air Defense (NORAD) commander-in-chief, observed that the use of fighter planes with authority to shoot down civilian airliners was not law enforcement, but a matter of national defense.<sup>42</sup>

In a subsequent news conference, Army Secretary Tom White, in his capacity as DoD executive agent for homeland security, commented on the Levin hearing. Claiming that the basic prohibitions of posse comitatus were appropriate, White revealed the ongoing effort within DoD to look at execution issues and the range of existing exceptions to posse comitatus.<sup>43</sup>

After this initial flurry of commentary, debate concerning posse comitatus quieted until the President released his new "Strategy for Homeland Security" in July, 2002. The strategy described four foundations that frame the homeland security debate. In one of the foundations – law – the Administration committed to a review of the authority for domestic military operations, in response to the threat of catastrophic terrorism.<sup>44</sup>

Anew, the posse comitatus debate resumed. Eugene Fidell anticipated extensive congressional debate, noting the "symbolic resonance" of posse comitatus and its ability to unite those on opposite ends of the ideological spectrum.<sup>45</sup> Questioned at the daily DoD briefing, on 22 July 2002, SECDEF Rumsfeld noted that everyone in the Administration who had been

asked about posse comitatus: himself, Governor Tom Ridge, CJCS General Meyers, and General Eberhart, had announced consistently they were not aware of any specific changes required for posse comitatus.<sup>46</sup>

Since then, Mr. Fidell's observation -- that proposals to repeal posse comitatus unite opposition from both ends of the ideological spectrum -- has borne fruit. The conservative Washington Times ran a recent editorial characterizing posse comitatus as "a barrier against the pell-mell deployment of troops by the President against the American people" and "one of the most commonsense-laden pieces of legislation ever to come out of Washington."<sup>47</sup> The New York Times, not known for sharing the editorial views of the Washington Times, termed PCA "an important bulwark of civilian supremacy and a barrier to the erosion of basic civil liberties."<sup>48</sup> In reality, though, the bulwark has gradually eroded.

### **THE BULWARK ERODES**

Over the years, Congress has carved out several noteworthy exceptions to the prohibitions of Posse Comitatus. Some view this trend with alarm, asserting that the desire of elected officials "to do something" in times of danger erodes fundamental limitations the PCA places on the U.S. armed forces.<sup>49</sup>

Some exceptions are longstanding. For example, upon the request of a state governor or legislature, the Insurrection Act allows the use of military personnel to suppress insurrections against state authority.<sup>50</sup> This was the vehicle for the employment of federal troops to quell riots in Los Angeles following the Rodney King trial verdict in 1992. Likewise, if a state is unwilling or unable to enforce federal laws because of an ongoing rebellion against federal authority, the President may use federal troops for that purpose.<sup>51</sup> Recall President Eisenhower's decision to order 1,000 paratroopers and 10,000 National Guardsmen to Little Rock, in 1957, to enforce school desegregation.<sup>52</sup> More recently, to bolster the counterdrug fight, Congress enacted the provisions appearing at 10 U.S.C. Sections 371-382, which permit a broad range of military assistance to law enforcement entities engaged in stemming the production and trafficking of illegal narcotics into the U.S.

Of particular importance, given the current threat by terrorist groups with potential access to weapons of mass destruction, are recent statutes enabling the use of military assets, primarily in a technical assistance vice tactical response role. Under 18 U.S.C. Section 831, in emergency situations DoD personnel can assist the Department of Justice to enforce laws that concern nuclear materials. Similarly, with respect to emergencies involving chemical and biological weapons of mass destruction, 10 U.S.C. Section 382 allows military assistance to

civilian law enforcement agencies to reduce the threat. Under both of these sections, the joint agreement of SECDEF and the Attorney General authorizes the assistance sought; Presidential authorization need not be obtained.

Two significant post-9/11 acts, the USA PATRIOT ACT and the Homeland Security Act, continue the trend by Congress to craft legislative relief to the restrictions of posse comitatus. Section 104 of the USA Patriot Act permits the use of military forces in emergencies involving weapons of mass destruction other than nuclear, biological or chemical.<sup>53</sup> The effect of Section 885 of the Homeland Security Act is unclear at this point. In the view of one congresswoman, it would allow the Secretary of Homeland Security unchecked authority to establish and operate a task force composed of military and civilian personnel, charged with anticipating and preventing harm to the U.S.<sup>54</sup>

The existing statutory exceptions to posse comitatus demonstrate the willingness of Congress to specify a domestic military role when circumstances demand the employment of unique military capabilities. Yet this approach, essentially a legislative patchwork, appears haphazard at best. An effective strategy to enhance homeland security requires unity of effort. Unfortunately, the tendency to frame the issue as “this measure supports law enforcement (crime)” as opposed to “this measure improves national security (war)” hinders pursuit of that unity. After all, national security encompasses far more than law enforcement. Our best efforts to prevent another significant terrorist attack may prove inadequate; focusing narrowly on only one aspect of the issue fails the legitimate expectations of the American people.

## **AN EFFECTIVE FRAMEWORK**

Any effort to consider revising or repealing posse comitatus requires first a conceptual framework to outline the problem we now face. From the Administration’s perspective, countering terrorism is the fundamental task to preserve America’s security.<sup>55</sup> Historically, the U.S. has applied diverse elements of national power -- economic, military, diplomatic, and information -- in peace and war, responding to a full range of challenges to America’s interests abroad. The U.S. has now declared war on terrorism. The threat has effectively penetrated our borders and expressed the intent to do so again wherever and whenever possible. Can we simply swap the traditional elements of peacetime and wartime power for a law enforcement-centered response against common criminals engaged in common-law crimes? Many policymakers express discomfort with that default option.

This tension – between those who see our traditional framework as essentially adequate to meet a transient terrorist threat and those who perceive an immediate need for sweeping

structural reforms – underlies a broader debate concerning post-9/11 policies.<sup>56</sup> In a recent thoughtful analysis, Professor Noah Feldman argues that terrorism on the scale of the 11 September attacks “defies easy categorization” under several criteria he advances to distinguish crimes from war.<sup>57</sup> Some argue the need to even make that distinction, but it has always “played a key role in determining what parts of the U.S. government do what.”<sup>58</sup> Feldman reasons convincingly that the U.S. military could “pursue and capture foreign troops on U.S. soil if those troops were (deemed to be) engaged in an act of war.”<sup>59</sup> In a newspaper interview, DEPSECDEF Paul Wolfowitz conceded that terrorism exhibits aspects affecting domestic law enforcement functions as well as aspects of a war by enemy combatants on our own turf. Asked what that portended as far as a military role, Wolfowitz offered only providing military intelligence to the FBI to address the problem.<sup>60</sup> Therein lies the rub. To the extent that U.S. policymakers conceive terrorism as crime, posse comitatus restrictions legally constrain the military’s role.

If terrorism is definitively neither crime nor war, but a hybrid, how do we construct the framework that will allow a reasoned analysis of the need to revise posse comitatus? The report of the Hart-Rudman Commission specifies the essential requirement that homeland security measures exist within a legal framework that protects liberty and privacy for U.S. citizens.<sup>61</sup> Admiral Loy, Commandant of the Coast Guard, agrees that the first guiding principle in a comprehensive approach to homeland security must be adherence to the Constitution and the rule of law.<sup>62</sup> In Professor Feldman’s view, the values we seek to protect drive the issue. The crime/war distinction for terrorism bears no fruit. Rather liberty, privacy, the rule of law and safety are the true values we must safeguard.<sup>63</sup>

Those values prove revealing. No serious American can argue that we should ignore either the Constitution or the rule of law that have well-served the republic for more than 225 years. Differences arise, however, when the required task is balancing the other three values. On the one hand, any reasonable measure to increase safety for Americans from further terrorist attacks warrants consideration. As one commentator observed, the threats themselves consist of “low-probability, high consequence events that are impossible to absolutely prevent and impossible to politically ignore.”<sup>64</sup> While conceding that absolute prevention is next to impossible, Frank Gaffney, Jr., of the Center for National Security asserts we must yet make “every effort . . . to defend the American people.”<sup>65</sup> On the other hand, the preservation of civil liberties and privacy exist as fundamental core values embodied throughout the Constitution and Bill of Rights. Any attempt to enhance safety while degrading civil liberties or infringing

privacy rights brings the issue squarely to the fore. The tension has infected a range of issues in the post-9/11 world: intelligence collection and dissemination, terrorist detentions, and the proposed use of military commissions, among others.

These issues, collectively, illustrate the need for a unified approach to countering terrorism. Essentially, enhancing homeland security against terrorism entails unified action in three phases of effort: prediction, prevention and response. Posse comitatus restrictions proscribe potential military actions most significantly in the response phase of effort. Before demonstrating that revisions to posse comitatus could improve the response to terrorist threats within the homeland, it is worthwhile to discuss ongoing initiatives in the prediction and prevention phases.

In each of these phases, just as with posse comitatus, sacred cows are under attack, or have been defeated recently through legislation or executive action. The effect of these sundry reforms awaits further analysis: at the end of the day, the institutions of government may alter the revised structures to their pre-9/11 state. Nevertheless, the significance of these alterations, for this paper, lies in demonstrating that policymakers have exhibited a newfound willingness to tweak the structures that control a broad range of governmental actions. In a recent address at the Army War College, a senior Administration official candidly observed that even veteran interagency players – in this changed world environment – are thinking through these issues from perspectives never seen before.<sup>66</sup> That same willingness to consider anew the practical limitations of posse comitatus will produce tremendous dividends.

Prediction and prevention both relate to the need for the best intelligence we can obtain about the intentions and plans of those who would carry out terrorist attacks against Americans at home. For that reason, the homeland security community has focused extensively on improving the acquisition and timely dissemination, within the interagency, of relevant intelligence. When able, the military readily assists in that effort. For example, law enforcement authorities arrested American-born Jose Padilla, in May 2002, based on military intelligence, and thwarted a possible terrorist attack.<sup>67</sup> DoD possesses a significant intelligence community infrastructure to gather, analyze and disseminate relevant threat data.

Some question whether the FBI can adequately fulfill its revised charter to counter terrorism as its top priority. Congressional committees, advisory commissions, and other experts constitute a growing community of those who see the FBI “miscast as a domestic intelligence agency that detects and disrupts terrorists.”<sup>68</sup> For its part, the Office of the Secretary of Defense has reorganized its intelligence-related structure to provide the Secretary a more responsive source of intelligence analysis.<sup>69</sup> DoD also announced the launch of the

“Total Information Awareness Project . . . to link multiple electronic sources and filter the data through software designed to pick out suspicious behavior.”<sup>70</sup>

If the FBI fails in its redefined focus, the failure will not derive from a lack of effort by the Congress to give the FBI needed powers to prosecute the new “war.” Less than 6 weeks after the terrorist strikes of 11 September, Congress passed and the President signed into law the U.S.A. Patriot Act. As designed, the Patriot Act should improve the exchange of information between the FBI and other agencies, to include the CIA, with terrorism responsibilities.<sup>71</sup> The Act has removed some “legal fire walls”<sup>72</sup> that stemmed from FBI abuses in the era of Director J. Edgar Hoover, when the bureau built extensive files on U.S. citizens. The Patriot Act affords the FBI greater latitude to acquire information concerning potential terrorist attacks and effects changes to the Foreign Intelligence Surveillance Act of 1978.<sup>73</sup> In a recent challenge before the FISA court of appeals, the appellate court affirmed the legality of the expanded powers to acquire and most importantly, disseminate, information obtained via a FISA warrant.<sup>74</sup>

A common thread unites the changes discussed above: the need to improve our capabilities to predict the threats we will face. At the same time, however, the new security environment has also affected our prevention strategy. One aspect of the new approach seems to be an indeterminate detention, with limited due process, of those who might seek to harm U.S. citizens or interests.<sup>75</sup> The Bush Administration has, in addition, resurrected military tribunals, with unique rules of procedure. DoD’s Office of General Counsel, heading the tribunal effort, will soon finalize the rules governing the tribunals;<sup>76</sup> at this point, no one knows how many individuals presently detained may ultimately undergo the tribunal procedure. Finally, the Administration revealed the most sobering aspect of its prevention strategy in the November, 2002 conduct of an armed Predator strike against a terrorist suspect found in Yemen.<sup>77</sup> Along that same line, a few writers have recently discussed lifting the ban on assassination reflected in Executive Order 12,333 and now more than 20 years old.<sup>78</sup>

## **BENEFITS TO POSSE COMITATUS REVISION**

Do not . . . regard the critics as questionable patriots. What were Washington and Jefferson and Adams but profound critics of the colonial status quo?

- Adlai Stevenson

Revisions to posse comitatus could enable a range of timely military actions, responding to ongoing terrorist threats, by eliminating the need to invoke the cumbersome approval system now in effect. Under the present statutory scheme, a deliberate process of Presidential authorization precedes any commitment of military forces in situations within the ambit of posse

comitatus.<sup>79</sup> That process simply can't respond with the speed requisite to effectively counter incipient threats. Instead, approval authority to commit military forces should rest with the Northern Command combatant commander. Terrorists armed with WMD pose no less of a threat than airplanes for which it is difficult to ascertain hostile intent, yet while we have authorized NORTHCOM to engage certain airborne threats, we have not extended that authority to ground-based threats of equal or greater magnitude. With a more efficient approval process, military forces with a range of capabilities, in a heightened alert posture, can respond as required.

Speed is the dominant characteristic of the information age, now and for the foreseeable future. Borrowing from Thomas Friedman, noted columnist for the New York Times, General Shinseki outlined the fundamental world change confronting the Army today: the fast eat the slow; globalization requires speed to survive.<sup>80</sup> Terrorist actors that threaten global U.S. interests provide little advance notice; they too benefit enormously from globalization and the speed of access it provides. Owen Jacobs argues "environmental change determines when the point is reached when it is essential that [policies] change."<sup>81</sup> We have reached that point; terrorists can now inflict levels of destruction equal to what, formerly, only states could achieve with military power.<sup>82</sup> Any improvement we can make in the time required to marshal the assets to counter the threat presented appears a worthwhile effort to pursue.

Existing statutory and regulatory authorities complicate and slow the process by which an operational military response can occur.<sup>83</sup> For consequence management measures, that may be an acceptable delay. For crisis response, however, bureaucratic delay in authorizing the right assets may allow a devastating attack to occur. Consider, for example, the worst such possibility: terrorist use of a nuclear WMD. Even if PCA prohibitions are surmounted, "numerous factors may complicate and slow a federal response precisely when such delays can least be tolerated."<sup>84</sup> For example, military capabilities to monitor, intercept, or "spoof" cell phone calls and computer-based communications from a crisis site held by terrorists might prove vital. Military assets such as "jammers" can prove instrumental in isolating a crisis site, preventing remote electronic detonation of a WMD or communication with a terrorist command and control node. Military firepower and precision engagement could provide an overwhelming advantage in quickly reducing the threat posed by a large terrorist force. Military research and development of non-lethal weapons may yield promising techniques, similarly, to neutralize a threat.

The use of all of these measures requires approaching the problem from other than a law enforcement perspective. As much as anything, we have learned to eliminate some of the

traditional “roles and missions” stovepipes post-9/11, and are exploiting synergies through sharing of relevant foreign and domestic intelligence, an interagency approach to threat analysis, and a renewed commitment to domestic security. Further tweaking may prove useful, from the perspective of “how can we best achieve mission success?” Incremental changes to improve the cumulative time required to respond to a terrorist incident warrant consideration.

Speed drives the need to revise posse comitatus. Several other factors also favor broadening the military’s authority to assume an enhanced role in homeland defense within U.S. borders. First, such a move would provide unity of effort. Northern Command’s assumption of the homeland defense mission enables it to defend the homeland not just from airborne threats within U.S. airspace, but also from ground-based threats just as lethal. Working with the Department of Homeland Security in a framework to be developed over time, NORTHCOM should receive delegated authority for a rapid commitment of appropriate military assets. Already, NORTHCOM has the authority and rules of engagement in place to engage specified airborne threats.<sup>85</sup> Why, logically, should we restrict the authority to commit ground elements against identified terrorist threats of similar magnitude? In addition, under the Unified Command Plan, NORTHCOM now has command over Joint Task Force – Civil Support and Joint Task Force Six, which exercise consequence management and counterdrug missions, respectively.<sup>86</sup> That command arrangement should produce within NORTHCOM’s staff a greater awareness of threat tactics, techniques and procedures and generate greater confidence in the range of actions available to counter the threat presented.

Unity of effort flavors another aspect of this issue. CSA Shinseki notes that we are now The Army, not One Army or The Total Army.<sup>87</sup> The Army relies increasingly on reserve component forces to complement active component forces across the full spectrum of contemporary missions. The new reality constitutes “a wrenching, gear-stripping shift, both for the reserve components and for the people who serve in them.”<sup>88</sup> Though increasingly called upon to perform traditional active component missions (e.g., overseas deployments for peacekeeping in Bosnia and in Kosovo), the Reserve and Guard have seen no corresponding reduction in domestic calls for their service.<sup>89</sup> Posse comitatus does not restrict guard soldiers called up in state status from performing law enforcement-related duties; thousands have performed airport and other facility security duties under state authority since 9/11.

Brigadier General (Ret.) Reid Beveridge, former editor of National Guard magazine, cautions against significant changes to posse comitatus, and claims the 54 adjutants general are united in opposition to such a move.<sup>90</sup> Yet Beveridge does not address an overriding truth – allowing the use of regular Army forces to perform some of the facility security missions now

performed solely by reserve component units would substantially ease the operational and personnel tempo challenges facing the reserve components now and for the foreseeable future.<sup>91</sup> In addition, active forces could “reconnect” with America in this endeavor and gain experience in the mission areas that seem to comprise many of the deployments recently experienced.

Finally, unity of effort means that effectiveness in the campaign at hand mandates strong relationships among local, state and federal entities. All agree on that point. Posse comitatus restrictions preclude an effective contribution by America’s regular forces, which comprise a substantial component of the federal asset base. Moreover, the present policy fails to recognize the nature of the social contract between American citizens and their government, which extends to its armed forces. A recent conference, examining the all-volunteer armed force and citizenship, concluded that civic virtue – “the obligation of the citizenry to protect the liberal democratic order” – is as strong as ever and is the same for military personnel and non-serving citizens.<sup>92</sup> That observation, in combination with the Army’s post-Vietnam move away from conscription and transformation “into a profession vice obligation,”<sup>93</sup> bolsters the case for using regular Army forces, not just reserve troops, where the regular forces possess the skill sets required.

Resource issues also inform the debate on revisions to posse comitatus. Many DoD officials judge the department fiscally constrained already, with competing demands to fund transformation, modernization of legacy systems, research and development, missile defense, and scheduled procurement. Understandably, they evince reluctance to take on enhanced responsibilities for homeland defense, with the resource demands that effort will undoubtedly entail. At the same time, Americans legitimately expect a reasonable return on the \$364 billion resident in DoD’s 2003 budget.<sup>94</sup> With the largest real spending increase in many years, DoD must be willing to consider new roles and missions in homeland defense.

The challenge exists now, in an era of relatively generous funding, and will only grow over the next 10-20 years. In that time, defense faces an ever-increasing competition for the discretionary dollars available in the budget.<sup>95</sup> An aging baby boomer population will stress both social security and health care funding.<sup>96</sup> The Administration plans further tax cuts, too, that will only exacerbate the budget fight. A recent Economist magazine supplement argues that even at \$379 billion, America’s defense share of the probable gross domestic product remains below 4%, substantially less than historical levels of wartime (to include Cold War) spending.<sup>97</sup> It remains to be seen, though, whether an Administration gearing for reelection in 2004, poised for a war with Iraq, and facing an environment of economic uncertainty, can push through another

real increase in the defense budget. In that sense, DoD can bolster its claim to a fair share of future discretionary dollars by demonstrating greater relevance in the homeland security fight.

### **FUNCTIONAL IMPROVEMENTS – THIS IS WAR**

In 1861, as President Abraham Lincoln prepared the country for the monumental struggle to follow, he determined it necessary to authorize suspension of the writ of habeas corpus for the public safety. That action brought him into direct conflict with the Chief Justice of the U.S. Supreme Court, Roger Taney. In a message to a special session of Congress, on July 4, 1861, Lincoln asked, eloquently: “[a]re all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?”<sup>98</sup> Lincoln’s simple question allowed only one answer. He recognized that war requires some measures inconceivable in peacetime.

The question Lincoln framed resonates again today. Jeffrey Norwitz cites findings by the National Commission on Terrorism that the Pentagon has unrecognized “organizational and resource strengths as they relate to terrorism.”<sup>99</sup> Norwitz argues that when strictly construed, upon Presidential order, the PCA presents no obstacle to a partnership of the armed forces and civil authority in domestic security. Taking a longer view, he advocates a broadened role for the armed forces in traditional law enforcement roles.<sup>100</sup>

All concede the military possesses unique ability to handle divergent threats. Particularly in mission areas including terrorism, weapons of mass destruction, and cyber-attacks, the military can apply significant resources to monitor, track, locate and preempt attacks.<sup>101</sup> Unclassified sources reflect the existence of a counterterrorist organization within DoD, organized to perform such operations when required.<sup>102</sup> With an asymmetric threat, we need greater ability to counter it across the spectrum. In many cases, military intervention may most effectively address threats such as those posed by heavily armed terrorists.<sup>103</sup>

Timely military intervention requires superb coordination between the FBI and the military. A hodgepodge of confusing statutory and regulatory authorities, with PCA at its center, prevents the smooth coordination requisite for success.<sup>104</sup> Two recent domestic deployments for a variety of missions illustrate that PCA still hampers a logical, effective approach. In 1992, soldiers responding to Hurricane Andrew in south Florida were not allowed to detain or arrest civilians. Yet, “as the only tangible evidence of governmental authority”<sup>105</sup> their mere presence served to enforce the law. Also in 1992, the Rodney King trial verdict generated violence throughout Los Angeles. Pursuant to the PCA, upon request of the Governor of California, the President authorized the armed forces to restore law and order.

Two significant consequences ensued. First, because of a lack of coordination and planning with law enforcement entities -- the logical result of PCA prohibitions -- the federal response proved fragmented and confused. Second, either because he received flawed legal advice or ignored good counsel, the military commander cited PCA as the reason his soldiers could not participate in law enforcement activities.<sup>106</sup> Having obtained Presidential authorization for the use of soldiers to enforce the law, PCA barred nothing. Yet the confusion that typically surrounds PCA hampered the military response. In any situation involving local, state, and federal assets, confusion will exist initially as the authorities involved sort out the roles each will perform. The sorting should, however, proceed from a capabilities-based perspective, not from an erroneous legal conclusion about what certain federal assets can and cannot do. An effective approach to the war on terrorism will not allow the degree of error seen in Los Angeles.

### **OPPOSITION TO REFORM**

Admittedly, many view any attempt to ease PCA restrictions as the wrong tack entirely. Congressman Ron Paul believes that with the imminent repeal of PCA, "liberty, the Constitution, and the republic will suffer another major setback."<sup>107</sup> Mackubin Owens, a professor at the Naval War College, adds: "weakening the PCA in response to terrorism makes for terrible national security policy, poor politics, and guaranteed failure in the terror war."<sup>108</sup> Opponents usually raise 4 primary objections: it would blur the line between essentially military and essentially civilian roles; it would adversely affect military readiness; the military possesses the wrong skill-set for this effort; and most fundamentally, it would undermine federalism and civilian control of the military.<sup>109</sup>

As discussed above, concern about blurred lines ignores the nature of the new threat, one unlike any traditional criminal threat, and one that poses the greatest threat to domestic security. Most Americans, however, remain unconvinced. Eugene Fidell, president of the National Institute of Military Justice, says "[a]t bottom, we as a country have an allergy to the idea that military personnel should function as police officers."<sup>110</sup> Senator Robert Byrd of West Virginia warns starkly "[o]urs is a nation in which the streets of our small towns and large cities are patrolled by civil forces, not tanks and black helicopters."<sup>111</sup> Byrd cautions the wall between civil and military government will soon erode.<sup>112</sup>

Conceding that PCA amendment could improve our posture to defend against terrorism, Fidell asserts that PCA reflects a basic value of American political life, one of several values such as open government and the civil service merit system that have "taken root over the course of our history."<sup>113</sup> Significantly, however, the new Homeland Security Department

legislation exempts from the department's operations certain aspects of the Freedom of Information Act and the Civil Service Reform Act of 1978. That certainly reflects a willingness to depart from "business as usual" on key issues. With PCA, however, our apparent insistence on establishing neat, distinct categories to separate crime from war, and police work from military work, may ultimately prove our undoing.

The effect on readiness and the claim of an inapposite skill set are arguments that resound both outside and within the military. Military personnel view as their fundamental task to fight and win the nation's wars. Over-committed and under-resourced units look for a break in the storm, and seek to avert resource expenditures for perceived "non-core" tasks. Without fail, we must prepare for major combat operations abroad. Having said that, when the threat has invaded the homeland, protecting the homeland becomes our primary responsibility. The American people expect its armed forces to conduct a range of missions across the spectrum of conflict. Forward presence and power projection capabilities, by necessity, lag in priority behind a secure domestic environment. As to the necessary skills, many of the tasks that promote homeland security are those the military has performed with increasing frequency and aptitude in Somalia, Bosnia, Kosovo and now Afghanistan. Moreover, as discussed earlier, the military alone possesses required capabilities to respond to certain terrorist threats, such as those involving sophisticated WMD. One proposal leaves PCA intact, calling for a para-military civil defense force as potentially a "better long-term solution" to defend the homeland.<sup>114</sup> It is not at all clear, though, that a solution entailing more people, money, and levels of coordination, staffing, and liaison best serves the national interest.

The final argument, one that cannot be dismissed casually, concerns the effect revisions to posse comitatus would have on our structure of governance and on civil-military relations inherent in that structure. The U.S. Constitution embodies its framers' concerns, derived from personal experience, with a large standing army and preference for a militia to meet most security requirements. In a constitutional democracy, "government is particularly complex."<sup>115</sup> Post 9/11, our domestic security policies must retain the overarching structure that divides power among coordinate and subordinate branches of federal, state and local government.

The strategic context of the twentieth century demonstrated the need to overcome the founders' distaste for a large standing army. Yet a large standing army argues compellingly for significant restrictions on its domestic employment -- to curb the potential for misusing the Army to further a partisan political agenda. Jeffrey Norwitz claims that today's "citizen-soldiers, exemplifying the truest sense of volunteerism as envisioned by George Washington" and "attuned to permissible conduct" should be trusted with domestic security.<sup>116</sup> Tom Lujan

echoes that the experience and training of today's soldiers enable them to make "the right decisions" in difficult situations.<sup>117</sup>

Others exhibit far less enthusiasm. Some cite "the abuses and serial military dictatorships" the U.S. has avoided to date but has also seen frequently in our hemisphere.<sup>118</sup> Some warn that civil-military relations over the last several years have declined; logically, they worry about an expanded influence in American society by a contemptuous military unresponsive to civilian authorities.<sup>119</sup> America's civil-military relations history reveals that:

Acceptance of civilian supremacy and control by an obedient military has been the core principle of the American tradition of civil-military relations. U.S. military officers take an oath to uphold the democratic institutions that form the very fabric of the American way of life. Their client is American society, which has entrusted the officer corps with the mission of preserving the nation's values and national purpose. Ultimately, every act of the American military professional is connected to these realities – he or she is in service to the citizens of a democratic state who bestow their trust and treasure with the primary expectation that their state and its democratic nature will be preserved.<sup>120</sup>

Citizen-soldiers of today, pursuing the profession of arms, exhibit the same civic virtue as the citizens they serve. Soldiers share the feelings, sentiments, habits and interests of their countrymen, just as the militiamen of Alexander Hamilton's time reflected their citizenry. Assisting American citizens with relevant military capabilities to enhance homeland security should flow dutifully from that relationship.

## **CONCLUSION**

With the passing of the World War II generation, relatively few Americans have a significant connection to someone in the armed forces. Posse comitatus restrictions prevent a meaningful reconnection with America, an effort that would certainly arrest the perception of a military culture becoming isolated from the society it serves. For 125 years, posse comitatus performed as intended. Now, however, it hampers unity of effort in the war on terrorism where most critical: in the heartland. In only 15 months since 9/11, policymakers have revised or repealed an extraordinary number of measures thought to constitute essential parts of the fabric of American government, in a focused campaign to improve our response to terrorist threats. Apply that same effort to posse comitatus. We can preserve both our national values and our national purpose.

WORD COUNT = 7668



## ENDNOTES

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<sup>4</sup> George W. Bush, The National Security Strategy of the United States of America (Washington, D.C.: The White House, September 2002), iv.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., 5-6.

<sup>7</sup> Ibid., 6.

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<sup>9</sup> George W. Bush, National Strategy for Homeland Security (Washington, D.C.: The White House, July 2002), 5.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid., iii.

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

<sup>14</sup> Ibid., 26.

<sup>15</sup> Ibid., 25.

<sup>16</sup> George W. Bush, National Strategy for Combating Terrorism (Washington, D.C.: The White House, February 2003), 1.

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<sup>18</sup> Secretary of Defense Donald Rumsfeld, “Legislative Priorities for Fiscal Year 2004,” memorandum for Secretaries of the Military Departments, Washington, D.C., 17 September 2002.

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<sup>26</sup> Bonnie Baker, "The Origins of the Posse Comitatus," Air & Space Chronicles; available from <http://www.airpower.maxwell.af.mil/airchronicles/cc/baker1.htm>; Internet; accessed 22 November 2002.

<sup>27</sup> "The raid on Harpers Ferry," Africans in America; available from <http://www.pbs.org/wgbh/aia.html>; Internet, accessed 5 March 2003.

<sup>28</sup> Brinkerhoff, 4.

<sup>29</sup> Ibid., 5.

<sup>30</sup> Baker, 1.

<sup>31</sup> William Winthrop, Military Law and Precedent, 2d Edition (Washington, D.C.: Government Printing Office, 1920), 846.

<sup>32</sup> Ibid., 848.

<sup>33</sup> Baker, 1.

<sup>34</sup> Adam Liptak, "Posse Comitatus Act Limits Armed Services at Home," New York Times; available from <http://www.nytimes.com/2002/07/21/politics/21POSS.html>; Internet; accessed 5 March 2003.

<sup>35</sup> Brinkerhoff, 6-7.

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<sup>109</sup> Nolon J. Benson, The Posse Comitatus Act: Is there a Need for Change?, Strategy Research Project (Carlisle Barracks: U.S. Army War College, 1998), 15-16.

<sup>110</sup> Eugene Fidell, "Think Again Before Relaxing Posse Act," The Boston Globe, 3 August 2002, sec. A, p. 15.

<sup>111</sup> Paul J. Nyden, "Byrd warns Americans about Bush secrecy, policies," The Charleston Gazette, 10 September 2002, sec. A, p. 5.

<sup>112</sup> Ibid.

<sup>113</sup> Fidell, sec. A, p. 15.

<sup>114</sup> Antulio J. Echevarria II, "Homeland Security Issues: A Strategic Perspective," in Defeating Terrorism: Strategic Issue Analyses, ed. John R. Martin, (Carlisle: Strategic Studies Institute, January 2002), 36.

<sup>115</sup> Judge James E. Baker, "National Security Process and a Lawyer's Duty: Remarks to the Senior Judge Advocate Symposium," Military Law Review 173 (September 2002), 125.

<sup>116</sup> Norwitz, 9.

<sup>117</sup> Lujan, 6.

<sup>118</sup> Beveridge, 25.

<sup>119</sup> Owens, 3.

<sup>120</sup> Marybeth P. Ulrich, "Infusing Civil-Military Relations Norms in the Officer Corps," in The Future of the Army Profession, ed. Lloyd J. Matthews (West Point, New York: McGraw-Hill, 2002), 245-246.

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